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Current Index of Indian Cases
Sanjiva Row's All India Digest
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1918. FINAL PART (Section II—Civil).

FOURTEENTH YEAR OF ISSUE.

The "Current Index" is published monthly, the Sixth Part incorporating and superseding the first five parts, and the final part incorporating and superseding all the parts issued during the year.

THE CURRENT INDEX OF INDIAN CASES, 1918

(FINAL PART—SECTION II—CIVIL).

COMPILED AT

THE LAWYER'S COMPANION OFFICE, MADRAS.

Digested in this part have been taken from the following Reports:—

Madras Law Journal, Vol. XL.	Law Weekly (Madras) Vols. VII & VIII.
" " XLII.	Madras Law Journal, " XXXIV & XXXV.
" " XLV.	Madras Law Times, Vols. XXIII & XXIV.
" " XLI.	" Weekly Notes (1918).
Journal, " XVI.	Punjab Record (1918).
Law Reporter, " XX.	" Law Reporter (1918).
Bombay Criminal Cases, " V, Pts. 13 to 23.	" Weekly Reporter (1918).
Bombay Law Times, " X, " 9 & 10.	Nagpur Law Reports, Vol. XIV.
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Weekly Notes, Vol. XXII, Pts. 6 to end and Vol. XXIII, Pts. 1 to 6.	Upper Burma Rulings (1918), 1st, 2nd & 3rd Qrs.
Patna Law Journal, " III.	Lower " " Vol. X, 1st, 2nd & 3rd Qrs.
Law Weekly, " IV.	Criminal Law Journal, Vol. XIX.
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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.
A.L.J.	...	...	...	...	Allahabad Law Journal.
A.W.N.	...	...	...	...	Allahabad Weekly Notes.
B.	...	...	...	...	Indian Law Reports, Bombay Series.
B.H.C.	...	...	...	...	Bombay High Court Reports.
B.L.R.	...	...	...	...	Bengal Law Reports.
Bom. Cr. Cas.	...	...	...	...	Bombay Criminal Cases.
Bom. L.R.	...	...	...	...	Bombay Law Reporter.
Bur. L.R.	...	...	...	...	Burma Law Reports.
Bur. L.T.	...	...	...	...	Burma Law Times.
C.	...	...	...	...	Indian Law Reports, Calcutta Series.
C.L.J.	...	...	...	...	Calcutta Law Journal.
C.L.R.	...	...	...	...	Calcutta Law Reports.
C.W.N.	...	...	...	...	Calcutta Weekly Notes.
C.P.L.R.	...	...	...	...	Central Provinces Law Reports.
Cr. L.J.	...	...	...	...	Criminal Law Journal of India.
I.A.	...	...	...	...	Law Reports, Indian Appeals.
Ind. Cas.	...	...	...	...	Indian Cases.
L. W.	...	...	...	...	Law Weekly, Madras.
L.R.	...	...	...	...	Lower Burma Rulings.
M.	...	...	...	...	Indian Law Reports, Madras Series.
M.H.C.	...	...	...	...	Madras High Court Reports.
M.L.J.	...	...	...	...	Madras Law Journal.
M.L.T.	...	...	...	...	Madras Law Times.
M.W.N.	...	...	...	...	Madras Weekly Notes.
M.I.A.	...	...	...	...	Moore's Indian Appeals.
Mys. or Mys. C. C. R.	...	...	...	...	Mysore Chief Court Reports.
Mys. L. R.	...	...	...	...	Mysore Law Reports.
N.L.R.	...	...	...	...	Nagpur Law Reports.
N.W.P.H.C.	...	...	...	...	North-West Provinces High Court Reports.
O.C.	...	...	...	...	Oudh Cases.
Pat. L.J.	...	...	...	...	Patna Law Journal.
Pat. L.W.	...	...	...	...	Patna Law Weekly.
P.R.	...	...	...	...	Punjab Record.
P.L.R.	...	...	...	...	Punjab Law Reporter.
P.W.R.	...	...	...	...	Punjab Weekly Reporter.
S.L.R.	...	...	...	...	Sind Law Reporter.
T.L.R.	...	...	...	...	Travancore Law Reports.
U.B.R.	...	...	...	...	Upper Burma Rulings.
W.R.	...	...	...	...	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	...	...	...	Applied.
Appr.	...	...	...	...	Approved.
D. or Distd.	...	...	...	...	Distinguished.
Disc.	...	...	...	...	Discussed.
Diss.	...	...	...	...	Dissented from.
Exp.	...	...	...	...	Explained.
F.	...	...	...	...	Followed.
(F.B.)	Full Bench.
Obs.	Observed.
(P.C.)	Privy Council.
R. or Refd. to	Referred to.
(S.B.)	Special Bench.

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43	970	446	371	264	45	
51	716	448	164	266	868	
74	136	452	1038	281	51	
88	663	454	371	283	402	
92	371	456	447	286	531	
95	179	460	934	299	642	
96	196	465	254	364	644	
99	374	475	119	281	1014	
101	373	478	664	335	308	
103	477	481	832			
112	53	482	269	4 Pat L W—		
116	273, 379, 785	484	375	1	545	
119	747	490	373	9	108	
122	45	499	825	27	389	
131	702	509	521	37	642	
143	51	513	691	47	643	
145	44	516	959	52	1089	
156	24	518	18	54	698	
160	1098	522	68	70	1077	
162	1125	533	58	72	1122	
166	186	537 (F B)	53	75	305	
			415, 50	84	44	

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4 Pat L W—		7 L W—		7 L W—	
85	719	1	67	376	80
88	831	8	258	380	658
91	989	10	261	403	218
100	273, 785	16	743	404	659
109	257 288	22	989	406	285
108	411	28	1141	407	534
109	664	30	836	411	12
116	24	32	541	415	1110
119	988	33	963	490	829
129	999	36	545	495	272, 884
150	768, 891	37	981	488	745, 988
133	309	58	340	440	988
136	392	62	1014	443	700
138	1086	66 (P C)	883	454	556
146	842	72	522	468	69
152	911	81	1128	471	78
157 (F B)	502	85	993	477	77
169	52	90	885	482	787
192	1079	91	545	490	984
203	325	104	1119	503	109
210	31	114	877	505	852
213	455	119	775	508	150, 619
216	475	124	789	513	1159
218	937	131	792	516	997
221	564	133 (P C)	880	518	349
226	529	140	76	524	721, 939
229	1154	143	74	537	1128
237	971	146	1089	543	776
247	964	149	108	547	304
256	498	156	694	552	7
279	489	159	243	557	260
281	370	175	657	563	238
283	985	194	654	561	113
296	465	201	276	566	181
303	10~	206	75	569	77
310	832	210	1123	573	182
339	142	215	765	571	659
347	174	218	594	577	1154
349	204	221	839	581	564
369	386	225	784, 1147	546	245
417	800	229	969	604	779
437	537	234	236	610	434
445	609	241	459	612	167
448	960	243	248	614	189
		260	231		
		271	82		
5 Pat L W—				8 L W—	
1 (P C)	27	299	743	1 (P C)	1180
9	49	281	890	4	350
15	150	297	77	12	70
21	477	291	658	19	1014
25	354	298	213	21	256
57	561	315	21	24	559
64	1001	329	528	28	735
83 (P C)	144	326	589	44	659
104	254	329	247	46	828
147	640	320	726	53	854
229	682, 684	332	428	62	563
316	1034	336	522	84	559
		389	1133	88	1144
6 Pat L W—		361	550	91	861
72	540	372	69	100	1116

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3 L W--		3 L W--		34 M L J--	
103	604	460	577	170	658
109	657	497	299	177	1126
118	777	499	691	184	175
120	561	501	16	210	589
126	931	503	353	213	559
140	114	507	255	219	697
142	717	512	577	223	67
145	1165	517	587	224	658
152	989	519	1095	253	412
154	776	524	458	258	522
160	259	526	8	263	1119
163	444	530	594	271	354, 652
167	519	543	803	279	330
171	193	548	59	282	781
175	846	551	959	291	528
176	802	559	762	295	211
179 (P C)	135	565	918	298	564
186	1001	570	358	305	1154
192	349	573	577	309	150, 619
197	313	582	192 751	315	338
202	194	586	87	323	192
205	476	594	1048	327	550
206	1012	594	9	342	1080
208	432	599	79	344	984
212	563	621	623	358	983
219	307			361	21
221	726	9 L W--		373	7
223	210	54	1015	381	556
240	936	60 (P C)	500	397	134, 1099
256	628	126 (P C)	539	399	297
259	1111			400	776
261	633	Madras Law Journal		408	876
271	633			412	904
275	74	33 M L J--		419	77
281	929	746	559	421	882
289	1037	750	275	425	407
292	722	757	79	431	737
301	562	759	552	439	1128
317	846			446	70
324 (P C)	336	34 M L J--		454	75
328	82	1	546	460	765
336	1087	12	1014	463	832
340	953	17	296	470	167
354	317	24	272	473	134
357	193	32	726	479	1160
369	185	41	876	488	1129
374	249	48	389	494	245
377	1015	63	698	515	1164
379	193	67	1089	517	779
382	1142	71	311	524	113
400	425	79	967	526	467
405	822	84	240	528	735
413	523	87	522	536	981
416	1129	97	108	545	802
427 (P C)	882	104	219	551	8
432	76	128	774	553	328
436	958	130	983	558	1144
455	731	139	78	561	342
460	161	145	71	563	1149
470	104	156	283	590	604
473	1016	167	74	596	559

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1	831	375	1071	707	850
5	561	377	249	728 (P G)	781
11	655	380	778	733 (P G)	812
23	515	384	529	740	803
27	1165	387	185		
35	953	392	555	36 M L J—	
46	444	396	428	40	522
51	776	402	364		
57	563	405	777		
83	633	407	432	Madras Law Times	
87	377	410	76	22 M L T—	
90	846	414	822	1	272, 698
96	592	422	769	7	256
99	540	441	192, 751	9	283
110	637	443	46	24	275
120	1116	450	557	26	108
124	717	451	549	31	1089
129	657	459	563	36	462
138	519	467	836	44	248
144	1087	468	756	67	775
150	965	473	594	70	1119
153	534	489	963	78	756
169	1059	507	746	81	12
169	135	509	777	84	342
177	1037	512	577	85	1123
180	349	525	87	89	311
184	918	531	936	94	983
189	609	533	912	106	823
194	831	541	762	117	389
196	562	547	80	127	75
214	27	552	8	137	77
219	73	555	158	142	564
229	535	565	777	147	21
231	313	571	9	154	82
236	986	575	1095	156	74
251	71	579	298	158	281
256	317	581	795	159	589
258	161	585	82	161	658
262	354	601	1018	178	658
272	361	605	1127	183	78
281	657	608	460	187	984
284	113	609	1147	198	832
287	922	614	1139	203	1154
294	181	626	1013	206	236
296	929	632	1049	208	1014
301	1123	639	1013	210	480
309	635	644	1037	213	181
312	183	647	657	215	388
313	1128	650	682	218	550
315	836	652	1148	228	528
317	577	657	418	231	69
335	722	661	941	233	446
347	1001	666	1099	235	67
355	417	669	353	245	580
361	910	673	1076	251	150
364	734	684	1160	255	249
368	516	692	1149	258	946
379	869	698	523	261	7

* At Col 831 read 5 M L J 194 as 35 M L J 194.

† At Col. 185 read 25 M L J 887 as 35 M L J 887

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266	556	134	813	478	808
278	983	137	936	482	1048
280	1126	149	929	483	1095
288	721, 939	155	633	486	8
291	787	163	562	489	615
297	68	175	328	495	238
300	885	179	956	498	777
302	904	183	577	500	897
307	974	197	722	501	298
312	1110	205	1012	504	193
316	776	207	161, 1037	25 M L T—	
319	285	209	609	1	522
320	347	212	367	30	589
337	407	214	698	55	1139
341	779	216	594	71	683
346	70	227	349	231	519
351	619	236	563	Madras Weekly Notes.	
352	81	242	272, 284	(1918) M W N—	
353	1159	244	232	1	319
355	188	246	317	7	1014
357	245	247	361	9	205
372	604	254	376	16	545
376	350	260	1149	23	236
382	456	261	726	28	980
384	27	267	1136	38	659, 778
388	802	271	1106	40	374
392	540	276	555	41	836
400	354	282	385	42	711
24 M L T—		292	87	44	534
1	1142	297	59	46	657
16	103	306	561	51	877
17	852	311	260	54	340
18	167	315	368	55	584
20	259	346	64	69	1159
22	735	351	185	75	837
28	776	356	764	89	522
32	1111	358	101	92	272
34	238	361	76	98	777
35	80	370	1015	106	292
38	953	376	822	107	903
46	1165	330	79	110	925
51	846	339	763	121	283
56	1129	392	109	130	76
60	192	400	353	132	275
62	444	403	453	134	193
66	1001	407	577	136	569
72	981	420	500	139	820
79	659	423	348	141	75
81	569	434	565	143	183
83	633	447	82	144	778
86	424	448	460	146	545
92	831	453	777	163	108
95	233	454	6	167	480
101	1114	455	587	171	82
102	193	461	912	173	337
104	717	469	1076	175	1015
106	931	471	667	177	16
110	135	472	631	179	984
115	563	473	778		
138	836	477	1013		
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191	68	399	347	688	986
194	181	406	444	699	313
195	1014	409	981	703	974
197	659	414	245	709	523
198	289	427	260	715	460
199	218	431	561	716	1048
200	658	435 (P C)	350	717	6
205	74	440	513	718	587
207	231	441	1001	719 (F B)	458
208	522	448	735	721 (F B)	594
214	743	454	779	732 (P C)	70
219	654	458	633	739	734
224	69	461	563	742	762
226	278	477	193	746	104
230	342	479	931	748	1095
231	1123	482	192	756	577
235	775	487	929	761	777
238	249	497	1165	764	255
239	272	502	167	768	467
239	881	503	1114	769	803
242	726	505	836	772	112
244	723	506	77	779	523
246	756	507	275	786	942
249	835	514	604	793	8
251	893	518	831	794	259
262	967	520	956	796	795
265	556	521	609	806	353
274	12	524	955	809	398
276	407	535	135	811	968
283	776	540	633	830	113
285	7	547	476	831	388
289	927	551	71	840	59
291	1111	555	1137	842	432
292	193	561	367	844	161
293	852	562	376	846	657
295	21	564	726	847	683
300	462	567	1012	849	1069
305	456	569	562	853	803
306	564	570	1016	859	589
310	832	586	728	874	104
313	555	587	550	877	9
315	1151	595	193	880	87
318	904	598	722	885	64
325	1089	606	185	886	699
324	1160	611	336	897	188
327	150, 619	614	361	898	566, 1000
331	983	621	519	892	530
333	238	625	577	896	1060
334	737	638	82	898	1013
340	78	643	79	902	1017
345	295	655	962	906	698
346	77	658	349	913	418
350	248	661	609	917	823
371	1120	662	1059	922	555
376	653	666	73	928	897
378	233	672	425	929	105
379	27	673	535		
382	802	675	76		
384	774	678	523		
386	540	680	425		
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7	92
8	1067
9	1093
10	549
11	570
12	396
13	1023
14	584
15	588
16	69
17	818
18	1050
19	1131
20	162
21	152
22	95
23	975
24	907
25	513
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37	1150
38	466
39	194
40	750
41	727
42	359
43	197
44	478
45	727
46	1019
47	198
48	549
49	718
50	1019
51	906
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54	623
55	393
56	512
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58	1050
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60	630
61	511
62	318
63	827
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65	396, 398
66	706
67	1030
68	711
69	990
70	1040
71	175
72	1050
73	159
74	905
75	397
76	89
77	1095
78	492
79	738
80	506
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85	16
86	592
87	391
88	806
89	975
90	623
91	371
92	478
93	318
94	400
95	739
96	135
97	943
98	732
99	1100
100	707
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102	121
103	616
104	907
105	1020
106	341
107	700
108	763
109	910
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115	960
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124	1189
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4	665
5	857, 858
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148	152
149	1020
150	925
151	360
152	768
153	844
154	448
155	878
156	396
157	975
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2	698
3	398
4	153
5	878
6	1019
7	976
8	538
9	917
10	699
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13	1049
14	396, 398
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19	906
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21	716
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28	756	112	598	22	1028
29	232	113	1050	23	1050
30	906	114	233	24	588
31	1050	115	853	25	392
32	312	116	926	26	773
33	153	117	990	27	155
34	431	118	391	28	194
35	395	119	1144	29	395
37	194	120	121	30	704
38	153	121	393	31	263
39	395	122	512	32	1031
40	704	123	465	33	198
41	263	124	1150	34	1019
42	228	125	598	35	806
43	1075	126	727	36	1030
44	1021	127	926	37	89
45	198	128	739	38	790
46	1019	129	944	39	812
47	806	130	616	40	906
58	1051	131	628	41	1065
59	1051	132	665	42	399
62	154	133	311	43	716
64	133	140	907	44	871
65	706			45	1021
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67	721	W R 1917—		47	320
68	673			48	598
69	478	120	539	49	926
71	939	122	1023	50	853
72	733	125	570	51	233
74	90	136	1093	52	738
75	448	167	878	53	827
76	582			54	813
77	16	W R 1917 (Rev.)—		55	153
78	1030			56	431
79	194	7	242	57	460
80	978	W R 1918—		58	109
81	807			59	479
82	135	1	360, 665	60	750
83	400	2	844	61	511
84	1019	3	872	62	393
85	139	4	159, 857	63	213
86	1024	5	925	64	798
87	935	6	1020	65	90
92	154	7	768	66	1150
93	595	8	448	67	1031
94	699	9	396	68	465
99	394	10	975	69	699
101	318	11	986	70	706
102	806	12	1038	71	1020
103	700	13	501	72	399
104	1155	14	790	73	733
105	492	15	585	74	90
106	893	16	584	75	448
107	1095	17	907	76	630
108	721	18	549	77	1019
109	397	19	1	78	582
110	511	20	549	79	16
111	549	21	399	80	1080

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82	978	139	970	3	660
	807	140	401	6	546
84	138	141	624	12	1068
85	400	142	327	18	627
86	139	143	478	21	1189
87	1024	144	584	25	135
88	935	145	629	27	212
89	842	146	213	30	150
90	195, 1051	147	624	35	493
91	355	148	1056	41	535
92	153	149	908	51	902
93	228	150	139	55	904
94	1075	151	378	56	308, 561
95	858	152	449	62	660
96	907	153	110	66	289
97	368	154	177	71	4
98	429	155	492	78	1058
99	256	156	893	82	547
100	756	157	1095	97	117
101	539	158	721	101	365
102	155	159	199	107	660
103	396, 398	160	397	111	202
104	91	161	156	115	1017
105	419	162	511	117	824
106	906	163	905	122	954
107	859	164	741	125	661
108	859	165	599	129	661
109	400	166	706	133	752
110	689	167	806	149	547
111	909	168	478	152	1070
112	990	169	271	165	64
113	890	170	318	176	990, 1119
114	391	171	623	181	312
115	1144	172	394	184	825
116	121	173	943	188	661
117	1052	174	739		
118	874	175	377		
119	121	176	361, 944	Oudh Cases.	
120	1052	177	377, 913	21 O C—	
121	1021	178	827	1	84
122	393	179	616	66	1165
123	615	180 (P C)	1139	68	3
124	512	181	906	70	893
125	700	182	586, 1031	74	507
126	449	183	397	78	1058
127	626	184	400	86 (P C)	424
128	377	185	707	97	496
129	728	1 (Rev)	665	101 (P C)	161
130	1155	2	68	106	353
131	109	3	670	119	587
132	1025	4	457	124	904
133	154			138	940
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* At Col. 195 read 90 W R 1918 as 90 P W R 1918.

† At Col. 870 read 3 P W R 1917 as 3 P W R 1918.

‡ At Col. 590 read 12 O C 156 as 21 O C 156.

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728	224	28	836	205	983
732	499	29	128	209	1156
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455	971	634	76	826	884
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* At Col 124 read 46 Ind Cas 16 as 47 Ind Cas 16.

* At Col 79 read 19 A 46 as 19 A 496.

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* At Col 181 read 28 A 395 as 23 A 381.

* At Col 478 read 25 O 443 as 25 A 443.

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* At Col 70b read 27 A 199 as 27 A 704.

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It. Col 1185 read 33 A 360 as 33 A 660.

* At Col 561 read 33 A 234 as 34 A 234.

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* At Col 831 read 5 M L J 194 as 35 M L J

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† At Col 491 read 36 A 250 as 36 A 350.

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*As Col 580 read 12 O C 156 as 21 O C 156.

*At Col 1059 read 5 B L R 231 as 5 B L R 521

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* At Col 549 read 2 B 318 as 2 B 388.

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26 C 579...R...U B R (1918), 4th Qr 125	896
26 C 615...Appr...43 Ind Cas 377=3 Pat L W 297	642
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26 C 839...R...27 C L J 400=45 Ind Cas		64 P W R 1918=44 Ind Cas	
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* At Col 827 read 5 C L R 21 as 5 C L R 213.

† At Col 1113 read 1 C L R 440 as 12 C L R 440.

‡ At Col 243 read 13 C L R 263 as 13 C L J 263.

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* At Col 827 read 36 I A 145 as 6 I A 145.

† At Col 109 read 58 P W R 1917 as 58 P W R 1915.

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* At Col 868 read 21 I A 12 as 21 I A 1.

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*At Col 13 read 5 Ind Cas 795 as 4 Ind Cas 795. †Read 6 Ind Cas 629 as 6 Ind Cas 630 in col 1050. ‡At Col 531 read 6 Ind Cas 72 as 6 Ind Cas 731. ¶At Col 704 read 8 Ind Cas 78 as 8 Ind Cas 374.	

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At Col 8 read 24 Ind Cas 75 as 24 Ind Cas 275.

* At Col 566 read 88 Ind Cas 4 as 81 Ind Cas 4.
† At Col 831 read 5 M L J 194 as 35 M L J 194.

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* Read 40 Ind Cas 1008 as 40 Ind Cas 65 in the Col 1051.

* At Col 368 read 7 Ind Cas 330 as 7 I D (N S) 930.

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* At Col 83 read 5 M L J 194 as 35 M L J 194.
 † Read 39 M 1918 as 39 M 1018 in the Col. 1049.
 ‡ At Col 75 read 40 A 594 as 40 M 594.

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* At Col 152 read 15 M L T 487 as 15 M L J 487.	

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* At Col. 891 read 5 M L J 194 as 35 M L J 194.

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* At Col 534 read (1911) M W N 35 as (1911) 1 M W N 385.			
† At Col 659 read (1915) M W N 24 as 1915) M W N 249.			
† At Col 831 read 5 M L J 194 as 35 M L J 194.			

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*At Col 367 read 13 N L R 97 as 3 N L R 97.

†At Col 312 read 3 N L R 172 as 3 N L R 171.

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* At Col 150 read 4 N L R 51 as 8 N L R 51.

† At Col 162 read 10 O C 205 as 1 O C 205.

* At Col 1154 read 13 O C 163 as 13 O C 163.

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† Read 68 P L R 1915 as 86 P L R 1915 in Col 1050.	89 P R 1888...F...140 P W R 1918=46 Ind Cas 679 ... 401
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* At Col 861 read 33 R R 1901 as 33 P R 1901.

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* At Col 616 read 111 P R 1910 as 111 P R 1916.

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* At Col 177 read 157 P W R 1916 as 107 P W R 1916.

† At Col 616 read 334 P W R 1910 as 234 P W R 1916.

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* At Col 116 read 1 W R 11 (P O) as 14 W R 11 (P C).

+ At Col 116 read 15 W R 210 as 15 W R 212.

† At Col 13 read 15 W R 274 as 15 W R 279.

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* At Col 517 read 20 W R 341 as 22 W R 341

* At Col 517 read W R Sp No 173 as W R F B) 173.

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OF

INDIAN CASES, 1918.

FINAL PART.

SECTION II—(CIVIL CASES).

Abadi.

- (1) *Tenant's right to house site—Consent of malguzar—Failure to object to tenant's occupation—Effect.*

The tenant's right to a site for his house free of charge is, of course, subject to the permission of the *malguzar* as to the position and extent of the site, but failure by *malguzar* to object to the occupation of a site, by a tenant for even two or three years, would be conclusive evidence of the grant of permission. **Mt. Deok! v. Mukund! Kunbl**, 42 Ind. Cas. 508.

HALLIFAZ, A.J.C.

- (2) *Abadi Deb, proprietary right in—Loss of right to share of kurt kamini, whether involves loss of proprietorship—Wajib-ul-arz, entry in.*

Held that :—

(1) The village *abadi* is the property of all the village proprietors and not only of a few.

(2) Nothing that is not specifically mentioned in the *Wajib ul-arz* can be allowed to derogate from the common right of all proprietors.

(3) It does not follow that because a proprietor has lost the right to a share in the *kurt kamini*, he has also lost the greater right to control the disposal of *abadi* land. **Parwalsh Bakhsh v. Muhammad Hussain**, 19 P.W.R. 1918=43 Ind. Cas. 456.

LE-ROSSIGNOL, J.

- (3) *House in abadi—Possession thereof as kamini—Succession—Village custom.*

Where a deceased person was in possession of a house in the village *abadi* as a *kamin*, held that his near collateral is entitled to retain possession thereof under the ordinary village custom applicable to such cases. **Bell Ram v. Umar Bakhsh**, 116 P.R. 1919.

SHAH DIN, J.

Reference :—129 P.L.R. 1916, F.

Abadi—(Concluded).

- (4) *Alienation by non-proprietor, validity of. See CUSTOMS—PUNJAB (ALIENATION), No. 9, 39 P.L.R. 1918.*

(5) *Residents in houses on abadi in village Sakitra near Gobardhan—Death of residents without legal heirs—Claim to site of house by Bharatpur State as zamindar alleging ancient grant—Secretary of State for India if can claim house. See ESCHEAT, No. 1, 16 A.L.J. 653.*

(6) *Cultivation of village land given up by tenant—Right of tenant to retain his house in village abadi against landlord's wishes. See LANDLORD AND TENANT, No. 71, 21 O.C. 257.*

(7) *Tenant's house in village—Ejectment of tenant from agricultural holding—Right of tenant to occupy house against will of Zamindar. See LANDLORD AND TENANT, No. 52-h, 47 Ind. Cas. 645.*

Abandonment.

(1) *Departure from village after mortgage of property—Adoption of itinerant mendicant life of Chela—No return to village nor marriage—Abandonment of property and renunciation to be inferred. See HINDU LAW (INHERITANCE), No. 10, 18 P.W.R. 1918.*

(2) *Transfer of portions of occupancy holding if constitutes abandonment of whole holding—Transfer or abandonment by ryot of his undivided share in non-transferable occupancy holding—Right of co-sharer landlord to re-enter. See LANDLORD AND TENANT, No. 21, 41 Ind. Cas. 704.*

(3) *Re-entry, Right of, of landlord on, of holding without recourse to provisions of S. 87, Bengal Tenancy Act (1886). See LANDLORD AND TENANT, No. 52-e, 47 Ind. Cas. 147.*

(4) *Suit against minors on mortgage—Question of proof of proper execution and attestation*

Abandonment—(Concluded).

of mortgage-deed not raised in written statement nor issue framed thereon throughout trial—Decree against minor—Right to raise question if abandoned or waived. See PLEADINGS, No. 7, 35 M.L.J. 372.

Abatement of Appeal.

- (1) *Setting aside abatement order, grounds for*—Civ. Pro. Code, O. XXII, rr. 9 and 11.

It is the duty of the person, who is prosecuting an appeal, to keep himself informed of the existence of his adversary. A mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate. **Muhammad Askari v. Lahu**, 21 O.C. 68=45 Ind. Cas. 594.

LINDSAY, J.

References:—24 Ind. Cas. 75; 60 P.R. 1911, F.

- (2) *Death of one appellant during pendency of appeal—Application to bring his legal representative on record made beyond time—Appeal if abates—Re-opening of whole appeal and disposal thereof*—Civ. Pro. Code, 1908, O. XLII, r. 4.

Held that an appeal by three joint decree-holders did not abate, but that the whole case was reopened and could be disposed of, even though one of the appellants died pending the appeal and an application to bring his legal representatives on record was found to be time-barred. **Piyare Lal v. Chura Mani**, 84 P.R. 1918=46 Ind. Cas. 50.

CHEVIS and BROADWAY, JJ.

References:—64 P.R. 1914; 88 P.R. 1914; 22 B. 718; 27 B. 324; 25 A. 27; 20 Ind. Cas. 952; 20 M. 473, Rel. on; 22 A. 222; 4 Ind. Cas. 385, Not F.; 62 P.R. 1913; 41 P.R. 1915; 3 P.R. 1916; 49 P.R. 1917, Dist.

- (3) *Joint decree—Execution proceedings. Appeal in—Respondent, Death of one, while appeal pending—Deceased respondent, Legal representative of, not brought on record within limitation period—Appeal, if abates*—Civ. Pro. Code (Act V of 1908), O. XXII, rr. 4, 12.

An appeal arising out of execution proceedings of a joint decree cannot proceed against the surviving respondents alone, if one of the decree-holders-respondents dies during the pendency of the appeal and his legal representatives are not brought on the record within the prescribed period. **Baksh Ali Sarkar v. Sarat Chandra Roy**, 46 Ind. Cas. 911.

WOODROFFE and SMITHER, JJ.

(4) *Death of some plaintiff-appellants pending appeal—Appeal if totally abates.* See OCCUPANCY TENURE, No. 13, 109 P.W.R. 1918.

Abatement of Rent.

Patnidar entitled to apply for, under Bengal Tenancy Act. See BEN. ACT VIII OF 1885 (TENANCY), No. 32, 45 Ind. Cas. 190.

Abatement of Suit.

- (1) *Civ. Pro. Code, O. XXII, r. 6, S. 99—Death of defendant before hearing arguments for which suit was adjourned—Judgment passed without further hearing and without substituting legal representative—Judgment ultra vires and without jurisdiction.*

Where, after the adjournment of a suit for hearing arguments on facts admitted the defendant died, but the Court without any legal representative of the deceased being substituted for him, pronounced judgment against such deceased purporting to act under O. XXII, r. 6, Civ. Pro. Code, held that the death of the defendant having occurred before the conclusion of the hearing within the meaning of that phrase in O. XXII, r. 6, the judgment and decrees were *ultra vires* and passed without jurisdiction which had abated on the defendant's death and that S. 99, Civ. Pro. Code, cannot cure a defect of jurisdiction. **Maulamlala v. Amber Singh**, 14 N.L.R. 71=43 Ind. Cas. 161.

STANFORD, J.C.

References:—11 Bom. L.R. 1070, F.; 19 C. 513; 26 M. 101; 21 B. 311; 21 A. 314; L.R. 17 Eq. 561, R.

(2) *Ex parte order of abatement—Application to set aside order—Limitation—Nature of suits by reversioners.* See HINDU LAW (REVERSIONERS), No. 6, (1918) M.W.N. 988.

(3) *Resolution by electors of unsuitness of present incumbent of office of Mahant and election of another thereto—Suit with Collector's leave for removal of incumbents from office and property and appointment of the elected with possession of property given to him—Ad valorem Court-fee on value of property if payable—Person elected if necessary party plaintiff to suit—Death of one of two plaintiffs to whom leave given, suit if abates.* See PUBLIC CHARITIES, No. 3, 97 P.R. 321.

Abwab.

- (1) *Bengal Tenancy Act (VIII of 1885), S. 74—Peshkosh—Improvement—Embankment.*

Peshkosh, a fixed annual sum, levied by Government from *lakhirajdars* and *nispahdars* of estates under direct management of Government and paid as a contribution towards the expense incurred in repairing embankment, and the payment of which comes out of the land, is not an imposition in the nature of an *abwab*. There was no vice in the origin of *peshkosh*, the consideration for which was most beneficial work. **Lakshmi Narain Roy v. Secretary of State for India in Council**, 22 C.W.N. 824=45 O. 866=44 Ind. Cas. 497=29 O.L.J. 285.

RICHARDSON and BEACHCROFT, JJ.

References:—8 M.I.A. 1 (40); 22 C.W.N. 823, Rel. on.

(2) *Reg. V of 1812, S. 3—Whether each of several sums mentioned as payable in a lease, recoverable as rent—Every sum which is consideration for use and occupation, if rent—Full*

Abwab—(Concluded).

Bench decision, on point not arising in the case but accepted for years as good law, if may be departed from by Division Bench. **Bejoy Singh Dudhuria v. Krishna Behari Biswas**, 21 C.W.N. 959=41 Ind. Cas. 561=45 C. 259. See Final Part, 1917, Col. 4.

(3) *Peshkosh or annual sum levied by Government for upkeep of embankment, if abwab.*

An annual sum levied by Government for the upkeep of embankments is not an abwab.

Long-continued payment from time immemorial which in itself is a title in the recipient of the payment is a good and sufficient basis of the claim. **Uday Narain Jana v. The Secretary of State**, 22 C.W.N. 823=47 Ind. Cas. 297.

JENKINS, C.J. and HOLMWOOD, J.

Reference :—8 M.I.A. 1, R.

Accounts.

(1) *Suit for rendition of—Partnership—Death of one partner—Suit against his minor legal representative—Whether suit maintainable.*

Held that a suit for rendition of accounts of a partnership business is maintainable by the surviving partner against the minor son of a deceased partner, who, in his lifetime, was manager and had the account-books in his keeping. **Shankar Lal v. Ram Babu**, 16 A.L.J. 303=40 A. 446=45 Ind. Cas. 31.

RICHARDS, C.J. and BANERJI, J.

(2) *Partition suit—Consent decree directing parties to furnish accounts of villages in the respective management of parties—Whether such decree can be executed in perpetuity—Res judicata—Incompetent reference—Decision of Court—Effect.*

In a suit for partition, after dividing certain properties of the family, some villages were left in the possession of plaintiff and some others in possession of the defendants and the parties were directed by the decree to divide the produce of the villages and to submit accounts to each other. The parties were seeking accounts of these villages from each other year after year in execution of this decree.

Held, that accounts could not be claimed in perpetuity in execution of the decree in evasion of the Law of Procedure and in evasion of the Court Fees Act.

Where a reference was made to Judicial Commissioner which under S. 617 of the Civil Procedure Code, 1882, was incompetent, the opinion expressed upon such a reference cannot operate as *res judicata*. Also the opinion is not an adjudication. Even if it were an adjudication the Court is not bound to perpetuate an error. **Zeshwantrao v. Dattatraya Krishna**, 45 Ind. Cas. 201.

MITTAL, A.J.C.

Reference :—22 B. 669, R.

(3) *Provincial Small Cause Courts Act (IX of 1897), Art. 31—Suit for accounts, Nature of—Suit for money paid at*

Accounts—(Concluded):

defendant's request—Necessity to look into accounts.

In a suit for money paid at the defendant's request, the mere fact that accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by plaintiff, would not render the suit one for account under Art. 31 of the Provincial Small Cause Courts Act. **Ukkandan Nair v. Sankara Yarma Rajah**, 24 M.L.T. 453=(1918) M.W.N. 717.

KUMARASWAMY SASTRY, J.

References :—28 M. 394 ; 19 M.L.J. 43 ; 24 M.L.J. 693 ; 27 C.L.J. 96, R.

(4) *Ascertainment of exact balance after examination of accounts—Settlement by compromise—Difference—Settlement of accounts by compromise if can be reopened. See APPEAL (SECOND APPEAL), No. 21, 62 P.L.R. 1918.*

(5) *Refusal to render accounts—What should be proved. See LIMITATION ACT (1908), No. 130, 43 Ind. Cas. 570.*

(6) *Suit for, by principal against agent—Agent, Death of, during pendency of suit—Legal representatives of agent, Liability of—Procedure to be followed in suit. See PRINCIPAL AND AGENT, No. 5, 47 Ind. Cas. 371.*

(7) *Rendition of, Suit for, by agent of Limited Co.—Maintainability of, after audit—Audit, Effect of, as between shareholders and directors. See PRINCIPAL AND AGENT, No. 6, 9 P.L.R. 1918=86 P.R. 1917*

(8) *Suit for ascertained sum of money claimed from defendant as sole manager of land as plaintiff's share of produce of such land if suit for. See PROVINCIAL SMALL CAUSES COURT, No. 14-a, 3 Pat. L.J. 423.*

(9) *Long misappropriation of trust funds by trustee, his father and grandfather—Liability of trustee to account for the misappropriation of his predecessors—Courts if empowered to fix period during which accounts should be rendered by trustee. See PUBLIC CHARITIES, No. 1, 35 M.L.J. 631.*

(10) *Adjudication of—Suit for, by mortgagor without asking for redemption, Maintainability of. See RES JUDICATA, No. 22-c, 47 Ind. Cas. 21.*

Accounts Suit for.

What is—Small Cause Court, Jurisdiction of—Test to determine, Plaint not written statement. See SMALL CAUSE COURT, JURISDICTION OF, No. 2, 43 Ind. Cas. 755=3 Pat. L.J. 423=4 Pat. L.W. 70.

Accretion.

(1) *Execution sale, Land purchased at—Declaration of title, Suit for, to—Plea, accretion after sale, but finding accretion before sale, Effect of. See CERTIFICATE OF SALE, No. 1, 46 Ind. Cas. 908.*

(2) *Possession, Suit for, of land as contiguous accretion—Accretion, Nature of, Proof as to, Necessity of. See POSSESSION, SUIT FOR, No. 1, 46 Ind. Cas. 555.*

Acknowledgment.

Succession by reversioners—Acknowledgment by one—Whether binds others. See LIMITATION ACT (1908), No. 81, 43 Ind. Cas. 351.

Acknowledgment of Debt.

- (1) *Limitation—Acknowledgment of judgment-debtor after attachment, effect of, as against auction-purchaser.*

An acknowledgment by the judgment-debtor may save limitation against the auction-purchaser, but such acknowledgment if made after the attachment cannot prevail against the auction-purchaser who is entitled to have the property purchased by him in the condition in which it was at the time of attachment. *Rajeshwari Dasl v. Binoda Sundarl Dasl*, 22 C.W.N. 278=41 Ind. Cas. 533.

CHATTERJEE and WALMSLEY, JJ.

References:—8 I.A. 65; 22 C. 909; 16 B. 197, R.

- (2) *Partnership—Acknowledgment by partner, if binding on partnership—Direct evidence of authority to co-partner to make acknowledgment if necessary—Limitation Act (1908), Ss. 19, 21 (2).*

Held (by the Full Bench) that, in the absence of direct evidence that a co-contractor or partner has specifically authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other surrounding circumstances, such as the position of the other co-contractors or partners in the business, though it cannot be laid down what circumstances should be deemed sufficient to warrant the inference (a). *Pandit Veeranna v. Grandhi Veerabhadraswami*, 34 M.L.J. 373=41 M. 427=7 L.W. 552=23 M.L.T. 261= (1918) M.W.N. 285=15 Ind. Cas. 18 (F.B.).

AYLING, COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

References:—(a) 35 M. 142 (145); 32 M. 421, overruled; 37 M. 146; 19 Bom. L.R. 86 (95); 39 B. 261; 32 A. 51, R.

- (3) *Construction of document purporting to be—Implied acknowledgment—Acknowledgment if can be spell out if liability subsisting.*

A liberal construction should be placed upon documents purporting to be acknowledgments (a).

An acknowledgment may be implied as well as express and can be spelt out if the liability is subsisting (b).

The plaintiff, the assignee of a debt, wrote to the defendant a letter requiring him to credit the amount due under the assignments in a specified manner and to pay him the balance and the defendant wrote in reply that he could not pay because no assignment deed was shown to him and also because there were counter-claimants claiming the amount for themselves.

Acknowledgment of Debt—(Continued).

Held that the defendant's letter did contain an acknowledgment of liability. *A. Subba Rao v. Parasurama Pattar*, 34 M.L.J. 551=46 Ind. Cas. 973.

SESHAGIRI AIYAR, J.

References:—(a) 25 C. 844, F. (b) 35 A. 437, F.; 6 M. 182; 20 M. 239 and 36 M. 68, D.

- (4) *Civ. Pro. Code, Ss. 47, 96, O. XXXIV, r. 5—Application for passing final decree, nature of—Order on application if appealable—Statement contained in application for extension of time, if will constitute acknowledgment—Limitation Act, S. 19.*

An application under O. XXXIV, r. 5, Civ. Pro. Code, for the passing of the final decree was dismissed as being barred by limitation.

Held on appeal that the order on the application was not one passed under S. 47 of the Code but was appealable under S. 96, as it finally adjudicated on the rights of the parties (a).

The decree passed in a mortgage suit having been held executable without a final decree for sale being passed, the mortgaged properties were proclaimed for sale, and the mortgagor in an application for an adjournment of sale stated, "I have applied for extension of time till reopening of Court to pay the plaintiff the decree amount. I pray that the sale may be adjourned." The decree was subsequently held not executable and on the plaintiff applying for the passing of a final decree a plea of limitation was raised.

Held that the statement of the defendant contained a sufficient acknowledgment within the meaning of S. 19 of the Limitation Act. It is not necessary that the acknowledgment should also be of every legal step necessary for enforcing the right (b).

The substantial right claimed by the plaintiff-mortgagee in an application under O. XXXIV, r. 5, is his right to realise the decree amount by sale of the mortgaged properties through Court. *Subbalakshmi Ammal v. Ramanujam Chetty*, 35 M.L.J. 552=8 L.W. 526=24 M.L.T. 486= (1918) M.W.N. 792.

SPENCER and KRISHNAN, JJ.

References:—(a) 30 M.L.J. 486; 38 A. 21, Appl. (b) 25 C. 844, Rel. *pn*.

- (5) *Suit for dissolution of firm—Appointment of Receiver—Receiver's acknowledgment if and when binding on firm—Civ. Pro. Code, O. XL, r. 1 (d)—Limitation Act, Ss. 19, 21.*

Where during the pendency of a suit for dissolution of a partnership, a Receiver is appointed with power to do all things necessary for the realisation and preservation of the assets of the firm, he may be a person 'authorised to,' make an acknowledgment binding on the firm within the meaning of S. 19, Expl. II of the Limitation Act, if the acknowledgment was necessary

Acknowledgment of Debt—(Continued).

for the preservation of the partnership assets. **Lakshumanan Chetty v. Sadayappa Chetty**, 35 M.L.J. 571—8 L.W. 594—(1918) M.W.N. 877.

ABDUR RAHIM and OLDFIELD, JJ.

References:—26 B. 221; 17 A. 198; 34 M. 221; 30 A. 422; 16 M.L.T. 489; 19 Bom. L. R. 86; *Chinnery v. Evans*, 11 H.L.C. 115; *Whitley v. Lowe*, 25 Beav. 421, *R.*

(6) *Limitation Act (IX of 1908), S. 19—Acknowledgment of liability—Right claimed must be acknowledged.*

The acknowledgment referred to in S. 19 of the Limitation Act must be an acknowledgment of liability in respect of the right claimed.

A possessory mortgage was created in 1897, the mortgagee never got possession of the mortgaged property. More than 17 years after the date of the mortgage, a suit was brought for possession by the mortgagee. For bringing the suit within limitation reliance was placed on an acknowledgment of liability contained in a sale-deed executed by the mortgagor in 1906. By this sale transaction, some money was left with the vendee with a direction embodied in the deed to pay the same to the mortgagee. *Held*, that, if there was any acknowledgment, it was with respect to the liability to pay the money due on the mortgage, and it could not be availed of to give a fresh start of limitation for a suit for possession of the mortgaged property as was sought by the mortgagee. **Beal Madho v. Bir Bal Singh**, 21 O.C. 151—10 Ind. Cas. 813.

LINDSAY J.

(7) *Limitation Act (1908), S. 19—Suit on promissory note—Deposition made by defendant in another suit but neither signed by him nor his duly authorised agent—Plea of defendant in another suit calling upon plaintiff to produce promissory note in question in that suit—Deposition and plea whether constitute acknowledgment of liability.*

In a suit on a promissory note a deposition made by the defendant in an appeal before a Divisional Judge and a written statement filed by him in the original suit prior to the appeal were relied upon as constituting a valid acknowledgment of liability within the meaning of S. 19, Limitation Act. *Held* that the deposition not being signed by the defendant nor by the agent duly authorised by him in that behalf did not amount to a proper acknowledgment and could not save limitation (a). *Held* also, that the mere fact that the defendant, in the written statement referred to, called upon the plaintiff to produce the promissory note adverted to in the plaint in that other case was insufficient to establish an acknowledgment of liability in respect of the promissory note which was the foundation of the present claim. **Kapur Chand v. Narlojan Lal**, 34 P.R. 1918—45 Ind. Cas. 99.

SHAH-DIN, C.J.

Acknowledgment of Debt—(Concluded).

References:—(a) 194 P.W.R. 1911, *F.*; 122 and 145 P.R. 1889 and 16 P.R. 1891, *D.*

(8) *Interest, Payment of—Interest paid as such. See LIMITATION ACT (1908), No. 77, 27 C.L.J. 141.*

(9) *Mortgage—Part-payment—Payment by mortgagor. See LIMITATION ACT (1908), No. 78, 16 A.L.J. 790.*

(10) *Illiterate person's mark affixed beneath endorsement written by third person—Hand-writing if sufficient to satisfy proviso to S. 20 (1), Limitation Act. See LIMITATION ACT (1909), No. 84, 28 C.L.J. 222.*

(11) *Sub-mortgagee, Receipt by, of his share of interest from mortgagors within six years of suit—Cause of action against principal mortgagee if kept alive by a sub-mortgagee. See LIMITATION ACT (1908), No. 85, 3 P.R. 1918.*

Acknowledgment of Liability.

Suit on a promissory note—Limitation Regulation (IV of 1911), Ss 20, 21—Part-payment by duly authorised agent—Lawful guardian—Hindu law—Joint family—Collaterals impleaded in the suit.

The plaintiff, in support of an allegation that his suit on a promissory note was in time, relied on an alleged part-payment by the father of a minor, whose lawful guardian was at the time of the alleged payment her husband's mother, but did not explain how the mother-in-law's authority was ousted, merely alleging that the father was *de facto* guardian of the minor:

Held that the pleadings did not allege a payment by an agent duly authorised within the meaning of S. 20 of the Limitation Regulation and that the claim was barred by limitation.

The question whether collateral members of the joint family of the maker of a promissory note can be impleaded in a suit on the note was referred to but not decided. **Seshadri v. Savithramma**, 25 Mys. C.C.R. 267.

MILLER, C.J. and PARAMASIVA IYER, J.

References:—17 Mys. C.C.R. 133; 17 Mys. C.C.R. 175, *R.*

Acquiescence.

(1) *Real owner of property allowing another to appear as owner—Purchase by third person for value from such ostensible owner—When real owner estopped from asserting his title—Circumstances negating acquiescence of real owner—Notice. See BENAMI TRANSACTIONS, No. 7, 73 P.R. 1918.*

(2) *Acquiescence and laches, Difference between. See LIMITATION ACT (1908), No. 186, 41 Ind. Cas. 726.*

(3) *Rent, Enhanced rate of, for garden crops, Custom as to, Plea of, negated—Acquiescence, Effect of, on such disposal. See MAD. ACT VIII of 1865 (RENT RECOVERY), No. 1, (1918) M.W.N. 732 (P.G.).*

Acquiescence—(Concluded).

(4) Hindu Law—Gift, Suit challenging a, by reversioners, Delay in filing, it amounts to. See HINDU LAW (SUCCESSION), No. 2, 125 P.W.R. 1917 = 11 P.R. 1918.

Act of God.

Meaning of—Damage to adjoining wall—Rain water collecting in the debris of fallen house—Liability to compensate the owner.

The term 'Act of God' is limited strictly to those classes of inevitable accidents which are occasioned by the elementary forces of the nature unconnected with the agency of man or other causes. It does not include cases of damage which could have been prevented by such an amount of foresight and care as can be reasonably expected from an adjoining owner.

Held that a person who allows rain water to collect in the materials and the debris of his fallen house and thus to cause injury to an adjoining wall makes himself liable to compensate the owner of the wall for the damage sustained by him. *Lallu v. Fazl Haq*, 21 O.C. 295.

KANHAIYA LAL, A J.C

References:—Fletcher v. Rylands, L.R. 3 H. L. 330; 31 M. 169; 9 Bom. L.R. 564, *Rel. on*; 28 B. 472; 30 P.R. 1593, *Dist.*

Act of State.

Negligence of Municipality to warn passengers of repairs to road—Consequent injury to passenger—Whether such misfeasance act of state. See TORT, No. 1, 41 M. 538.

Acts.

- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BIHAR AND ORISSA ACTS
- 4.—BOHAR ACTS.
- 5.—BURMA ACTS
- 6.—CENTRAL PROVINCES ACTS.
- 7.—MADRAS ACTS.
- 8.—ODISH ACTS.
- 9.—PUNJAB ACTS.
- 10.—UNITED PROVINCES ACTS.

1.—Imperial Acts.**Act XIX of 1841 (Property Protection).**

(1) Ss. 3 and 4—Provisions of sections ignored by Court and order passed—Application for revision of order—Other remedies open—Procedure. See REVISION, No. 4, 31 P.L.R. 1918.

(2) S. 1. See No. 1, *supra*.

Act XXI of 1850 (Caste Disabilities Removal).

(1) Hindu widow—Conversion to Mahomedanism—Marrying a Mahomedan husband—Rights in property of first husband not lost—Hindu Widow Re-marriage Act (XV of 1956).

The Hindu Widow Re-marriage Act is confined in its operation to a Hindu widow remarrying as such. It does not apply to a Hindu widow who becomes a convert to another religion and then re-marries.

Where a Hindu widow becomes a convert to Mahomedanism and then marries a Mahomedan

1.—Imperial Acts—(Continued).**Act XXI of 1850 (Caste Disabilities Removal)—(Concluded).**

husband, she cannot be deprived of the estate which she has inherited from the Hindu husband (a). *Karnam Chowdappa v. Karnam Narasamma*, 23 M.L.T. 81 = 7 L.W. 411 = (1918) M.W.N. 274 = 44 Ind. Cas. 299.

SESHAGIRI AIYAR and NAPIER, JJ

References:—(a) 35 A. 466, *F.*; 5 C. 775; 19 C. 289, *R.*

(2) S. 1—Rights in estate of first husband of Hindu widow remarrying M.homedan after conversion to Mahomedanism. See HINDU LAW (WIDOW), No. 14, 35 M.L.J. 317.

Act XV of 1856 (Hindu Widow's Re-marriage).

(1) Applicability of, to Hindu widows embracing another religion and then remarrying. See ACT XXI OF 1850 (CASTE DISABILITIES REMOVAL), No. 1, 23 M.L.T. 81.

(2) S. 2—Rights in estate of first husband of Hindu widow remarrying Mahomedan after conversion to Mahomedanism. See HINDU LAW (WIDOW), No. 14, 35 M.L.J. 317.

Act XLV of 1860

See PENAL CODE.

Act XX of 1863.

See RELIGIOUS ENDOWMENTS ACT.

Act III of 1865 (Carriers)

See CARRIERS ACT.

Act X of 1865 (Succession).

See SUCCESSION ACT.

Act XV of 1865 (Parsi Marriage and Divorce).

(1) S. 17—Delegates appointed under the Act being unable to understand the English language, unfit to act as such—Appeal—Challenging the fitness of the delegates for the first time in appeal—Validity—Civ. Pro. Code, 1908, O. XI, r. 21—Failure by defendant to press for production of the documents, at the trial—Effect—Evidence Act, S. 149—Statement of witnesses recorded for special purpose when privileged—Pressing for—Production of such statements after verdict—Effect.

Held that there is no precedent for a delegate under the Parsi Marriage and Divorce Act being challenged, as to his fitness to act as such, for the first time in appeal.

Held that, where a party failed to press for the production of documents under O. XI, r. 21, while the suit was proceeding no penalty for their non-production can be asked for the first time after the case is closed.

Obiter dictum. If the statements of witnesses were recorded for the special purpose of being shown to the plaintiff's legal advisers only to ascertain whether there was a fit case to go to Court, then they would be privileged under

1.—Imperial Acts—(Continued).**Act XV of 1865 (Parsi Marriage and Divorce)—(Concluded).**

B. 129, Evidence Act., but not otherwise.
Dinbal v. Fromroz, 43 Ind. Cas. 71.

BATTEN, A.J.C.

Reference:—17 B. 146, R.

Act IV of 1869 (Divorce).

See DIVORCE ACT.

Act VII of 1870 (Court Fees).

See COURT FEES ACT.

Act I of 1871 (Cattle Trespass).

S. 22—*Suit for damages for illegally impounding cattle—Burden of proof—Special remedy provided by statute—Election of party to pursue special remedy or common law remedy.*

Where a plaintiff brought a suit to recover damages for illegal impounding of his cattle, and the defendant sought to justify the seizure of the cattle, held that the onus lay on defendant who in substance stated an affirmative. *Prima facie* to deprive a man of his property by disturbing his possession is to do him a legal wrong and so to give him a cause of action in tort.

In cases where a special remedy is provided for a right or liability already existing at common law, the party suing has his election to pursue either the common law remedy or the statutory remedy, unless the statute contains words which expressly or by necessary implication exclude the common law remedy. *Bala v. Vithu*, 41 Ind. Cas. 237.

DRAKE-BROCKMAN J.C.

References:—8 M.L.A. 103; 15 W.R. 274; 16 C. 189; 9 M. 3; 8 S. 266, *Appr.*; 2 C.L.R. 341, R.; 5 Ind. Cas. 795, *Dist.*; 27 M. 493, *Jr.*

Act XXIII of 1871 (Pensions).

S. 4—*Suit for declaration—Share in kulkarni Vatan—Certificate from the Collector.*

A suit to obtain a declaration that the plaintiff is the owner of a share in a *kulkarni vatan* falls within the purview of S. 4, Pensions Act, 1871, and cannot be entertained in absence of a certificate from the Collector (a). *Bal-krishna Sumbhajl Ghatte v. Dattatraya Mahadev Ghatte*, 20 Bom. L.R. 335=42 B. 267=46 Ind. Cas. 580.

SCOTT, C.J. and BATCHELOR, J.

References:—(a) 1 B. 75; 20 B. 480; 14 Bom. L.R. 998, *F.*; 18 B. 516, D.

Act I of 1872 (Evidence).

See EVIDENCE ACT.

Act IX of 1872 (Contract).

See CONTRACT ACT.

Act XV of 1872 (Christian Marriage).

See CHRISTIAN MARRIAGE ACT.

1.—Imperial Acts—(Continued).**Act VIII of 1873 (Northern India Canal and Drainage).**

(1) B. 30. See No. 2, *infra*.

(2) B. 23, 30—No proceedings taken under sections—Canal department if can temporarily empower person to irrigate from private water course of another—Canal department if can confer permanent right irrigation and if can upset Civil Court's decision. See REMAND, No. 5, 177 P.W.R. 1918.

Act X of 1873 (Oaths).

See OATHS ACT.

Act IX of 1875 (Majority).

S. 2—Exception mentioned in section if applies to dower. See MAHOMEDAN LAW (DOWER), No. 3, 23 M.L.T. 78.

Act I of 1877 (Specific Relief).

See SPECIFIC RELIEF ACT.

Act IX of 1879 (Court of Wards).

S. 55—*Manager of Court of Wards—Power to institute suits without Court's sanction—Suit, if can proceed without Court's order.*

The law gives the manager of a Court of Wards power to file a suit in anticipation of the sanction when the suit would otherwise be barred by limitation. Such a course should be adopted where there is very little time left to get the authority of the Court of Wards.

Though a plaint may be filed in order to prevent a suit from being barred by limitation, the suit shall not be proceeded with except under the order of the Court. If a suit be proceeded with without such order, all proceedings taken subsequently to the filing of the plaint, being without jurisdiction, should be set aside.

In the circumstances of the case, the land being *chur land*, the manager of the Court of Wards was held justified in instituting the suit without the authority of the Court of Wards, although there was some time between the date of the institution of the suit and the date on which the limitation would expire from the time when the cause of action arose (a). *Digendra Chandra Sen v. Nritya Gopal Biswas*, 27 C.L.J. 125=22 C.W.N. 419=43 Ind. Cas. 184.

CHATTERJEE and RICHARDSON, JJ.

Reference:—(a) 16 C. 89, R.

Act XVII of 1879 (Dehkan Agriculturists Relief).

See DEKHAN AGRICULTURISTS RELIEF ACT.

Act XVIII of 1879 (Legal Practitioners).

See LEGAL PRACTITIONERS' ACT.

Act V of 1881 (Probate and Administration).

See PROBATE AND ADMINISTRATION ACT.

Act XXVI of 1881 (Negotiable Instruments).

See NEGOTIABLE INSTRUMENTS ACT.

Act II of 1882 (Trusts).

See TRUSTS ACT.

I.—Imperial Acts—(Continued).**Act IV of 1882 (Transfer of Property).**

See TRANSFER OF PROPERTY ACT.

Act V of 1882 (Easements).

See EASEMENTS ACT.

Act VI of 1882 (Companies).

See COMPANIES ACT.

Act XIV of 1882 (Civil Procedure).

See CIV. PRO. CODE.

Act XV of 1882 (Presidency Small Cause Courts).

See PRESIDENCY SMALL CAUSE COURTS ACT.

Act II of 1886 (Income Tax).

See INCOME TAX ACT.

Act VII of 1887 (Suits Valuation).

See SUITS VALUATION ACT.

Act IX of 1887 (Provincial Small Cause Courts).

See PROVINCIAL SMALL CAUSE COURTS ACT.

Act VII of 1899 (Succession Certificate).

See SUCCESSION CERTIFICATE ACT.

Act VIII of 1880 (Guardians and Wards).

See GUARDIANS AND WARDS ACT.

Act IX of 1890 (Railways).

See RAILWAYS ACT.

Act IV of 1893 (Partition).

See PARTITION ACT.

Act I of 1891 (Land Acquisition).

See LAND ACQUISITION ACT.

Act X of 1887 (General Clauses).

See GENERAL CLAUSES ACT.

Act II of 1899 (Stamp).

See STAMP ACT.

Act IX of 1899 (Arbitration).

Ss. 5 and 8—Appointment of arbitrator—Effect—Procedure, if arbitrator neglects to act.

Where parties appoint a person as their arbitrator, it is irrevocable without leave of the Court under S. 5 of the act. Where an arbitrator neglected to act, the parties should adopt the procedure prescribed under S. 8 of the Act. *Dwarakaprasad v Firm of Dipchand Parsaram*, 44 Ind. Cas. 260 = 11 S.L.R. 101.

CROUCH, A.J.C.

Act VII of 1904 (Ancient Monuments Preservation).

Ss. 10, 21 — Land Acquisition Act (1 of 1894), Ss. 53, 54—Award by Court—Appeal to High Court—Jurisdiction—Practice. *Vishnu Narayan Valdyia v. The District Deputy Collector, Kolaba*, 19 Bom. L.R. 237 = 42 B. 100 = 43 Ind. Cas. 480. See Final Part, 1917, Col. 25.

I.—Imperial Acts—(Continued).**Act III of 1907 (Provincial Insolvency).**

See PROVINCIAL INSOLVENCY ACT.

Act V of 1908 (Civil Procedure Code).

See CIV. PRO. CODE.

Act IX of 1908 (Limitation).

See LIMITATION ACT.

Act XVI of 1908 (Registration).

See REGISTRATION ACT.

Act III of 1909 (Presidency Towns Insolvency).

See PRESIDENCY TOWNS INSOLVENCY ACT.

Act II of 1910 (Paper Currency).

S. 26—Document payable on demand how far offends section.

A document which is payable to the bearer who brings it to the place of payment on the order of the payee does not offend against S. 26 of the Paper Currency Act, for there must be an endorsement by the payee.

40 M. 585 and (1917) M.W.N. 778 referred to cases where there was no necessity for an endorsement before payment can be demanded, by the bearer of it who is not the payee under it.

A note which does not fix any date for payment is an on-demand note; also, a note will be construed as an on-demand note, if it is so expressed. *Tittu Gopalachariar v. Maiyappa Chetty*, (1918) M.W.N. 177 = 8 L.W. 501 = 45 Ind. Cas. 22.

SESHAGIRI Aiyar and NAPIER, JJ.

Act IX of 1910 (Electricity).

S. 24, Sch., cl. VI, sub clauses 1, 2 and 3 — Fuse or cut out—Service line, Costs of maintenance of—Liability of licensee—Installation, defective—Consumer, whether liable to pay for fuse cut-out.

Held, that:—

1. A fuse or cut-out is a necessary part of the service-line and is kept under the licensee's seal.

2. The licensee is bound to bear the cost of maintenance of the service-line, whether or not it has been initially paid for by the consumer.

3. If the consumer's installation is defective, the licensee is entitled to discontinue the supply of energy to him.

4. In case of a dispute as to any alleged defect, the licensee can take action under cl. VI, sub-cl. (3), of the Schedule to the Electricity Act and refer the matter to an Electric Inspector who shall decide it.

5. If the licensee continues to supply energy to a consumer when he knows or has reason to believe that the latter's installation is defective, he does so at his own risk, and the consumer is not liable to pay for a new fuse or cut-out, if the old one melts owing to a defect in his installation. *The Lahore Electric Supply Company v. Durga Das*, 77 P.L.R. 1918 = 79 P.W.R. 1918 = 86 P.R. 1918 = 45 Ind. Cas. 171.

SCOTT-SMITH, J.

1.—Imperial Acts—(Continued).**Act II of 1911 (Patents and Designs).**

- (1) Ss. 5, 17, 43, 62, 64 and 67 and Form No. 20—'Novelty' band—Design—Wrist band—Jurisdiction of the Controller—"Non-insertion" or "omission" from the register—"Cancellation"—English Patents and Designs Act, 1907 (7 Ed. VII, c. 29)—Specific Relief Act. (I of 1877), S. 45—S. 70—New Original Design—Novelty and originality—Test of novelty—Novelty in application—Articles of an analogous character.

The appellant applied, to the Controller of Patents and Designs for the registration of a design, described therein, in class 1, calling it the "novelty" band. The Controller registered that design. The respondents, B & Co., applied to the Controller for cancellation of the registration, and, after hearing both parties, the Controller cancelled the registration. Upon that the appellant moved the High Court under S. 45 of the Specific Relief Act, 1877, for an order that the Controller of Patents and Designs should place the design upon the register of Designs in such manner, as this was on and prior to the cancellation.

Held—That the Controller, upon the application of B. & Co., had no jurisdiction to cancel the registration.

The ordinary way of expunging the registration of a design is to apply to this Court under S. 64 of the Patents and Designs Act of 1911.

The only persons who can apply under S. 64 of the Patents and Designs Act, 1911, are the registered proprietor or some person in whom his interest is vested.

The words "non insertion in or omission from the register," in S. 64 do not include "cancellation," and so the High Court cannot interfere under that section when there has been an improper cancellation.

Form No. 20 (under the Patents and Designs Act, 1911) must be limited to applications by a registered owner, though it has been framed in a general way.

Under S. 45, Specific Relief Act, the High Court can interfere when, in the opinion of the High Court, the doing or forbearing of the required act is "consonant to right and justice." Therefore the High Court, before it can direct the Controller to restore the registration of the design, has to consider whether the design is new and original.

A bracelet was produced before the trial Judge manufactured by Messrs. Cooke and Kelvey, Calcutta, which was in use for about five years prior to the registration of the design in suit, and which was designed like the "novelty" band. The design in suit was for holding a wrist watch :

Held, that though the shape of the "novelty" band by itself could not be said to be new and original, the application of it to a watch to be worn on the wrist was for a purpose so different from, and for a use so dissimilar to, the purpose and use of the bracelet that the design in question might be said to be original.

1.—Imperial Acts—(Continued).**Act II of 1911 (Patents and Designs)—(Old.).**

- * Per Woodroffe, J.—There was novelty in applying what was an old thing to a new use. If that was so, the design should be protected, provided it was not merely, to use the words of the cases, analogous.

Sanderson, C. J. (approving Fletcher, J.)—The test of novelty is the eye of the Judge. He must place the two designs side by side and see whether the one for which novelty is claimed is new. *Earnest Otto Gammeter v. The Controller, Patents & Designs & J. Boseck & Co.*, 22 C.W.N. 580=45 C. 606.

SANDERSON, C.J. and WOODROFFE, J.

References :—*In re Clarke's Design*, (1896) 2 Ch. 38; *In re Read & Greswell's Design*, L.R. 42 Ch. D. 260; *In re Walker, Hunter & Co., Falkirk Iron Co.*, 4 Pat. Cas. 390; *Heda Foundry Co. v. Walker; Hunter Co.*, L.R. 14 A.C. 550, R.

- (2) S. 17. See No. 1, *supra*.

- (3) S. 32—Patent—Novelty—Specification—Combination of old materials.

The plaintiffs patented a process of turning out *banslochan* (a medicinal powder manufactured by a calcining process from the interior of bamboo found in Singapore) of which the essential features were the treatment of the substance at a red heat, with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved were (a) no iron or other metal being used in the composition of the crucible, there was no danger of any deleterious action, on the part of the furnace, of the acid upon the metal aforesaid; (b) the retort or crucible was entirely closed from the time when the acid was added until the process of calcination was complete, the result being that the necessity of a chimney communicating with the retort for the purpose of carrying off the fumes was dispensed with. This process was one of a new combination of admittedly old materials :—**Held** that it was a good subject-matter for a patent. *Lakhpatt Rai v. Sri Kishan Das*, 16 A.L.J. 941.

PIGGOTT and WALSH, JJ.

References :—*Harrison v. Anderston Foundry Co.*, (1876) L.R. 1 A.C. 574; *Plimpton v. Spiller*, (1877) L.R. 6 Ch. D. 472, *Appl.*; *Brunton v. Hawkes*, (1821) 106 E.R. 1034, R.

- (4) S. 43. See No. 1, *supra*.

- (5) S. 62. See No. 1, *supra*.

- (6) S. 64. See No. 1, *supra*.

- (7) S. 67. See No. 1, *supra*.

Act II of 1912 (Co-operative Societies).

- (1) S. 42 (5) and (6)—Order of liquidator declaring each member, as jointly and severally liable—Application for attachment of property hypothecated and other property—Whether Court could examine the legality of the order—*Appeal*. *Mathura Prasad v. Sheobalak Ram*, 15 A.L.J. 863=40 A. 89. See Final Part, 1917, Col. 45.

1.—Imperial Acts—(Concluded).**Act II of 1912 (Co-operative Societies)—(Cld.).****(2) S. 42 (6)—Jurisdiction of Civil Courts—Oudh Civil Digest—Pleader's certificate.**

Under the provisions of S. 42 (6), a Civil Court has no jurisdiction to entertain an appeal against the order of a liquidator, acting under the Act.

R. 272 of the Oudh Civil Digest is mandatory, and, according to it, all pleaders except those who appear for the Crown, the Government or the Court of Wards, or a Local Authority, must file a certificate. *Beal Madho Singh v. The Tahsildar of Unao*, 44 Ind. Cas. 353=4 O.L.J. 583.

STUART and KANHAIYA LAL, A.J.Cs.

Act IV of 1912 (Lunacy).**Ss. 3 (11), 6—Wife's brother, if a relative—Wife's brother, if competent to apply for an inquisition order—Rules under the Act, if applicable to mofussil—Civ. Pro. Code (Act V of 1908), applicability of.**

A wife's brother is a "relative" within the meaning of S. 63 of the Lunacy Act and is competent to apply for an inquisition order.

The rules under the Act framed for the original side of the High Court for the Presidency Towns cannot be and ought not to be extended to places outside it.

The provisions of the Civ. Pro. Code apply to applications under this Act. *Mont Lal Sil v. Nepal Chandra Pal*, 27 C.L.J. 205=22 C.W.N. 547=43 Ind. Cas. 511.

MOOKERJEE and BEACHCROFT, JJ.

References:—5 W.R. (Mis.) 51; 7 W.R. 267; 18 W.R. 246, R.; *Ex parte Oyle*, 15 Ves. 112 and *Re Nesbitt*, 2 F. 445, Rel.

Act VI of 1913 (Muslimans Wakf Validation).

Ss. 3, 4—Retrospective operation of sections. See MAHOMEDAN LAW (WAKF), No. 2, 16 A.L.J. 811.

Act VII of 1913 (Companies).

See COMPANIES ACT.

Act XII of 1915 (Indian Soldier's Litigation).

(1) Ss. 1 and 8—Suit against defendant serving under war condition, trial of—Right of defendant to have decree passed against him set aside. *Sobha Singh v. Thakar Singh*, 94 P.R. 1917=172 P.W.R. 1917=43 Ind. Cas. 272. See Final Part, 1917, Col. 46.

(2) S. 8. See No. 1, *supra*.

2.—Bengal Acts.**Act X of 1889 (Bengal Rent).**

Occupancy rights under, Nature of—Transferability of. See OCCUPANCY RIGHTS, No. 3, 46 Ind. Cas. 657.

Act XI of 1859 (Bengal Land Revenue Sales).

(1) Ss. 3, 5, 6, 33—Sale for arrears of Government revenue not published in vernacular gazette also—Failure to so publish if

2.—Bengal Acts—(Continued).**Act XI of 1859 (Bengal Land Revenue Sales)—(Continued).**

irregularity or illegality vitiating sale. See REVENUE SALE, No. 6, 35 M.L.J. 644 (P.C.).

(2) S. 5. See No. 1, *supra*.

(3) S. 6. See No. 1, *supra*.

(4) S. 25—Appeal under, dismissed by Commissioner for default—Restoration of appeal, Power of, of Commissioner—Final Courts including Revenue Courts, Inherent power of, to rectify errors and mistakes.

All final Courts, including Revenue Courts, have an inherent power to make such orders as may be necessary for the ends of justice.

A Revenue Court when exercising final powers must be regarded as possessing an inherent power to rectify its errors and mistakes and take such action as the ends of justice may demand.

A Commissioner of a Division possesses the power to restore to his file an appeal under S. 25 of the Bengal Revenue Sales Act XI of 1859, decided by him *ex parte*, if he thought this to be necessary for the ends of justice.

An appeal under S. 25 of Act XI of 1859 having been preferred, it was fixed for hearing at 11 A. M. The appellant's counsel arrived at 11-20 A. M. to find that the opposite party was just leaving and that the appeal had been dismissed in petitioner's absence. An application made to the Commissioner later on in the day for the restoration of the appeal having been dismissed, an application was made to the Board.

Held, (1) that whatever the real cause of delay may have been, the amount of delay was not very serious and in view of the fact that the Commissioner's decision in an appeal under S. 25 of Act XI of 1859 is final, the Commissioner would have exercised a wise discretion if he had allowed the parties a little more grace, and unless it would have proved seriously inconvenient and detrimental to the due discharge of public business the Commissioner might well have held the hearing of the case over for sometime longer;

(2) that the Commissioner possessed the power to restore the appeal to his file and decide it after both parties have been allowed ample opportunity of being heard and that he ought to exercise that power and restore the appeal. *D. N. Ray v. Nalin Behari Bose*, 46 Ind. Cas. 621.

STEVENSON MOORE, M.B.

(5) Ss. 31 and 53—Encumbrances—Sale proceeds—Purchase by the proprietor—Sale brought about by dishonest motives of the proprietor—Civ. Pro. Code (Act V of 1908), Ss. 107 and 161 and O. XLI, r. 33—Power of the Court of appeal—Estoppel.

The Bengal Land Revenue Sales Act (XI of 1859), S. 31, provides that the purchase monies, after paying the public claims, shall be held

2.—Bengal Acts—(Continued).

Act XI of 1859 (Bengal Land Revenue Sales)
—(Continued).

on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court, but the section nowhere transfers the charges from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section, and the Court would undoubtedly direct that such claims, in due order of priority should be satisfied out of the sums in the hands of the Collector.

Where the property is bought by the recorded proprietor and the estate is acquired, under S. 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale has merely provided money for payment of the Government claims, and the encumbrances are left entirely unaffected and could only be enforced against the property, and the rights to the sale proceeds of the recorded proprietor, who has purchased the property, are those under S. 31 notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest.

In a suit to which a puisne mortgagee was a party, the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the benamidar of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the Court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale proceeds:

Held, that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts that showed all the circumstances relating to the sale, the Court had abundant power under Ss. 107 and 151, and O. XLII, r. 33 of the Code of Civil Procedure, 1908, to vary, as it did, the decree in the prior mortgagee's suit. **Held**, also, that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit, did not operate as an estoppel against the puisne mortgagee as to prevent him from attacking the sale in his own suits, and obtaining consequential relief. **Tarini Charan Sarkar v. Bishan Chand**, 23 M.L.T. 147 = 7 L.W. 315 = 27 C.L.J. 303 = 34 M.L.J. 361 = (1918) M.W.N. 296 = 16 A.L.J. 271 = 22 C.W.N.

2.—Bengal Acts—(Continued).

Act XI of 1859 (Bengal Land Revenue Sales)
—(Continued).

505 = 20 Bom. L.R. 553 = 44 Ind. Cas. 304 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE,
SIR WALTER PHILLIMORE, BART.,
and SIR LAWRENCE JENKINS.

(6) S. 33—Revenue sale under, Suit to set aside a—Appeal to Commissioner, grounds not specified in, if can be urged in suit. See REVENUE SALE, No. 4, 47 Ind. Cas. 422.

(7) S. 33. See No. 1, *supra*.

(8) S. 37, *Proviso*—'Protected interest'—Occupancy raiyat obtaining grant of fixed rent—Occupancy raiyat at fixed rent under old law.

A person, who has already acquired an occupancy right, does not, by obtaining a grant of fixed rent, lose that occupancy right; such a person is protected from ejectment, under S. 37 of the Revenue Sale Law (a).

A raiyat who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy raiyat although his rent has been fixed in perpetuity by reason of which he becomes a raiyat holding at fixed rates according to the classification of raiyats in the Bengal Tenancy Act. **Lakhi Charan Saha v. Hamid Ali**, 27 C.L.J. 284 = 44 Ind. Cas. 513.

CHATTERJEA and RICHARDSON, JJ.

Reference:—(a) 22 C.L.J. 221, F.

(9) S. 37, *Proviso*—'Protected interest'—Settled raiyat holding land in the same village.

A settled raiyat holding land which was sold for arrears of revenue, in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent, is entitled to the benefit of the *proviso* to S. 37 of the Revenue Sale Law. **Lakhi Charan Saha v. Mokal Ali**, 27 C.L.J. 293 = 45 Ind. Cas. 25.

FLETCHER and RICHARDSON, JJ.

(10) S. 37, *proviso*—Raiyats holding at fixed rates, if persons having protected interest under. See LANDLORD AND TENANT, No. 49, 46 Ind. Cas. 254.

(11) Ss. 37, 53—Proprietor purchasing his own estate as arising in the name of a benamidar, effect—Adverse possession—Incumbrance.

Where a proprietor purchased his own estate, which stood in the benami of another, in a revenue sale, the case clearly falls under S. 35 of Act XI of 1859 and his purchase was subject to all encumbrances existing at the time of the sale.

Adverse possession is an incumbrance within the meaning of not only S. 37 but also within the meaning of S. 53, of Act XI of 1859. **Hamdu Mia v. Ramdhan**, 43 Ind. Cas. 461.

CHATTERJEA and RICHARDSON, JJ.

References:—12 C.W.N. 528; 13 C.W.N. 407; 16 C.W.N. 587, R.

2.—Bengal Acts—(Continued).**Act XI of 1889 (Bengal Land Revenue Sales)—(Concluded).**

(12) S. 52—Revenue sale under, of permanent tenure—Howla under-tenure, if affected by sale. See **REVENUE SALE**, No. 3, 45 Ind. Cas. 892.

(13) S. 53. See Nos. 4 and 9, *supra*.

(14) S. 58—Collector's peon, bidding started by, by bid of a rupee as per custom—Subsequent bids falling short of arrears—Collector's power to buy property for highest bid. See **REVENUE SALE**, No. 2, 22 C.W.N. 769.

Act VII of 1869 (Bengal Tenancy).

Act if governing sale of non-transferable jote for rent decree. See **LANDLORD AND TENANT**, No. 10, 22 C.W.N. 563.

Act VIII of 1869 (Landlord and Tenant Procedure).

(1) S. 52—Transfer of portion of non-transferable holding. Right of, to make deposit. See **DEPOSIT**, No. 1, 23 C.W.N. 132.

(2) Ss. 59, 64, 65—Sale of non-transferable jote for rent decree, if governed by Act. See **LANDLORD AND TENANT**, No. 10, 22 C.W.N. 563.

(3) S. 64. See No. 2, *supra*.

(4) S. 65. See No. 2, *supra*.

Act VI of 1870 (Village Chaukidari).

(1) Tenants induced by Zamindar on land being vacated by Chaukidar in possession, if trespasser. See **CHAUKIDARI CHAKRAN LANDS**, No. 3, 22 C.W.N. 997.

(2) Service tenant-holder—Service, Nature of.

S. 1 of the Chaukidar Chakran Act does not govern cases in which there might be definite and conclusive evidence to satisfy the Court as to what was the nature of the services required from the service tenant-holder (*a*). **Sattis Chandra Bandopadhyaya v Natabar Doina**, 29 C.L.J. 281.

FLETCHER and PANTON, JJ.

Reference:—(a) 43 C. 227, *Dist*.

(3) Ss. 50, 51—Legal effect of resumption of customary chakran lands and subsequent transfer thereof to the Zamindars, whether in such a case the Zamindar acquires a new title thereto and whether it is incumbent on the putnidar to ask for a fresh settlement thereof.

Where chaukidari chakran land forming part of lands settled in *outas* was resumed by Government under the provisions of the Village Chaukidars Act and was subsequently transferred to the Zamindar, who thereupon settled such lands with the plaintiffs who were third parties:

Held—That the Zamindar was not competent to make a settlement with the plaintiffs and that, under the grant which the plaintiffs obtained they had acquired no right as against the *putnidars*.

2.—Bengal Acts—(Continued).**Act VI of 1870 (Village Chaukidari)—(Ctd.).**

The *putnidars* were not bound to take a fresh settlement from the Zamindar after resumption (*a*).

Held, also, that the transfer of the land by Government, subsequent to resumption, did not create a new estate in the Zamindar, but the estate thus taken by him was in confirmation and by way of continuance of his existing estate (*b*). **Sourendra Mohan Sinha v. Rajendra Nath Roy**, 22 C.W.N. 66C=28 C.L.J. 160=46 Ind. Cas. 435.

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 21 C.W.N. 609=25 C.L.J. 499, *h*; 33 C. 593=5 C.L.J. 299=10 C.W.N. 598, *overruled*; 34 C. 109=11 C.W.N. 201=5 C.L.J. 33; 13 C.L.J. 102, *R*. (b) 42 I.A. 30=42 C. 710=19 C.W.N. 65, *F*; 10 M.L.A. 16; 14 C.W.N. 547=37 C. 57; 14 C.W.N. 995; 14 C.W.N. 1049, *Diss*.

(4) S. 51—"Contract" in section, meaning of *S*—**S**—**LIMITATION ACT**, No. 155, 16 A.L.J. 264 (P.C.).

(5) S. 51. See No. 3, *supra*.

Act VI of 1876 (Chota Nagpur Encumbered Estates).

(1) Applicability of Act to immoveable property outside Chota Nagpur. See **RES JUDICATA**, No. 3, 6 A.L.J. 569 (P.C.).

(2) S. 3—Trespasser if included in term "holder of property" in section—"Debt and liability" in section if contract pecuniary or contractual liability.

A trespasser does not come within the bar under S. 3 and other connected sections of the Chota Nagpur Encumbered Estates Act as the words "holder of property" in S. 3 do not include a trespasser (*a*).

Obiter.—The words "debt and liability" as used in S. 3 and connected S. 5 of the Chota Nagpur Encumbered Estates Act, mean pecuniary debt and pecuniary liability (*b*). **Lal Mirtunjay Nath Sahi Deo v. Thakur Panch Kauri Nath Sahi Deo**, 3 Pat. L.J. 156=4 Pat. L.W. 116=43 Ind. Cas. 120.

MULLICK and ATKINSON, JJ.

References:—(a) 20 C. 609, *D*. (b) 33 C. 1065; 7 C.L.J. 575, *Disapp*.

Act VII of 1876 (Land Registration).

(1) Ss. 12, 41, 54 and 78—Mortgages of revenue-free property—Estate, meaning of—Non-registration—Suit for rent by the mortgagee.

The preamble of the Act read with Ss. 44 and 54, would seem to indicate that it is only in the case of an estate as defined therein, i. e., revenue paying property, that the mortgagee is required to register himself before he can sue for rent. The disqualification placed by S. 78 does not extend to the case of a usufructuary mortgagee of a revenue free property. **Pertap Mahton v. Bechankuer**, 42 Ind. Cas. 585.

MULLICK and JWALA PRASAD, JJ.

2.—Bengal Acts—(Continued).**Act VII of 1876 (Land Registration)—(Old.).**(2) S. 44. See No. 1, *supra*.(3) S. 52. See No. 1, *supra*.(4) S. 78. See No. 1, *supra*, and No. 5, *infra*.(5) Ss. 78, 81—*Rent, Suit for—'Malikana'—'Written contract.'*

Where a sum recoverable by the plaintiff was described in a *putni* lease as '*Malikana*', but the lease showed that it was in essence rent and was made expressly recoverable by the summary procedure prescribed in the *Putni Regulation* :

Held that S. 78 of the Land Registration Act was applicable to a suit for recovery of arrears.

The term '*written contract*,' mentioned in S. 81 of the Land Registration Act, refers to a contract between the person, who claims rent as proprietor and the person who is bound to pay rent to him under S. 78. S. 81 has no application to a case where the written contract was between the defendant, the person bound to pay rent, and the proprietor from whom the plaintiff claims to have derived title as usufructuary mortgagee. *Iswar v. Kall*, 27 C. L.J. 174 = 43 Ind. Cas. 724.

MOOKERJEE and BEACHCROFT, JJ.

References :—11 C.L.J. 477, F.; 8 C.L.J. 300, Dist.; 4 B.L.R. 29 (A.O.), R.

(6) S. 81. See No. 5, *supra*.**Act VIII of 1876 (Bengal Estates Partition).**

(1) Partition concluded after passing of Act of 1897—Allegation as to its being under Act of 1876—Opus in case of—Occupancy holding. Title to, Declaration of, Suit for, by tenant, maintainability of, under S. 119 of Act of 1897. See PARTITION, No. 2-a, 43 Ind. Cas. 359 = 3 Pat. L.W. 266.

(2) S. 112—Partition of estate under Assam Land and Revenue Regulation (I of 1886)—Revenue Authority, mode of partition, questions as to, to be raised before—Imperfect partition when can be obtained. See PARTITION, No. 2-b, 46 Ind. Cas. 967.

Act IX of 1879 (Bengal Court of Wards).

(1) Notice on ward—How to serve. See EXECUTION OF DECREE, No. 21, 45 Ind. Cas. 404.

(2) Ss. 5, 6 (e) and 35—Disqualified proprietor under Court of Wards, suit against—Manager of Court of Wards, if a necessary party. See DISQUALIFIED PROPRIETOR, No. 1, 46 Ind. Cas. 316.

(3) S. 6 (e). See No. 2, *supra*.(4) S. 35. See No. 2, *supra*.**Act IX of 1880 (Bengal Cess).**

(1) S. 20—*Incorrect description in Road Cess Return—Zerai—Kasht—Effect on rent suit.*

Where there was a dispute in regard to a land, whether it was *zerai* or *kasht*, the fact that the land was incorrectly described as *zerai* land

2.—Bengal Acts—(Continued).**Act IX of 1880 (Bengal Cess)—(Concluded).**

in the Road Cess Return, did not debar the landlord from recovering rent under S. 20, Bengal Cess Act. *Jogeshwar Singh v. Ramoo Singh*, 43 Ind. Cas. 497 = 2 Pat. L.W. 42 (N).

HARRINGTON and NEWBOULD, JJ.

(2) S. 20, Sch. A, part I, II of Forms prescribed under—Tenants holding, wrong entry as to, in part I, Sch. A, Suit for rent, if barred by. See RENT, SUIT FOR, No. 1, 43 Ind. Cas. 501 = 2 Pat. L.J. 653 = 2 Pat. L.W. 41.

(3) Ss. 54, 56—*Failure by plaintiff to publish notice—Whether plaintiff can recover cesses.*

In a suit to recover arrears of road cess in respect of certain rent free land, *held* that, under terms of S. 56, the notice required by S. 54 not having been published by the plaintiff, the defendants are not bound to pay cesses upon the basis of the re-valuation of 1907. *Baranathbhai Mukerjee v. Hari Krishna Shaha*, 44 Ind. Cas. 32.

RICHARDSON and BEACHCROFT, JJ.

(4) S. 56. See No. 2, *supra*.**Act III of 1884 (Bengal Municipal).**

(1) Ss. 6 (1), 204, 218—*Patil land adjoining house but not shown as being enjoyed as part of it if "house"—Obstruction in front of Patil land if punishable.*

In the absence of a definite finding that a piece of *patil* land or orchard adjoining the accused's house was held and enjoyed along with the house or as part of the premises, a heap of broken pottery stacked on the road and in front of the *patil* land or orchard could not be regarded as an obstruction placed against or in front of the accused's house, within S. 204 of the Bengal Municipal Act. *Bhuvan Chandra Dutta v. Chairman of Kote Chandpur Municipality*, 22 C.W.N. 376.

RICHARDSON and BEACHCROFT, JJ.

(2) S. 204. See No. 1, *supra*.(3) S. 218. See No. 1, *supra*.**Act VIII of 1885 (Bengal Tenancy).**

(1) Suit, maintainability of—Tenant, status of—Settlement Officer—Settlement of rents. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 2, 27 C.L.J. 210.

(1-a) S. 3. See No. 97-a, *infra*.(1-b) S. 4. See No. 97-a, *infra*.

(2) S. 5—*Tenant having more than 100 standard bighas—Presumption Pottah, its nature and construction.*

Under S. 5, Bengal Tenancy Act, there is a presumption that if a tenant has more than 100 standard bighas, he shall be presumed to be a tenure-holder.

Where there was a question whether the holders of certain land were occupancy raiyats or tenure-holders, the fact that the Collector caused a measurement, of the land to be made

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

and recorded the holders of the land as occupancy raiyats and also the settlement officer describes them as such in the record of rights :

Held that the holders of the land are occupancy raiyats.

The *Pottah* is the repository of the intentions of both the contracting parties and unless they were *ad idem*, obviously there could not have been any contract at all. **Kulwant Sahay v. Babu Ram Tewari**, 43 Ind. Cas. 941.

MULLICK and ATKINSON, JJ.

References:—23 C. 707 (P.C.); 5 O.L.J. 522, Dist.

(3) S. 5, sub-Ss. 1, 4, 5—*Land Tenure in Bengal—Tenure holder or raiyat—Area exceeding 100 standard bighas—Presumption that tenant is tenure holder—Purpose for which lease is granted—Cultivation by sub-lessee.*

Defendant was assignee of a lease of over 160 standard bighas of land granted by plaintiff's predecessor for cultivation, without any restriction as to the agency to be employed in such cultivation.

Held, that under the circumstances of the case the presumption arising under sub-S. 5 of S. 5 of the Bengal Tenancy Act, 1885, that the tenant was a tenure-holder and not a raiyat, since the area exceeded 100 standard bighas was not rebutted by referring under sub-S. (4) of the same section to the purpose for which the right of tenancy was originally acquired. **Debendra Nath Das v. Bibudhendra Man Singh Bhramarbar Roy**, 16 A.L.J. 522 = 22 C.W.N. 674 = 23 M.L.T. 384 = (1918) M.W.N. 379 = 20 Bom. L.R. 743 = 35 M.L.J. 214 = 45 C. 505 = 27 C.L.J. 543 = 5 Pat. L.W. 1 (C.).

LORD BUCKMASTER, MR. AMEER ALI, and SIR WALTER PHILLIMORE.

(4) S. 5, cl. (5)—*Applicability—Tenancy, if to be of 100 bighas at the date of suit—Presumption, if applicable to a tenancy existing before the coming into operation of the Act—Sub-division of tenancy—Incidents of divided tenure—Tenancy, real nature of, how determined—Occupancy raiyat holding at a rent not changed for 40 years, if raiyat at fixed rate. Jagabandhu v. Magnamoyi*, 24 C.L.J. 363 = 36 Ind. Cas. 584 = 44 C. 555 = 22 C.W.N. 69. See Final Part, 1916, Col. 74.

(5) Ss. 5, 104-II—*Suit under—Raiyat or tenure holder—Test—Intention of contracting parties—Presumption, where applicable—Tenancy, origin of, unknown—Court, what to determine.*

The mere fact that a tenant has sub-let his land, does not by itself establish conclusively that his status is that of a tenure-holder and not that of a raiyat. The test to be applied to determine the status of a tenant is the intention of the contracting parties.

In cases where the origin of the tenancy is unknown, the mode of user of the land may

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

furnish a valuable clue to determine the original purpose of the tenancy and where the terms of the grant are ambiguous, evidence of conduct subsequent of the parties may also be admissible (a).

The presumption laid down in S. 5, sub-S. (5) of the Bengal Tenancy Act is not applicable when the terms of the original grant are known.

It was recited in an *amalnama* granted on the 19th June, 1868, that the *mouzas* mentioned therein were settled with the grantees for bringing them under cultivation. It also specifically directed the grantees to extirpate wild beasts and by clearing out jungle and raising embankment at his own expense to carry on cultivation and tillage and enjoy the crops thereof. No rent was settled at the time but the *amalnama* recited that a *pottah* would be granted at the proper rent in the following year. On the 14th June, 1869, the grantor executed a *pottah* in favour of the grantees. This instrument recited that on the strength of the *amalnama*, the grantees had taken possession of land exceeding 2,000 bighas in area and that he had at his own expense commenced to reclaim jungles, to raise embankments and to cultivate the lands. The settlement was made for a term of 19 years for carrying on cultivation at a progressive rate of rent. The document further authorised the grantees to continue to enjoy the profits of the lands by bringing them under cultivation either by himself or by making settlements with tenants, and a covenant was inserted to the effect that if the grantees did not cultivate the lands fit for cultivation within the term of the lease, he would be liable to compensation for loss that might be sustained by the grantor.

Held, that the settlement was of a raiyati holding and not of a tenure and that the grantees was a raiyat.

In a suit under S. 104-II of the Bengal Tenancy Act, it is not sufficient for the Court to hold that the entry in the settlement rent roll as to the status or the rent is erroneous. The Court must determine affirmatively the exact conditions and incidents of the tenancy as also the rent to be settled on such basis. **Secretary of State for India v. Digambar Nanda**, 27 C.L.J. 334 = 15 C. 331 = 45 Ind. Cas. 43.

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 14 C.L.J. 33; 15 C.W.N. 396; 16 C.L.J. 322; 21 C.W.N. 452, 505; **Kreglinger v. New Patagonia Meat Co.**, (1914) A.C. 25 (40), R.

(5-a) S. 5. See No. 97-a, *infra*.

(6) S. 20—*Joint proprietary right, Lease of share in—Lease for cultivation, no specific plot mentioned in—Tenure holder—Occupancy right, acquisition of, by lessee—Part proprietor, whether can create ryoti right.*

Where in a lease executed in respect of a certain share in a *Zemindari*, no specific land is

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

mentioned in the lease which the lessee has to cultivate, the lease creates only a tenure.

A tenure-holder cannot acquire a right of occupancy in the lands comprised in his *ijara* or farm while holding the village as an *ijaradar* or a farmer.

In order to determine whether the right conferred by a lease is that of a tenure-holder under the Bengal Tenancy Act the intention of the parties has to be looked into. The principal object of giving the lease of an entire village or a share therein is to enable the lessee to collect rents from tenants. The fact that the lessee may bring under cultivation some lands in the village will not alter the character of the tenure created by the lease. There can be no lease for the purpose of cultivation in a village where no lands to be cultivated are specified in the lease.

A lessor, who is a part proprietor in an *ijmah* or joint village, has no right to create any right in respect of any specific lands in the village to the prejudice of the other co-proprietors without their consent.

A co-proprietor in a village cannot acquire any occupancy or non-occupancy right in the village. *E. G. Stonewall v. Babu Dwarka Singh*, 45 Ind. Cas. 706=27 C.L.J. 441.

MILLER, C. J. and JWALA PRASAD, J.

(6-a) Ss. 20, 31—Tenant, Power of, to contract himself out of the provisions of—Occupancy, Rights of, Tenant if can contract preventing himself the—Orissa Tenancy Act (Behar and Orissa II of 1913), Ss. 151, 232. See LANDLORD AND TENANT, No. 73 a, 2 Pat. L.J. 476.

(6-b) S. 21. See No. 6-a, *supra*.

(6-c) S. 22—Acquisition by occupancy tenant of part of proprietary interest, only in estate if creates merger. See HINDU LAW (REVERSIONERS), No. 6-a 3 Pat. L.J. 426.

(7) S. 22 (2) — Applicability of section only to a transferable occupancy holding.

Held that S. 22 (2) applies only to a case in which a transferable occupancy holding is the subject matter of the purchase. *Elpro Dass Paul Chowdhury v. Surendra Nath Basu*, 43 Ind. Cas. 467.

TEUNON and NEWBOULD, JJ.

References:—27 C. 473; 19 C.L.J. 400. R.; 42 C. 172, *Appr.*; 9 C.W.N. 249, *Dist.*

(8) Ss. 22 (2), 85 (1)—Landlord purchasing occupancy holding in execution sale and under private alienation, no difference.

A landlord who purchases an occupancy holding at a sale in execution of a decree for money is in no better position than the landlord who purchases under a private alienation.

The fractional landlord who obtains a transfer of an occupancy holding acquires from the *raiyat* some sort of tenancy or intermediate interest, but he cannot treat the under-*raiyat*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

as a trespasser. *Babu Ram Dheng v. Upendranath Koley*, 44 Ind. Cas. 922.

RICHARDSON and WALMSLEY, JJ.

References:—34 C. 104; 13 C.W.N. 913; 19 C.W.N. 1077; 33 C. 386, *Appr.*

(9) S. 29—Hajal or rent kept in abeyance—Device to evade law—Landlord not entitled to claim rent at the full nominal rate.

Where a *Kabuliyat* contained a clause that "if after the expiry of the term, I do not within a year deliver a fresh *dowl kabuliyat* for the whole amount inclusive of the sum kept in abeyance, I shall pay Rs. 37-1-0, being the full amount of actual rent inclusive of the sum kept in abeyance," held that such a clause was in the nature of a threat that rent at the full nominal rate would be levied, in case the tenants did not execute a *kabuliyat* within a year after the expiry of the term, and that such a clause was a device to evade the provisions of S. 29, Bengal Tenancy Act. The landlord was held not entitled to claim rent at the higher rate. *Prodyat Kumar Tagore v. Chundra Mohun Sii*, 44 Ind. Cas. 574.

RICHARDSON and BEACHCROFT, JJ.

Reference:—13 C.W.N. 735, *Dist.*

(10) S. 29—N) finding by lower Courts as to status of tenant—Section if can be applied in second appeal. See APPEAL (SECOND APPEAL), No. 5, 42 C.W.N. 156.

(11) S. 29—Applicability of. See ENHANCEMENT OF RENT, No. 1. 28 C.L.J. 142.

(12) S. 29—Enhancement of rent contrary to provisions of law—Effect. See REGISTRATION ACT, No. 3, 44 Ind. Cas. 638.

(12-a) Ss. 30, 50—Enhancement of rent at the instance of the landlord—Tenant if bound to produce rent receipts when pleading uniform payment for 20 years, when Zamindar's papers show that.

In a suit for enhancement of rent under S. 30 of the Bengal Tenancy Act all that has to be proved to entitle the tenant to the presumption under S. 50 is that he held at a rent or rate of rent which had not been changed during 20 years immediately preceding the institution of the suit, and ordinarily the tenant files his rent receipts which are the best evidence of non-variation; but when the Zamindar's own papers, for example, *chittas* produced by him, show that, the tenant need not file the rent receipts. *Madhusudan Mallik v. Jamiruddin Sheikh*, 22 C.W.N. 999=41 Ind. Cas. 767.

N. R. CHATTERJEE and SMITHER, JJ.

(13) Ss. 31-4, 50 (2), Chap. 10, Ss. 113, 115—Enhancement—Prevailing rate—Presumption of fifty of rent—Average of prices. *Harhar Persad Bajpal v. Ajur Misra*, 22 Ind. Cas. 604=45 C. 930. See Final Part, 1914, Col. 100.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(14) S. 37—Whether bars a suit for enhancement of rent—Invalid contract for enhancement of rent.

S. 37, Bengal Tenancy Act clearly contemplates a prohibition against enhancement of rent in respect of a contract validly made and binding between the parties; but, if an illegal or invalid contract and one not legally binding is made within the period of 15 years, such a contract does not come within the provisions of S. 37, Bengal Tenancy Act, so as to operate as a bar to the institution of a suit for enhancement of rent. **Budhan Mahton v. Wazi Hunsia**, 41 Ind. Cas. 293=4 Pat.L.W. 210.

CHAPMAN and ATKINSON, JJ.

(15) S. 40—Order for commutation of rent made under section—When such order can be questioned by Civil Court. See JURISDICTION (GENERAL), No. 1, 45 C. 769.

(16) S. 46—Non occupancy raiyat, ejectment of, on ground of refusal to agree to enhancement—Tender of an agreement—Agreement, meaning of, if means proposed agreement—Draft of the proposed agreement without stamp, service of, if sufficient—Notice, service of, with copy of the agreement, if required—Procedure.

The word "agreement" mentioned in the first sub-section of S. 46 of the Bengal Tenancy Act cannot be strictly construed, because an agreement cannot come into existence unless it has been assented to by both parties, and where it requires to be reduced to writing, until it has been executed. The statute means an agreement proposed by the landlord and the only requisite is that the document containing the terms of the proposed agreement be tendered.

Where a landlord sent a draft of the proposed agreement duly stamped to the Court and the Court served on the tenant a copy identical with the draft but without a stamp on it, and it was said that it was not the original of the agreement that was tendered to the tenant but only a copy and hence there was no valid tender:

Held—That there was a valid tender of the agreement as required under S. 46 of the Bengal Tenancy Act. If the defendant had executed the draft tendered to him, it would have been a sufficient compliance with the terms of the section:

Held, further—That there is nothing in S. 46 of the Bengal Tenancy Act that requires a notice to be served along with the copy of the agreement, though it may be convenient to do so. The statute does not make it obligatory. **The Port Canning and Land Improvement Co., Ltd. v. Noyan Paramanik**, 22 C.W.N. 555=45 Ind. Cas. 234=28 C.L.J. 87.

FLETCHER and SHAMSUL HUDA, JJ.

(16a) S. 48—"Holding at money rent," In—Reference to under raiyat not raiyat—Sub-tenant, if can criticise origin of tenancy where tenant recognised by landlord—Hindu joint

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

family, Sub-lease by manager of, Presumption as to—Tenancy not for specified period, lease from year to year. See LANDLORD AND TENANT, No. 28-a, 43 Ind. Cas. 965=3 Pat. L. J. 576=4 Pat. L.W. 109.

(17) S. 49—Ejectment of under raiyat holding, under harsana patta not for specified time—Notice necessary to terminate tenancy—S. 85, lease in contravention of—Grantor if may challenge validity—Estoppel.

In a suit for ejectment of the defendant, an under-raiyat holding under *harsana patta* not for any specified time, it appeared that the plaintiff (who was the raiyat) before the expiry of a year served a six months' notice to quit on the defendant and on non-compliance therewith brought the suit more than one year after the service of notice:

Held, that the tenancy was lawfully terminated and the plaintiff was entitled to recover possession of the land.

Per **Mockerjee, J.**—That for agricultural tenancies of this description, the provision for notice is to be found in S. 49 of the Bengal Tenancy Act which prescribes no form of notice and gives no indication as to its length, but only protects the under-raiyat from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord.

Per **Beachcroft, J.**—That if it be found as a fact that a raiyat giving a permanent sub-lease in contravention of the provision of S. 85 (2) has induced his lessee to accept it on the faith of a representation that his own status was such as to validate such a sub-lease, he will not afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be.

That it is absolutely necessary to plead estoppel if it is intended to rely on it. This is not a technical rule of pleading but a matter of substance, for if estoppel is pleaded it may be possible for the other side to show that there could be no estoppel, the real facts being known.

That the validity of a lease granted in contravention of S. 85 of the Bengal Tenancy Act can be questioned by the grantor.

Cases on the point reviewed. **Chandi Charan Nath v. Samla Bibi**, 22 C.W.N. 179=28 C.L. J. 91=44 Ind. Cas. 261.

MOOKERJEE and BEACHCROFT, JJ.

(18) S. 49—Under-raiyat, if can acquire occupancy right by custom or usage—Status of under-raiyat with right of occupancy, if he remains an under raiyat—Ejectment of such an under raiyat, if S. 49, Bengal Tenancy Act, applicable.

An under raiyat can acquire a right of occupancy by custom or usage, and on acquisition of such occupancy right continues to be an under-raiyat and is not liable to be ejected

2.—Bengal Act—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

under S. 49 of the Bengal Tenancy Act (a). *Gopal Mandal v. Japal Sankhari*, 22 C.W.N. 618=45 Ind. Cas. 545=28 C.L.J. 84.

FLETCHER and SHAMSUL HUDA, JJ.

Reference :—(a) 19 C.W.N. 245, R.

(19) S. 49—Notice to quit—Whether necessary to be signed by landlord.

There is no necessity that the notice to quit should be signed by the landlord at all. It is sufficient if the notice is at the instance of the landlord calling upon the under-*raiyyat* to quit the land. It is also quite immaterial whether the notice is actually given by the landlord himself or at his instance, provided that the notice signifies to the under-*raiyyat* that the landlord has called upon him to quit the land. *Mafedul Sha Fakir v. Maharuddin*, 44 Ind. Cas. 49.

OHITTY and SMITHER, JJ.

Reference :—6 C.W.N. 183, Appr.

(20) S. 49 (b)—Suit to eject under-*raiyyat*—Notice to quit signed by one co-sharer landlord—Validity. See NOTICE TO QUIT, No. 3; 23 C.W.N. 76.

(21) Ss. 49, 85—Permanent sub-lease by ryot—Inadmissibility in evidence—Ejectment—Custom—*Raiyyat* holding at a fixed rate of rent.

A permanent sub-lease granted by a ryot is inadmissible in evidence and the rights of the parties cannot be adjudicated on with reference to that document even though some money or some rent may have been paid under it by way of part performance. There may be a custom validating such a sub-lease but unless such custom be first proved, a document creating such sub-lease cannot be admitted in evidence.

A ryot holding at a fixed rate of rent might be able to create a permanent sub-lease. *Rashed Kazi v. Pachoo Sardar*, 42 Ind. Cas. 584.

FLETCHER and NEWBOULD, JJ.

References :—36 C.L.J. 144 ; 21 C.L.J. 478 ; 17 C.W.N. 468, F.

(22) Ss. 49 (b) and 85 (2)—Evidence Act (I of 1873), S. 91—Under *raiyyati* lease for more than nine years—Inadmissibility in evidence—Rights of under *raiyyat* in possession—Ejectment after notice to quit.

A sub-lease granted by a *raiyyat* for a term exceeding nine years (after the passing of the Bengal Tenancy Act) and erroneously registered in contravention of the provisions of S. 85 (2) is inadmissible under S. 91 of the Evidence Act to prove the tenancy.

Nevertheless, where an under-*raiyyat* is in possession as a sub-lessee, he can recover possession (on being dispossessed) or defend his possession on the strength of a subsisting tenancy which can be established from possession and other circumstances although he cannot produce his lease in writing by reason of the invalidity of the written lease. But if it is

2.—Bengal Act—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

found that a notice to quit under S. 49 (b) had been duly served upon the under-*raiyyat* in possession, he cannot rely on any subsisting tenancy. *Nazir Ali Shekdar v. Bang Badan Patwari*, 42 Ind. Cas. 671.

N.R. CHATTERJEE and RICHARDSON, JJ.

(22-a) S. 50. See No. 12-a, *supra*.

(23) S. 50 (1) (2) (3)—Presumption in favour of *raiyyat*, if rebutted by acquisition of non-transferable holding—Creation of new tenancy—Presumption if rebutted by new *kabuliyat* not varying rent but stating it to be variable. See LANDLORD AND TENANT, No. 12, 22 C.W.N. 904.

(24) S. 50 (2)—Tenants producing rent receipts showing payment by themselves of same rent for 20 years—Presumption that tenancy commenced from permanent settlement—Onus to show former tenant predecessor or not of present tenants, on whom. *Gopal Chandra Banerjee v. Mahomed Soleman Mullick*, 22 C.W.N. 126=43 Ind. Cas. 856. See Final Part, 1917, Col. 58.

(25) S. 50 (2)—Amalgamation of several tenures and stipulation by tenant to pay enhanced rents—New tenancy.

Where four originally separate tenures were in 1853 amalgamated and by a *kabuliyat* of that year the tenant expressly stipulated to pay enhanced rent:

Held, that the presumption under S. 50 (2) of the Bengal Tenancy Act arising from proof of payment of rent at the same rate for 20 years before the suit was rebutted. *Upendra Nath Ghosh v. Gopi Charan Saha*, 22 C.W.N. 921=44 Ind. Cas. 595.

N. R. CHATTERJEE and NEWBOULD, JJ.

Reference :—18 C.W.N. 949, D.

(26) S. 50 (2)—*Kabuliyat* of 1840 agreeing to pay enhanced rent at *parganah* rate—Presumption, rebuttal of.

A *kabuliyat* of 1840 by which the tenant expressly stipulated to pay enhanced rate according to the *parganah* rate rebutted the presumption arising from payment of the same rate of rent during 20 years before the suit. *Upendra Nath Ghosh v. Dwarka Nath Biswas*, 22 C.W.N. 323=44 Ind. Cas. 593.

N. R. CHATTERJEE and NEWBOULD, JJ.

(26-a) S. 50 (2)—Presumption, rebuttal of, by statement in rent receipts that holding is *sarazari*.

The mere statement in some rent receipts that a holding is *sarazari* is not sufficient to rebut the presumption arising under S. 50 (2) of the Bengal Tenancy Act from the fact that the rent has been unchanged for more than 50 years. *Satish Chandra Mustafa v. Abdul Majid Mahamad*, 47 Ind. Cas. 780.

FLETCHER and PANTON, JJ.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(27) S. 50 (2)—Rent, Fixity of, Presumption as to, under—Tenure, Sub-Division or amalgamation of, presumption if destroyed by—Fresh *Kabuliyat*, Execution of, in respect of old tenancy, if rebuts such presumption. See LANDLORD AND TENANT, No. 52, 46 Ind. Cas. 488.

(28) Ss. 50, cl. (2), 106—Suit instituted before Settlement Officer—Transfer to Civil Court—Appeal, if lies to the Special Judge—Fixity of rent, presumption of—Non-payment of rent for some years, if deprives tenant of the benefit of the presumption.

Where a suit, instituted before a Settlement Officer under S. 106 of the Bengal Tenancy Act, was transferred under the first proviso of that section to a competent Civil Court being the Court of the Munsif.

Held that, although the suit was originally instituted before the Settlement Officer, an appeal would not lie to the Special Judge against the decision of the Munsif, but the competency of the Civil Court would be ascertained under the Civ. Pro. Code, and the attributes of the competency of that Civil Court would follow from the transfer, and as such the Subordinate Judge had the jurisdiction to hear the appeal against the decision of the Munsif.

A tenant can claim the benefit of the presumption arising under S. 50, cl. (2) of the Bengal Tenancy Act, although there was no payment of rent for some of the twenty years immediately before the institution of the suit (a). *Kahlrod Gobinda Choudhury v. Gour Gopal Dass*, 27 C.L.J. 281.

FLETCHER and RICHARDSON, JJ.

Reference:—(a) 11 W.R. 482, F.

(29) S. 50 (2). See No. 13, *supra*.

(29-a) S. 52—Landlord not entitled to claim additional rent for excess and when it lies within the specified boundaries.

A landlord is not entitled to additional rent on account of excess area merely because the area within the boundaries specified in the *potah* is proved to be more than the estimated area given therein, but, if any part of the excess land lies without the specified boundaries, the landlord is at liberty to claim additional rent therefor. *Manjanall Debi v. Kallash Nath Mitra*, 44 Ind. Cas. 24.

RICHARDSON and BEACHCROFT, JJ.

(30) S. 52—Applicability of section to temporary tenure—Tenure holder at liberty to contract out of the Act—Diluvion—Reduction of rent.

In the case of the holder of a temporary tenure, S. 52, Bengal Tenancy Act must be read subject to the terms of the contract between him and his landlord.

The general principle is that an individual may renounce an advantage conferred upon him by a legislative enactment; that is, he

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

may contract himself out of the Act. A tenureholder is at liberty to contract himself out of his right to apply for a reduction of his rent on the ground of diluvion. The Secretary of State for India in Council v. *Kamal Krishna Pal*, 44 Ind. Cas. 222.

RICHARDSON and BEACHCROFT, JJ.

(31) S. 52—Landlord and tenant—Construction of lease—Agreement not to vary rent until actual measurement—Applicability of S. 52 of the Act. See LANDLORD AND TENANT, No. 18, 40 Ind. Cas. 494.

(32) Ss. 52 and 195—*Patnidar*, a tenant—*Patnidar* entitled to apply for abatement of rent.

A *Patnidar* is a tenant and so *prima facie* is entitled to make an application for abatement of rent under S. 52 of the Bengal Tenancy Act. S. 195 of the Act does not prevent a *Patnidar* from so applying under S. 52 of the Act. *Maharaja Ranjit Singh v. Abdur Rahim Khan Choudhury*, 45 Ind. Cas. 190.

FLETCHER and SHAMSUL HUDA, JJ.

(32-a) Ss. 60, 72—Rent, Suit for, by mortgagee of *ijara*—Purchaser at Revenue sale of the proprietary right, Payment to, Plea of, Admissibility of, under S. 60—S. 72, Applicability of. See LANDLORD AND TENANT, No. 25-a, 43 Ind. Cas. 182=3 Pat. L.W. 245.

(33) S. 61—Deposit in Court of rent by tenants when valid. See APPORTIONMENT OF RENT, 27 C.L.J. 438.

(33-1) S. 66—Suit for more than one year's rent disentitles person to the remedy under the section—Decree granting *khas* possession of land on default of payment of four years' rent, validity of.

If a landlord in a suit under S. 66 of the Bengal Tenancy Act asks for more than one year's rent, he disentitles himself to the remedy granted by that section.

A decree under S. 66 of the Bengal Tenancy Act directing that the plaintiff landlord should be entitled to recover *khas* possession of the land if four years' rent in arrears claimed and decreed in the suit is not paid, is bad. *Mukta Keshi Debi v. Gird Bala Debi*, 47 Ind. Cas. 1006.

WALMSLEY and PANTON, JJ.

References:—2 O.L.J. 540; 5 C.W.N. 10; 2 Bom. L.R. 927; 27 I.A. 216; 25 B. 387; 10 M.L.J. 368; 7 Sar. P.O.J. 789 (P.O.); 27 Ind. Cas. 61; 42 O. 172; 18 C.W.N. 971; 20 O.L.J. 52 (F.B.); 20 Ind. Cas. 698; 18 C.L.J. 262; 19 C.W.N. 246; 14 O. 33; 7 Ind. Dec. (N. S.) 28; 6 C.L.J. 102, R.

(33-a) S. 66, cl. (2)—Non-occupancy *raiyat*, ejectment of—Decretal amount, payment of—Payment, by whom to be made—Payment by an under-*raiyat*, if can be accepted.

S. 66, cl. (2) of the Bengal Tenancy Act contemplates that the payment made, to be a

1.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

good payment, must be a payment by or on behalf of the judgment-debtor. The Court cannot, therefore, accept the tender of the amount by an under-riyat in order to prevent the execution of the decree for the ejectment of the non-occupancy riyat. *Brojendra Nath Mitra v. Arman Shetkh*, 27 C.L.J. 478—44 Ind. Cas. 977.

TEUNON and NEWBOULD, JJ.

(34) S. 66 (3)—*Extension of time after expiry of statutory period—Whether valid.*

Under the present Bengal Tenancy Act, by virtue of sub-S. (3) of S. 66, the Court is expressly authorised and empowered to enlarge the time. Where the Judge was satisfied that there was sufficient reason for the extension of time, his extending the time, even after the expiry of the statutory period, is not improper. *Sarada Charan Basar v. Juro Ram Mandal*, 44 Ind. Cas. 473.

TEUNON and NEWBOULD, JJ.

References:—22 W.R. 460, *Dist.*; 18 W.R. 412, *Appr.*

(34-a) S. 67—*Interest on arrears of rent—From what date to be calculated.*

S. 67, Bengal Tenancy Act, provides for interest on arrears of rent and the section does not provide that arrears of rent shall bear interest from the date on which the rent becomes due, but from the expiration of the quarter of the agricultural year in which the installment falls due. *Brish Chandra Ray v. Jadunath Kundu*, 45 Ind. Cas. 592.

FLETCHER and SHAMSUL HUDA, JJ.

(34-b) S. 72. See No. 32-a, *supra*.

(36) Ss. 76, 155—*Scope of—Improvements, Erection of, by tenants, on holding—Dwelling-houses.* *Mahadeo Rai v. Sheogulam Mahto*, 2 Pat. L.J. 634—45 Ind. Cas. 332. See Final Part, 1917, Col. 63.

(36) S. 85—*Lease exceeding nine years—Under-riyat, right of, to sue for recovery of possession on declaration of title—Possession.* *Gour Mandal v. Balaram Manji*, 22 C.W.N. 61—43 Ind. Cas. 864. See Final Part, 1917, Col. 63.

(37) S. 85. See No. 21, *supra*.

(38) S. 85 (1). See No. 8, *supra*.

(39) S. 85 (2). See No. 22, *supra*.

(39-a) S. 85 (2)—*Under riyati lease—Permanent—Validity of, under.* See LANDLORD AND TENANT, No. 52-g, 47 Ind. Cas. 416.

(39-b) S. 87—*Holding, Abandonment of—Re-entry, Right of, of landlord on, without recourse to provisions of.* See LANDLORD AND TENANT, No. 52-a, 47 Ind. Cas. 147.

(40) S. 88—*Consent in writing, what is—Rent roll, meaning of—Jama Wasil Baki, whether rent roll.* *Rajan Sundari Das v. Hara Sundari Das*, 41 Ind. Cas. 501—22 C.W. N. 693. See Final Part, 1917, Col. 64.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(41) S. 88—*Scope—Receipt of part of rent—Whether and when constitutes division of holding—Receipts given by gomasta—Presumption—Distribution of rent—Inferent of general law.*

A mere acknowledgment of receipt of rent less than the total *Jama*, without any indication that it is in respect of a portion only of the holding cannot constitute a consent to a division of the holding even when continued over a number of years; but if it should clearly appear on the face of the receipt itself that the rent is paid in respect of a particular portion only of the holding, this may be a sufficient acknowledgment to bind the landlord.

In regard to receipts given by *gomastas* the onus of showing that the *gomasta* had no authority to recognize a distribution of rent or division of tenancies lies upon the landlord inasmuch as the relations between landlord and his servant are a matter peculiarly within his knowledge under S. 106 of the Indian Evidence Act.

S. 88 of the Bengal Tenancy Act refers to a sole landlord or the entire body of joint landlords where there are more landlords than one. A division which would not bind the whole body of landlords does not come within the scope of this section.

There is no express provision in the Bengal Tenancy Act which requires a landlord to recognize a distribution of rent. A landlord is certainly authorized to recognize a distribution, but that authority is derived not from the act but under the general law as an incident to the ownership of property. *Srikishun Prasad Panjlar v. Jeohal Kuar*, 45 Ind. Cas. 294.

MILLER, C.J. and MULLICK, J.

References:—25 C. 531; 18 C.L.J. 174; 15 C.W.N. 953; 25 C. 917 n.o.; 40 C. 29; *Maddison v. Alderson*, (1883) 8 A.C. 467; 42 C. 801, *Appr.*; 31 C. 1026, R.; 36 Ind. Cas. 777, *Dist.*

(41-a) S. 88—*Ejectment, suit for, by landlord—Occupancy holding, Purchasers of, failure to attorn—Suit by agent of lady—Agent, Authority of, to file suit—Burden of proof as to.* See EJECTMENT, No. 4-b, 47 Ind. Cas. 576.

(41-b) S. 98—*District Judge, Power of, under—Remuneration of common manager re—Suit brought for arrears of pay on basis of such order—Limitation, Question of, if arises in.* See JURISDICTION (OF CIVIL COURTS), No. 5, 46 Ind. Cas. 686.

(42) Ss. 102 (dd), 106—*Record-of-Rights, Amendment of, Suit for—Dispute between neighbouring proprietors—Question for determination in.*

Where a suit is instituted under the provisions of S. 106 of the Bengal Tenancy Act, to amend a Record-of-Rights, the dispute being between two neighbouring proprietors and falling within the provisions of S. 102 (dd), the only question between them that a Court can go into is the question as to which of the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

two rival proprietors was in possession of the land in question at the date of the final publication of the Record-of-Rights. *Maharaj Bahadur Singh v. Bhagwan Das*, 45 Ind. Cas. 781.

FLETCHER and SHAMSUL HUDA, JJ.

(43) S. 103-B, sub-S. 3—Entry under, proof of. See *LEASE*, No. 6, 27 C.L.J. 107.

(44) Ss. 103-B, 161 and 167—*Rent free or lakkiraj lands within patni when incumbrance—Onus of proof—Annulment of incumbrance, Conditions for.*

Under S. 103-B of this Act, an entry in the Record-of-Rights that certain lands within a *patni*, sold for arrears of rent, were rent free is to be presumed to be correct and the onus is on the auction-purchaser seeking to recover such lands to prove by evidence that it is incorrect. Hence, the interest of the person in possession of such lands is not an incumbrance, unless the auction-purchaser seeking to avoid it proves that the proprietor of the estate was in possession of those lands at the date of the creation of the *patni* and that the said incumbrance (the adverse possession) came into existence after the date of the *patni*. Further, even assuming that the two conditions are satisfied, the auction-purchaser cannot succeed unless the incumbrance has been annulled within one year from the date of the sale or the date on which he first had notice of the incumbrance as required by S. 107 of the Act. *Bipradas Pal Chowdhury v. Kedarnath Roy*, 47 Ind. Cas. 765.

CHATTERJEE and GREAVES, JJ.

References:—45 C. 574=47 Ind. Cas. 49=22 C.W.N. 396; 19 C.W.N. 18=26 Ind. Cas. 486, R.

(45) Ss. 104-A, 105 F—Rent settled under, correctness of, if can be questioned—S. 104-J—“Shall be deemed to have been correctly settled,” meaning of. See *LANDLORD AND TENANT*, No. 50, 46 Ind. Cas. 287.

(46) Ss. 104 F to 104-H, 111-A—*Limitation for suits falling within S. 104 H and for those outside it but within proviso to S. 111-A—Limitation Act, 1908, Art. 120.*

S. 104-H of the Bengal Tenancy Act only refers to suits by a person aggrieved by an entry of a rent settled in a Settlement Rent Roll prepared under Ss. 104 F to 104-H or by an omission to settle such a rent, and to such suits as fall within its scope the special limitation provided in that section applies.

To claims for other reliefs falling outside the scope of S. 104-H, the right to maintain a suit for which under certain conditions is expressly saved by the proviso to S. 111-A of the Bengal Tenancy Act, the limitation applicable is that provided by Art. 120 of the Limitation Act. *Rajani Kanta Mookerjee v. Secretary of State for India*, 45 C. 645=47 Ind. Cas. 820.

WOODROFFE and SHAMSUL HUDA, JJ.

Reference:—25 C.W.N. 896, *Rel. on.*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(47) S. 104-H—Suit against Secretary of State—When barred. See *LIMITATION ACT* (1908), No. 69, 28 C.L.J. 537.

(48) S. 104-H—Right of plaintiff to deduct period of notice to Secretary of State in computing the prescribed six months. See *LIMITATION ACT* (1908), No. 104, 22 C.W.N. 802.

(49) S. 104-H—Period of limitation for a suit under—Right of plaintiff to exclude time of currency of notice under S. 80, Civ. Pro. Code. See *LIMITATION ACT* (1908), No. 62, 22 C.W. N. 817.

(50) S. 104-H—Suits instituted under—Applicability of S. 15 (2) of the Limitation Act. See *LIMITATION ACT* (1908), No. 60, 45 Ind. Cas. 228.

(51) Ss. 104-H, 184, 185—Suit under S. 104-H instituted more than six months after period prescribed by sub-S. 2 of S. 104-H—Period of notice under S. 80, Civ. Pro. Code, previously given if also to be excluded. See *LIMITATION ACT* (1908), No. 61, 45 C. 934.

(52) S. 104-H. See No. 5, *supra*.

(53-a) S. 104-H, Suit under—Secretary of State, Against—Civ. Pro. Code (1908), S. 80, Notice under—Two months during which notice current, if to be excluded in the calculation of limitation. See *LIMITATION*, No. 9, 46 Ind. Cas. 899.

(53) S. 105—Suit, maintainability of—Suit, withdrawal of, effect of—Rent, non-payment of. See *LANDLORD AND TENANT*, No. 5, 28 C. L.J. 254.

(54) S. 105—Tenure, Auction sale of—Enhancement of rent, proceedings for, while pending—Purchaser at sale, Liability of, to pay enhanced rate—Sale if can be set aside. See *RENT*, No. 4, 46 Ind. Cas. 136.

(55) Ss. 105-A 107 and 109—Decision of Revenue Court in proceeding under S. 105-A finding absence of relationship of landlord and tenant—Suit on basis of such decision for ejectment of defendants—Decision of Revenue Court under S. 105-A if bars' defendants from litigating same question—“Shall be final” in S. 107, effect of words on decisions of Revenue Court. See *RES JUDICATA*, No. 34, 3 Pat. L.J. 379.

(56) Ss. 105, 109-A—*Appeal against decision of Settlement Officer—Period of limitation from what date.*

In the matter of appeals to the Court of District Judge or Special Judge, the period of limitation runs from the date of the decision of the Settlement Officer and the date of the decision is the date on which the schedule settling the rents is signed by the Settlement Officer. *Dharanikanta Lahari Chaudhuri v. Amir Sheikh*, 44 Ind. Cas. 152.

TEUNON and NEWBOULD, JJ.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(57) S. 105-F. See No. 45, *supra*.

(58) S. 106—Suit under section transferred to Civil Court—Plaint inartificially drawn up—Court-fees payable. See DECLARATORY SUIT, No. 2, 28 O.L.J. 301.

(58-a) S. 106, Proceedings under, for correction of entry in Record of Rights—Plaintiff and defendant entered joint landlords—Partition—Possession of plaintiff if possession on behalf of defendant also—Onus of proof. See RECORD-OF-RIGHTS, No. 3, 47 Ind. Cas. 5.

(59) Ss. 106, 109—Dismissal for default—Whether bars a subsequent suit—Appellate Court—Adequate judgment.

Where the proceedings under S. 106, Bengal Tenancy Act, was dismissed for default, such a dismissal cannot operate as a bar under S. 109, to a subsequent suit.

Where a Court of appeal reverses the decision of the primary Court, the law imposes upon the Court of appeal an imperative duty and obligation of giving an adequate and satisfactory judgment such as is required by law. *Bibi Saleha v. Antu Ram*, 43 Ind. Cas. 973.

ATKINSON, J.

References :—18 C.W.N. 604; 38 Ind. Cas. 814, R.; 38 Ind. Cas. 509; 26 C. 927, *Appr.*

(60) S. 106. See Nos. 28 and 42, *supra*, and No. 63, *infra*.

(61) S. 107. See No. 55, *supra*.

(62) S. 109. See Nos. 55 and 59, *supra*.

(63) Ss. 109-A, 106—Dismissal of suit under S. 106—Dismissal of appeal under S. 109-A (9) therefrom—Appeal if lies from order of refusal to rehear appeal. See APPEAL (GENERAL), No. 1, 45 C. 638.

(64) S. 109-A. See No. 56, *supra*.

(65) S. 111-A. See No. 46, *supra*.

(66) S. 113. See No. 13, *supra*.

(67) S. 115. See No. 13, *supra*.

(68) Ss. 116 and 181—"Khudkhasi" and "khudkhasi jagir" lands, meaning of.

The word "khudkhasi" does not necessarily mean "Teraiti" or private land within the meaning of S. 116 of the Act.

The words "khudkhasi jagir land" does not necessarily mean service tenure land within the meaning of S. 181 of the Act. *Deonath Misra v. Amar Singh*, 45 Ind. Cas. 418.

JWALA PRASAD, J.

Reference :—13 C.W.N. 661, R.

(68-a) S. 116. See No. 97-a, *infra*.

(69) S. 147-A, cl. 2—Compromise—Court, Power of, to record, even after repudiation by one of the parties. See COMPROMISE, No. 5, 46 Ind. Cas. 229.

(70) S. 148-A—Right of suit of co-sharer landlords—Plaint under S. 148-A of Act,

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Nature of—Decree, Nature of. See CO-SHARERS, No. 1, 27 O.L.J. 101.

(71) S. 148-A. See No. 80, *infra*.

(71-a) S. 149—"Pleads" in section if refers only to valid or legal pleas—Res judicata—Registered *Kabuliyat*, Oral evidence as to non-acceptance of, by owner of land, if admissible.

The word "pleads" in S. 149 of the Bengal Tenancy Act includes all pleas alike, whether good, bad or indifferent. On the third party's failure, after service of notice of the tenant's deposit, to bring his suit within the time fixed, the plaintiff in the first suit acquires the right to the deposit. The third party's suit, duly instituted under cl. 3 of S. 149, will not become barred as *res judicata*, merely because the plaintiff in the first suit manages, by reason of the Court's delay, to get a decree in a rent suit against the tenant.

There is nothing in the Evidence or Registration Act to preclude a landlord from giving oral evidence to show that he did not accept the terms of a *kabuliyat* or authorise its execution, even though it might have been registered. *Hemanta Kumar Kar v. Birendra Nath Roy Choudhury*, 47 Ind. Cas. 1003.

FLETCHER and SHAMSUL HUDA, JJ.

(72) S. 153—Decision as to question of title necessary to allow an appeal.

Under S. 153, Bengal Tenancy Act, it is not sufficient merely that there should be a controversy on the question of title but the section requires that some question of title should be decided to allow an appeal under the provisions of the section. *Jillor Rahman v. Ebrahim Khan*, 44 Ind. Cas. 558.

RICHARDSON and BEACHCROFT, JJ.

Reference :—24 C.L.J. 235, *Appr.*

(72-a) S. 153—Rent suit—Relationship of landlord and tenant, question at issue—Second appeal if lies. See APPEAL (SECOND APPEAL), No. 10-d, 47 Ind. Cas. 105.

(73) S. 153—Nagdi rent—Second appeal, whether lies. See TRANSFER OF PROPERTY ACT, No. 39, 43 Ind. Cas. 777.

(73-a) S. 153 (b)—Dismissal of rent suit for non-existence of relationship of landlord and tenant—Appeal if lies from dismissal order.

From the order of a Munsif dismissing a rent suit, in which he found that the relationship of landlord and tenant did not exist between the parties in respect of the jama for which rent was claimed in the suit, no appeal lay to the District Judge the decision on such a point not being sufficient to make the proviso to S. 153 applicable. *Mukundlal Roy v. Bhabsundarl Debye Chowdhurani*, 47 Ind. Cas. 922=5 O.L.J. 508.

NEWBOULD and PANTON, JJ.

Reference :—35 C. 547, F.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

- (74) S. 155—
- Notice—Whether sufficient for the suit to proceed with.*

Where in a suit under S. 155, the plaintiff in giving his notice proceeded on the view that the misuse complained of was in fact capable of remedy, held that such a notice was sufficient for the case to proceed with. *Bepin Behary Chakrabutty v. Sib Charan Chakrabarty*, 48 Ind. Cas. 801.

TEUNON and NEWBOULD, JJ.

- (75) S. 155. See No. 35,
- supra*
- .

- (76) S. 158-B (2)—
- Sale without notice—Validity of sale.*

Held that the provision of the section is mandatory and not merely directory. *Sarib Hochan v. Tilattama Dehl*, 49 Ind. Cas. 8.

FLETCHER and NEWBOULD, JJ.

(77) Ss. 159, 167, 179—*Purchaser of darpatu, tenure at sale for arrears of rent if can avoid encumbrances created by darpatnidar—Darpatni tenure granted on condition that on sale for arrears such encumbrances should determine.* See LESSOR AND LESSEE, No. 1, 45 C. 940.

- (78) Ss. 161, 163 (2) (b), 167—
- Mortgage of share of holding, if incumbrance to be annulled.*

A mortgage of a portion of a non-transferable occupancy holding is an incumbrance within S. 161 of the Bengal Tenancy Act, and a purchaser of the holding at a rent-sale under S. 163 (2) (b) of the Act takes the property subject to the mortgage, unless it is annulled by him in the only mode provided by law, viz., under S. 167 of the Act.

In a suit by the mortgagee to enforce his bond against the tenants of the holding and the purchaser at the rent-sale, the landlord is not a necessary party. *Pran Krishna Pal v. Atul Krishna Mukerjee*, 21 C.W.N. 862=46 Ind. Cas. 176.

WALMSLEY and GREAVES, JJ.

References:—42 C. 172; 16 C.L.J. 156; 24 C. 746; 21 C.L.J. 265; 22 C. 264, F.

- (78-a) Ss. 161 and 167—
- Interest of mortgagee-purchaser of part of holding if incumbrance as against his auction-purchaser in rent decree—Ejectment.*

A mortgagee-purchaser, who has a mortgage of part of a holding and who has purchased it in execution of his mortgage decree, has got, under S. 161 of the Act, an incumbrance on the property and cannot be ejected until his incumbrance is annulled under S. 167 of the Act by the purchaser in execution of a rent decree, as against those purchase the mortgage-purchaser is entitled to fall back on his mortgage as a shield. *Indra Narain Ray v. Mahin Chandra Banerjee*, 47 Ind. Cas. 847.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—38 C. 923=18 Ind. Cas. 785, F.

- (79) S. 163. See No. 78,
- supra*
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2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

- (80) Ss. 166, 167, 148 (a)—
- Sale of holding held at fixed rates in execution of rent decree—Reversioner or donee of judgment-debtor if can make deposit of decretal amount and stay sale.*

Neither the reversioner nor the donee of a judgment-debtor, in a decree made under S. 148 (a) in respect of a holding at fixed rates, has an interest voidable on the sale, so as to entitle him to deposit the decretal amount and have the sale set aside. *Gopal Rai v. Hitarayan Singh*, 3 Pat. L.J. 145=4 Pat. L.W. 84=49 Ind. Cas. 23.

ROE and IMAM, JJ.

Reference:—1 Pat. L.W. 504=2 Pat. L.J. 457, F.

(81) S. 167—*Ejectment—Purchaser seeking to annul the sub-tenancy—Sale of superior tenancy for arrears of rent—Adverse possession against sub tenant—Incumbrance—Notice.* *Bushan Chandra Ghose v. Srikanta Banerjee*, 23 C.L.J. 485=21 C.W.N. 155=33 Ind. Cas. 957=45 C. 756. See Final Part, 1916, Col. 98.

(82) S. 167—*"Date of sale," meaning of.* *Nanda Lal Banerjee v. Umes Chandra Das*, 26 C.L.J. 328=22 C.W.N. 86=40 Ind. Cas. 996=45 C. 151. See Final Part, 1917, Col. 72.

(83) S. 167—*Sale of an under-tenure, under—Effect of the sale, in case the landlord ceased to be the 'sole landlord' at the date of sale—If the sale passes the under-tenure to the purchaser free of incumbrances—Effect of the cessation, partial or entire, of the interest of the landlord on his right to enforce realisation of arrears of rent by sale of the tenancy—Propriety of applying isolated dicta from judicial precedents to cases where the facts are different in essential particulars.* *Syedunnessa Khatun v. Amiruddi*, 21 C.W.N. 847=25 C.L.J. 629=45 C. 294. See Final Part, 1917, Col. 74.

- (84) S. 167—
- Annulment of incumbrances—Procedure to be strictly followed—Service of notice—Entry in order-sheet, if sufficient proof of—Single suit for rent of entire taluk after same was split up—Consequential sale, if rent sale.*

The destruction of valuable incumbrances is a very severe measure, which the law allows, only if a certain procedure is strictly followed, and when a party wishes to enforce that severe measure, he must show that he has strictly followed the procedure laid down.

An entry in the order-sheet that notice has been served is not sufficient proof of service of notice (a).

Where it appeared that what was formerly one taluk was split up into several different taluks, a sale of the entire taluk in execution of a decree, obtained in a single suit for rent, due upon the entire taluk, was not a sale for arrears of rent within the meaning of Bengal

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).
Tenancy Act. *Prafulla Nath Tagore v. Shital Khan*, 22 C.W.N. 788=47 Ind. Cas. 97.

CHITTY and SMITHEE, JJ.

References :—(a) 7 C.L.J. 262, R.

(85) S. 167. See Nos. 78 and 80, *supra*.

(85-a) S. 167—Notice under, not given—Rent-decree, Purchaser in execution of, if can oust purchaser in execution of mortgage decrees even when. See AUCTION-PURCHASER, No. 4-a, 46 Ind. Cas. 921.

(86) S. 169 (1), cl. (c)—Decree for rent, sale in execution of—Sale proceeds, disposal of—Arrears of rent, since the institution of the suit—Interest on such arrears, if can be paid out of the surplus sale proceeds. *Prafulla Nath Tagore v. Matabaddin Mandal*, 26 O.L.J. 322=23 C.W.N. 323. See Final Part, 1917, Col. 73.

(86-a) S. 173—Execution sale, Order setting aside, under—Appeal if lies from—Purchaser, benamidar of judgment-debtor—Civ. Pro. Code (1908), S. 47, No right of appeal to benamidar under. See APPEAL (GENERAL), No. 23-c, 46 Ind. Cas. 748.

(87) S. 174—Sale in execution of rent-decree set aside—Declaratory suit, whether maintainable—Civ. Pro. Code (1908), O. XXI, r. 92 (3).

Where a sale in execution of a decree for arrears of rent was set aside under S. 174 of the Bengal Tenancy Act, there is no provision in the Act prohibiting the purchaser to bring a declaratory suit that defendant had no right to deposit the money, similar to O. XXI, r. 92 (3), Civ. Pro. Code, 1908. *Golab Chand Ray v. Feda Hussain*, 44 Ind. Cas. 532=2 Pat. L.J. 322=3 Pat. L.W. 264.

CHAMIER, C.J. and ROE, J.

References :—18 C. 431, *Dist.*; 19 C. 683; 3 A. 554; 19 B. 216; 20 A. 379, R.

(87-a) S. 174—Amount to be deposited under, to set aside a rent sale not same as amount to be deposited to set aside execution sale under Civ. Pro. Code (1908), O. XXI, r. 89. See RENT SALE, 47 Ind. Cas. 654.

(88) S. 178, proviso 3—Garden—Orchard—Horticultural holding—Transfer of Property Act.

The provisions of the Bengal Tenancy Act do not apply to the case of a lease of a piece of land containing fruit trees, of which the lessee enjoys the fruits and on which may be planted fresh and additional trees. It is not a garden in any sense of the words, but is let out as an orchard and the lease is governed by the provisions of the Transfer of Property Act. *Raj Kumar Nahi v. Nagesh Chandra Guha*, 42 Ind. Cas. 580.

FLETCHER and NEWBOULD, JJ.

(89) S. 179. See No. 77, *supra*.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(90) S. 180 and Chap. VI—Tenant of chur land—Non-occupancy holding—Utbandi tenure—Lease for terms of years.

In the case of a lease for a term of years in writing of chur land, the rent being payable at Rs. 2 per bigha in respect of such of the land as for the time being is capable of cultivation the rights of the parties are governed under the provisions of S. 180 of the Bengal Tenancy Act. The lessee does not come under the category of a raiyat holding under the custom of *utbandi* but is clearly a non-occupancy raiyat to whom the provisions of Chap. VI do apply. *Mitu Sheikh v. Amrita Lal Sen*, 42 Ind. Cas. 546.

FLETCHER and NEWBOULD, JJ.

(91) S. 181—Occupancy right acquired by Ghatwali tenant if affected by section. See OCCUPANCY TENURE, No. 5, 22 C.W.N. 763.

(92) S. 181. See No. 68, *supra*.

(92-a) S. 182—Occupation for more than twelve years of homestead land if confers occupancy rights.

Having a homestead in a village for more than 30 years will not enable the occupier to acquire occupancy rights in land on which he entered under a *kabuliyat*. Before he could become a settled raiyat in a village, he would have to prove that he was a raiyat. *Kamal Baldya v. Ganesh Chandra Biswas*, 47 Ind. Cas. 829.

CHITTY and WALMSLEY, JJ.

(93) S. 182—Homestead of raiyat, whether or not part of agricultural holding—Applicability of Act to. See HOMESTEAD, 46 Ind. Cas. 489.

(94) S. 184. See No. 51, *supra*.

(95) S. 185. See No. 51, *supra*.

(96) Ss. 188, 103-B—Land entered in record-of-rights as liable to assessment—Suit to assess rent by co-sharer landlord—Limitation. See LIMITATION ACT (1908), No. 170, 22 C.W.N. 685.

(97) S. 195. See No. 32, *supra*.

(97-a) Sch. III, Art. 1 (a), Ss. 9, 4, 5, 116—Zirat land, acquisition of non-occupancy rights in—Ejectment from Zirat land—Limitation—Interpretation of Statutes—Headings whether can be referred to.

Per Curiam (Chapman and Juala Prasad, JJ., dissenting) :—The Bengal Tenancy Act applies to a proprietor's private land, and a suit by a landlord to eject a non-occupancy raiyat of his private land on the ground of the expiration of his lease is governed by Art. 1 (a) of Sch. III of the Act.

Per Chamier, C.J.—The operation of Art. 1 (a) of Sch. III of the Bengal Tenancy Act is not excluded by S. 11 of the Act in the case of *sirat* land.

S. 116 of the Bengal Tenancy Act prevents the application of Ch. VI to raiyats of a proprietor's private land in two cases only, namely,

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

where such land is held under a lease for a term of years and where it is held under a lease from year to year. Except in these two cases, Ch. VI of the Act was intended to apply to *rai-yats* of a proprietor's private land and such *rai-yats* may be non-occupancy *rai-yats* within the meaning of the Act.

Per Mullick, J.:—There is nothing in the Bengal Tenancy Act to support the view that it is not open to a zemindar to create *rai-yati* interests in his private lands. On the contrary, S. 116 of the Act clearly contemplates the acquisition of occupancy rights in such land under certain circumstances and if of occupancy rights, then why not of non-occupancy rights also.

Per Chapman, J.:—The classification of tenants in Ss. 4 and 5 of the Bengal Tenancy Act was not intended to be scientific or precise, and, in order to render the act intelligible, these sections must be applied with a reasonable amount of elasticity.

Ziraf land is not *rai-yati* land although the *Zemindar* may lose his rights in it by treating it as if it was *rai-yati*. But if he lets it for a term or from year to year, it remains his own and the tenant of it is not a *rai-yat*.

Art. 1 (a) of Sch. III of the Bengal Tenancy Act does not apply to tenants in *Ziraf* land.

Per Jwala Prasad, J.:—The Bengal Tenancy Act does not purport to be a complete and exhaustive Code even in respect of the law of landlord and tenant. A person holding *Ziraf* land under a lease for a term of year is not a *rai-yat* and will not be governed by the Bengal Tenancy Act but by the general law. He does not become a non-occupancy *rai-yat* after the expiry of the lease and is a trespasser only. Therefore Art. 1 (a) of Sch. III of the Bengal Tenancy Act does not apply to persons holding under a lease the proprietor's private lands.

A Court is required to have regard to custom in determining whether a person is *rai-yat* or not. No custom is more certain than that tenant in *Ziraf* is not a *rai-yat*.

The headings prefixed to sections or sets of sections may be used for the purpose of interpreting the meaning, scope and intention of Statutes.

The recital or preamble of an Act is a key for opening the meaning and intent of the Act.

Per Ros, J.:—It is only when words are of doubtful meaning that the Courts should look to probable intention.

Per Mullick, J.:—The words of the heading should not be allowed to effect the construction of a section. *Janki Singh v. Jagannath Das*, 44 Ind. Cas. 94 (F.B.).

CHAMIER, C.J. CHAPMAN, MULLICK,
ROE and JWALA PRASAD, JJ.

(98) Sch. III, Art. 2—Tenure-holder put in possession of putni whether landlord—Limitation for recovery of rent by tenure holder. See, *REN. REG. VIII OF 1819*, No. 4, 41 Ind. Cas. 711.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Concl.).

(98-a) Sch. III, Art. 3—Special rule of limitation under—Plea not raised in written statement—Appellate Court if can dismiss suit as barred by. See, *APPELLATE COURT, JURISDICTION OF*, 46 Ind. Cas. 787.

(99) Sch. III, Art. 3—Possession taken by landlord through Court as purchaser in execution of decree for rent, if dispossession. See *EXECUTION SALE*, No. 1, 27 O.L.J. 528.

(100) Sch. III, Art. 3—Suit to recover possession of holding, limitation for, under—Recognition of ryot's interest in holding by Court in another suit, if extends limitation. See *LANDLORD AND TENANT*, No. 44, 45 Ind. Cas. 937.

(100-a) Sch. III, Art. 3—Sale of holding in execution of rent decree, Auction-purchaser at a, Suit to recover possession of holding from, Limitation applicable to. See *LIMITATION*, No. 10, 46 Ind. Cas. 976.

(101) Sch. III, Art. 3—Scope—General plea of limitation pleaded—Court, if can decide case on special plea of bar of suit under Art. 3 of Act. See *LIMITATION*, No. 2, 28 C.L.J. 216.

(102) Sch. III, Art. 3—Decision as to tenant's right to redeem if extends period of limitation under article. See *LIMITATION*, No. 3, 28 C.L.J. 219.

(103) Sch. III, Part III, Art. 6—Act I of 1907—Applicability of three years' rule of limitation to decrees obtained under the Act.

Held that the three years' rule of limitation applies to execution of decrees passed under the Act according to Sch. III, Part III, Art. 6, of the Bengal Tenancy Act as amended by Bengal Act I of 1907. *Byamkesh Chuckerbutty v. Uday Chand Pasul*, 43 Ind. Cas. 737.

TEUNON and NEWBOULD, JJ.

References:—10 C.L.J. 463 and 18 C.L.J. 81, F.

(104) Sch. III, cl. 6—Barring of execution petition under. See *EXECUTION OF DECREE*, No. 13, 22 C.W.N. 766.

Act XII of 1887 (Bengal, N.W.P. and Assam Civil Courts).

(1) Courts established under, Jurisdiction of, Land situate in Santal Parganas, Over—Santal Parganas Regulation (1879), S. 5, Under. See *JURISDICTION (OF CIVIL COURTS)*, No. 8, 46 Ind. Cas. 929.

(2) S. 21, cl. 4—Notification under—Subordinate Judge empowered to hear appeals from Munaf—Revenue appeals, such notification if confers jurisdiction to hear, also—Agra Tenancy Act (II of 1901), S. 197. See *JURISDICTION (OF CIVIL COURTS)*, No. 8, 46 Ind. Cas. 735.

(3) S. 21 (a)—Suit, Valuation of, at more than Rs. 5,000—Decision in, *ex parte*—Appeal against, to District Judge—Jurisdiction—

2.—Bengal Acts—(Continued).

Act XII of 1887 (Bengal, N.W.P. and Assam Civil Courts)—(Concluded).

Consent of parties if can confer jurisdiction—Objection when to be taken. See JURISDICTION (GENERAL), No. 6, 45 Ind. Cas. 920.

(4) S. 25—Civ. Pro. Code (1908), S. 24—"Court of Small Causes," Meaning of, in—Courts vested with Small Cause Court jurisdiction—Courts constituted under Provincial Small Cause Courts Act (IX of 1897), Ss. 5, 16. See SMALL CAUSE COURT, No. 3, 27 C.L.J. 461—44 Ind. Cas. 881.

(5) S. 33—Order by District Judge under section—Order based on evidence—Order only administrative—High Court's power to set it aside. See REVISION, No. 11, 27 C.L.J. 477.

(6) S. 33—Order by District Judge under section if one passed by Court subject to High Court's appellate jurisdiction—Order, if liable to revision under Government of India Act. See REVISION, No. 15, 42 Ind. Cas. 619.

Act V of 1897 (Estates Partition).

(1) Ss. 10, 11, 12—*Revenue paying estate, Partition of—Partition, Decree for, of Civil Court, Execution of Collector, Power of—Partition if could be reopened—Civ. Pro. Code (Act V of 1908), S. 51.*

A Civil Court has jurisdiction to execute a decree for partition of a revenue-paying estate, provided that it does not assume jurisdiction to partition the liability for the land revenue. In the event of a party applying to the Collector for a partition of the land revenue, after partition has been effected by the Civil Court, it would be open to the Collector to re-consider the allotment of the shares granted in the Civil Court proceedings.

There is nothing in any principle of law which would enable a Civil Court to re-open a partition properly made under a Civil Court decree otherwise than by proceedings by way of review. The effect of the final decree of a Civil Court for partition is to put an end to co-tenancy and to vest in each person or group a sole estate in a specific property or allotment. The law does not provide for a suit in the Civil Court under which these separated estates can be divested and a co-tenancy re-created for the purpose of making a fresh partition. *Debi Saran Singh v. Rajbans Nath Dubey*, 45 Ind. Cas. 895=4 Pat. L. J. 29=5 Pat. L.W. 9.

CHAPMAN and ATKINSON, JJ.

(2) S. 11. See No. 1, *supra*.

(3) S. 12. See No. 1, *supra*.

(4) Ss. 25, 29—Suit for declaration of invalidity of Revenue Board order directing revenue partition of estate previously divided in private, maintainability of. See PARTITION, No. 8, 3 Pat. L.J. 188.

(5) S. 29. See No. 4, *supra*.

2.—Bengal Acts—(Continued).

Act V of 1897 (Estates Partition)—(Concluded).

(5-a) S. 119—Partition concluded after Act came into operation—Allegation as to its being under Act of 1876, Onus in case of—Occupancy holding, Title to, Declaration of, Suit for, by tenant, Maintainability of. See PARTITION, No. 2-a, 43 Ind. Cas. 359.

Act III of 1899 (Calcutta Municipal).

(1) Ss. 3 (30), 37, 47, Sch. IV, rr. 3, 8 (1)—Occupier in S. 37, meaning of—Notice of claim to be voter, Formalities for, Sch. IV, r. 8—Persons liable to pay rates within r. 3 of Sch. IV—Associations of individuals within S. 37, meaning of. See ELECTIONS, No. 1, 45 C. 950.

(2) S. 37. See No. 1, *supra*.

(3) S. 47. See No. 1, *supra*.

(4) S. 56—Corrupt practices in elections, Provisions regarding if to be found in Act. See CORRUPT PRACTICES, 22 C.W.N. 678.

(5) S. 56, Sch. V, r. 2—Failure of public officer to exercise discretion—Description of candidate—Rai Bahadur, if sufficient description—Delay in presenting petition, effect of—Infructuous order, whether ought to be passed. See ELECTIONS, No. 3, 22 C.W.N. 951.

(6) S. 228—Consolidated rate—Interest of the owner of the building in the payment of the consolidated amount—His right to be reimbursed—Contract Act, S. 69.

In view of the provisions of S. 228 of the Act which makes the consolidated rate a first charge upon the building or land, it is clear that the owner of the building is a person who under the provisions of S. 69 of the Contract Act, is interested in the payment of this money. If the owner has paid the amount, he is clearly entitled to be reimbursed by the tenant thereof. *Firm Bhudar Mal-Ram Chandra Marwari v. Sew Narayan Marwari*, 44 Ind. Cas. 669.

TEUNON and NEWBOULD, JJ.

(7) Ss. 299 and 593—Notice upon one co-owner effectual against others.

Held that service of notice upon one co-owner is effectual against other co-owners of the property. *The Corporation of Calcutta v. Hemangini Dass*, 44 Ind. Cas. 413.

TEUNON and NEWBOULD, JJ.

(8) S. 341—Whether a platform is fixture See PUBLIC STREET, No. 1, 28 C.L.J. 494.

(9) S. 557, cl. (d)—Municipality if may acquire different portions of a holding by separate proceeding and thus evade the presumption of the section.

A holding within the Calcutta Municipality, which was the subject of a single assessment, having been partitioned amongst its owners, the owner of one of the partitioned shares applied for separate assessment of his share, but that application was refused and the Municipality then proceeded to acquire the two portions under the Land Acquisition Act by two separate proceedings:

Held—That there was no legal bar to the Municipality proceeding in this manner and

2.—Bengal Acts—(Continued).

Act III of 1899 (Calcutta Municipal)—(Concl'd.)

thereby depriving the owners of the several shares of the benefit of S. 557 (d) of the Calcutta Municipal Act. *Sham Lal Das v. The Secretary of State*, 22 C.W.N. 538 = 28 C.L.J. 144 = 46 Ind. Cas. 138.

GREAVES and N.R. CHATTERJEA, JJ."

(10) S. 593. See No. 7, *supra*.

(11) Soh. IV, r. 3. See No. 1, *supra*.

(12) Soh. IV, r. 8 (1). See No. 1, *supra*.

(13) Soh. V, r. 2—Requisites of valid nomination paper—Reference to electoral roll, if sufficient description of candidate—Absence of legal secondor and sufficient number of approvers—Effect. See ELECTIONS, No. 2, 22 C.W.N. 943.

(14) Soh. V, r. 2. See Nos. 5 and 10, *supra*.

Act VI of 1908 (Chota Nagpur Tenancy).

(1) S. 41—Minor, Lease to a, if null and void—Person in possession of property under such a lease, Ejectment of. See LEASE, No. 11-b, 3 Pat.L.J. 518.

(1-a) Ss. 4, 63 and 139—*Prodhan, Nature of his tenure—Powers of Deputy Commissioner to eject him—Want of jurisdiction of Court.* *Prodhan* occupies the position of a quasi service tenure holder, that is, he is a tenure holder of a kind but certainly not one within the definition of the Chota Nagpur Tenancy Act. The Deputy Commissioner has no power to eject him under the provisions of Chota Nagpur Tenancy Act.

S. 139, Chota Nagpur Tenancy Act does not vest jurisdiction in the Deputy Commissioner to try suits between parties who hold the relationship of landlord and tenant, which would be outside the scope of the Act.

In cases where there is an inherent absence of jurisdiction in Court, no subsequent action or conduct of parties will validate the institution of a proceeding instituted without jurisdiction. *The Tata Iron Steel Co., Ltd. v. Ragunath Mahto*, 45 Ind. Cas. 72.

CHAMPMAN and ATKINSON, JJ.

(2) S. 68. See No. 1, *supra*.

(3) Ss. 71, 217—*Civ. Pro. Code*, S. 115—*Government of India Act*, 1915, S. 107—*Revision—Powers of High Court.*

Where proceedings are governed by S. 217, Chota Nagpur Tenancy Act, which section provides that the proceedings of a Deputy Commissioner shall be open to revision by the Commissioner and the Board, the High Court shall not usurp that power until it has been shown to be abused. *Udhab Chandra Slogh v. Lakshmi Bibi Kuaraol*, 43 Ind. Cas. 993 = 3 Pat.L.J. 143 = 3 Pat.L.W. 281.

SHARFUDDIN and ROE, JJ.

References:—18 C.W.N. 789, *Appr.*; 40 C. 518, *K.*

(4) S. 139. See No. 1, *supra*.

2.—Bengal Acts—(Concluded).

Act VI of 1908 (Chota Nagpur Tenancy)—(Concluded).

(5) S. 139 (5)—*No bar to suit in Civil Court by tenant to recover possession of land—Construction of statute—Inadmissible evidence admitted by Court at request of parties—Effect.*

S. 139 (5), Chota Nagpur Tenancy Act, is no bar to a suit in a Civil Court for a tenant seeking relief of being put in possession of land wherefrom he was ejected.

In construing a statute, one is entitled to look and see the course of legislation up to that time and if the words of the previous statute are re-enacted, it may be assumed that it was intended that the law should be continued as it previously existed.

Where the parties themselves request either that certain evidence which is not in itself admissible as evidence if objections are taken, should be considered by the Court or where they request that the Judge should himself put questions to the witnesses, then it does not lie in the mouth of either of the parties who ask that that course should be taken, afterwards to question it on appeal. *Narain Singh v. Baba*, 44 Ind. Cas. 262 = 4 Pat.L.W. 189.

DAWSON MILLER and MULLICK, JJ.

Reference:—15 C.W.N. 387, *F.*

(6) S. 217. See No. 3, *supra*.

Act V of 1911 (Calcutta Improvements).

(1) Tribunal constituted by, and Calcutta Improvement (Appeals) Act (XVIII of 1911) if mere body of arbitrators or Court also under S. 195, *Crim. Pro. Code* (1898). See SANCTION TO PROSECUTE, No. 1, 45 C. 585.

(1-a) S. 24. See No. 3, *infra*.

(2) S. 41. See No. 3, *infra*.

(3) Ss. 42 (a), 41, 24, 68, 69, 80, 81, 122—*Compulsory acquisition of land for "recoupment" if authorized by the Act—"Affected by the execution of the scheme," meaning of—Preamble of an enactment, its relation to operating part—"Recoupment," "betterment," principles of—Interpretation of statute—Reference to Full Bench when cases distinguishable—Proper parties to the suit. Moul Lail Sing v. The Trustees for the Improvement of Calcutta*, 22 C.W.N. 1 = 27 C.L.J. 1 = 44 Ind. Cas. 770 = 45 C. 343 (F.B.). See Final Part, 1917, Col. 80.

(4) S. 68. See No. 3, *supra*.

(5) S. 69. See No. 3, *supra*.

(6) S. 80. See No. 3, *supra*.

(7) S. 81. See No. 3, *supra*.

(8) S. 122. See No. 3, *supra*.

Act XVIII of 1911 (Calcutta Improvement [Appeals]).

(1) Tribunal constituted by Calcutta Improvement Act of 1911 and, if mere body of arbitrators or Court also under S. 195, *Crim. Pro. Code* (1898). See SANCTION TO PROSECUTE, No. 1, 45 C. 585.

3.—Bihar and Orissa Acts.

Act II of 1913 (Bihar and Orissa Tenancy).

(1) S. 12—Mahomedan Law—Minor—Mortgage by minor's father and then by mother as guardian—Redemption of first mortgage by order of Collector—Possession received by minor—Mortgagee, Suit by, under S. 12—Equity. See MAHOMEDAN LAW (MINORITY), No. 1, 152 F.L.R. 1917.

(1-a) Ss. 31, 250—Transfer of occupancy holding—Right of landlord to recover registration fee by suit. See OCCUPANCY TENURE, No. 8, 3 Pat. L.J. 351.

(2) Ss. 57, 215, 220, 221—Interest of under-*rai*yat in occupancy holding—Incumbrance—Auction-purchaser's procedure for annulling incumbrance—Effectment of under-*rai*yat, conditions for.

An under-*rai*yat in occupation of land is, to the extent of his interest therein, an incumbrancer upon such land within the meaning of S. 215, Orissa Tenancy Act, Ss. 220 and 221 of which regulate in what way and in what manner the incumbrance can be got rid of by an auction-purchaser. If the purchaser takes the steps open to him to annul the incumbrance and the under-*rai*yat refuses to give up possession consequential thereon, the under-*rai*yat can be ejected as a trespasser under S. 57 of the Act but if the purchaser does not avail himself of the only remedy open to him and allows a year to elapse without taking any steps to annul the incumbrance, he is not entitled to eject the under-*rai*yat under the said section. *Shiba-Das v. Gajendra Nath Das*, 3 Pat. L.J. 112=44 Ind. Cas. 593.

MULLICK and ATKINSON, JJ.

Reference :—43 C. 178, R.

(3) Ss. 154, 232—*Nij chas* land, Occupancy rights, Acquisition of, in—Occupancy, Tenant if can contract preventing himself the right of, and out of provisions of Ss. 20 and 21 of the Bengal Tenancy Act (1885). See LANDLORD AND TENANT, No. 13 a, 3 Pat. L.J. 475.

(4) S. 215. See No. 2, *supra*.

(5) S. 220. See No. 2, *supra*.

(6) S. 221. See No. 2, *supra*.

(7) S. 222. See No. 3, *supra*.

(8) S. 250. See No. 1, *supra*.

4.—Bombay Acts.

Act V of 1862 (Bhagdari and Narvadari).

S. 3—Recognised sub-division of *narva*—Dismemberment—Compromise effecting dismemberment is void.

S. 8, Bhagdari and Narvadari Act, 1862, renders void a compromise the effect of which is to dismember the recognised sub-division of a Bhag. *Nagar Kashi Patel v. Bal Dhull*, 20 Bom. L.R. 342=45 Ind. Cas. 577.

BATCHelor, AG. C.J. and KEMP, J.

References :—28 B. 399 (404)=6 Bom. L.R. 429, 3; 1 B. 325, Dist.

4.—Bombay Acts—(Continued).

Act I of 1855 (Survey and Settlement).

(1) S. 35. See BOM. ACT V OF 1879 (LAND REVENUE CODE), No. 3, 20 Bom. L.R. 22.

(2) Ss. 37, 38—Khot's right to trees. See KHOTI TENURE, 20 Bom. L.R. 141.

(3) S. 38. See No. 2, *supra*.

Act XII of 1866 (Sind Courts).

S. 16—"Misconduct", meaning of—Duty of pleader—Writing letter personally attacking Judge, if constitutes misconduct.

The jurisdiction conferred on the Judicial Commissioner of Sind by S. 16 of the Sind Courts Act extends not only to professional misbehaviour but to general misbehaviour, but while this jurisdiction is unlimited, the Commissioner should be reluctant to take cognizance of misconduct not connected with the office of pleader or unless it were morally disgraceful or showed that the individual was not a proper person to hold that office.

The administration of justice is no doubt a matter of public interest and criticisms in good faith on a Judge are entitled to the privilege of exceptions 1 and 2 of S. 499 of the Penal Code.

A pleader by virtue of his *sanad* has certain rights and privileges, but he is not a chartered libertine and those rights and privileges carry with them corresponding duties and restraints.

A pleader is an officer of the Court and is bound to assist the Court in the administration of justice. Criticism which is permissible to a private individual is not permissible to a pleader. The co-operation of pleader and Judge would be impossible, if the pleader were attacking the Judge in the public press. Nor would it be possible for the business of the Court to be conducted with dignity, decorum and impartiality, when the pleader is posing in public as the chastiser of the Judge. Such conduct on the part of the pleader is not only breach of his duty to the Court but must also result in an actual obstruction to the administration of justice.

Where a pleader wrote a letter in a newspaper scandalising Judge and stated that the Judge is not doing work and reports that he has decided cases which have been really compromised.

Held that even if the letter were written in good faith and even if it did not constitute an offence of libel, it would still be reprehensible in that it was a personal attack on the Judge alleging that he was indolent and took credit for cases not true but compromised. *Re Enquiry Against Mr. M., Pleader*, 19 Cr. L.J. 322=44 Ind. Cas. 338.

PRATT, J.C., CROUCH and HAYWARD, A.J. Cs.

Act III of 1874 (Bombay Hereditary Offices).

(1) S. 11-A—Application to Collector, if civil proceedings. See LIMITATION ACT (1908). No. 52, 20 Bom. L.R. 918.

4.—Bombay Acts—(Continued).

Act III of 1874 (Bombay Hereditary Offices), —(Concluded).

(2) S. 18—Inquiry into existence of old Mahar Vataus if triable by Civil Court. See JURISDICTION (OF CIVIL COURTS), No. 1, 20 Bom. L.R. 993.

Act X of 1876 (Revenue Jurisdiction).

S. 4 (a)—Inquiry into existence of old Mahar Vataus. See JURISDICTION (OF CIVIL COURTS), No. 1, 20 Bom. L.R. 993.

Act V of 1879 (Bombay Land Revenue Code).

(1) Ss. 3 (20), 217—*Alienated village—Introduction of survey settlement—Holders of land become occupants.*

The plaintiff, who was an inamdar of a village, claimed to have Mirasi rights over certain lands in the village, alleging that the defendants were his annual tenants. The grant to the plaintiff was not merely of the Government's right to receive the land revenue but of the entire property in the soil. At the introduction of survey settlement into the village in 1880, the defendants were entered in the Settlement Register as *Khatedars*; and, since 1880, they cultivated the lands and paid to the plaintiff only a sum equivalent to the annual assessment. They contended that they had the same rights in respect of the lands as holders of lands in unalienated villages;

Held that, though the grant to the plaintiff was of the entire property in the soil, the lands in question were still "alienated" within the meaning of S. 3 (20) of the Bombay Land Revenue Code, and that the defendants were entitled to the rights of occupants in unalienated villages, by virtue of S. 217 of the Code. *Dadoo Bhao v. Dinkar Vishnu Aphale*, 20 Bom. L.R. 887=47 Ind. Cas. 745.

BACHELOR, A.C.J. and MARTEN, J.

Reference:—42 B. 112=20 Bom. L.R. 16, R.

(2) S. 40—Khots if occupants within the meaning of section. See KHOTI TENURE, 20 Bom. L.R. 141.

(3) S. 48—*Bom. Act I of 1865, S. 35—Conversion of land from agricultural to non-agricultural uses—Use of land for brick-kiln—Levy of fine by Collector for conversion under S. 35 of Bom. Act I of 1865—Building of chhappars on the land—Revision Survey—Assessment of land as agricultural under S. 48 of Land Revenue Code—Erection of substantial buildings—Collector's right to levy enhanced assessment—Building fines—Kiln for bricks.*

On conversion of his land from agricultural to non-agricultural uses by establishing a brick kiln in 1872, the plaintiff was called upon by the Collector to pay thirty times the assessment as fine for the conversion under S. 35 of Bom. Act I of 1865. About that time or shortly afterwards the plaintiff erected some huts on the land. At the Revision Survey, which took

4.—Bombay Acts—(Continued).

Act V of 1879 (Bombay Land Revenue Code) —(Continued).

place in 1889, the land was assessed as agricultural land. Sometime between 1897 and 1901 the plaintiff erected a substantial building on the land. In 1912, the Collector having levied building fine from the plaintiff, the latter filed a suit to recover it back:

Held that though the levy of additional assessment under S. 35 of Bom. Act I of 1865 might have protected the plaintiff against its enhancement before the Revision Survey of 1889, still S. 48 of the Land Revenue Code, 1879, rendered him liable to pay extra assessment for the conversion in use which took place after the date of the Revision Survey of 1889. *Mahmadbhai Dosabhai Kathlara v. Secretary of State for India*, 20 Bom. L.R. 22=42 B. 126=43 Ind. Cas. 744.

BEAMAN and HEATON, JJ.

(4) Ss. 74, 76—*Rajinamas and kabulayats under Bombay Code—Registration, Necessity of.* See REGISTRATION ACT, No. 45, 20 Bom. L.R. 358.

(5) S. 76. See No. 4, *supra*.

(6) S. 85—*Suit by superior holder to recover dues from inferior holders—Civil Court—Jurisdiction.* *Yuhvanath Ganesh Paranjpe v. Kondaji Sakharam*, 19 Bom. L.R. 820=42 B. 49=43 Ind. Cas. 995. See Final Part, 1917, Col. 81.

(7) Ss. 144, 160 (as amended by S. 33 of the *Gujarat Talukdar's Act, Bom. Act IV of 1888*)—*Talukdar—Grant of village lands rent free by Talukdar—Payment of Udhad Jama for the village to Government by Talukdar—Attachment of village by Government for non-payment of assessment—Right of Government to recover proportional assessment from holders of rent-free lands.*

The plaintiff held rent-free lands from the Talukdar of a village, who paid to Government assessment for the village in a fixed lump sum. On failure to pay assessment, the village was attached by Government, under S. 144 of the Bombay Land Revenue Code, 1879. The Collector, having levied proportional assessment from the plaintiff under S. 160 of the Code, the plaintiff sued to restrain him from doing so:

Held, that the Government had the right to levy the assessment on the lands of the plaintiff in the village, for the grant of lands rent-free by the Talukdar did not affect the right of Government to assess the lands. *Tulla v. Collector of Kalra*, 20 Bom. L.R. 748=47 Ind. Cas. 117.

BEAMAN and HEATON, JJ.

(8) S. 160. See No. 7, *supra*.

(9) S. 203—*Executive order of a Revenue Officer—Appeal by person aggrieved—Bombay Revenue Jurisdiction Act, S. 11.* Where, under S. 203 of the Bombay Land Revenue Code, the Revenue Officer disposes of

4.—Bombay Acts—(Continued).

Act V of 1879 (Bombay Land Revenue Code) —(Concluded).

Government land by a mere executive order, the right of appeal is vested in any person who is aggrieved by the order, whether he be a party or not to the enquiry wherein such order was passed. *Mulchand Tilokchand v. Muradali Shermohamed*, 45 Ind. Cas. 895.

PRATT, J.C. and HAYWARD, A.J.C.

References:—(1896) P.J. 341; (1879) P.J. 351; 10 Ind. Cas. 223, *Appr.*

(10) S. 217—Alienee of rights in soil—Enhancement of rent. See LANDLORD AND TENANT, No. 4, 20 Bom. L.R. 16.

(11) S. 217. See No. 1, *supra*.

Act V of 1886 (Hereditary Offices).

S. 2—Vatan—Jivak Badal grant—Personal inam held without condition of service—Daughter of the last Vatandar—Female entitled to share in the Vatan.

In a dispute as to the existence of a Vatan held on service tenure, the Government admitted, when announcing the settlement, that the grant had been made *Jivak Badal*, in other words, personal inam without condition of service. The plaintiff, who was the daughter of the last male Vatandar, having sued to recover her share in the Vatan, it was contended that the plaintiff, who was a female, was barred from inheritance by S. 2 of the Bombay Act V of 1886:—*Held*, overruling the contention, that S. 2 of the Bombay Act V of 1886 was no bar to the plaintiff, inasmuch as the property in suit was not service inam, to which alone the Vatan Act of 1886 extended. *Dwarkanadas Motilal v. Bal Jekore*, 20 Bom. L.R. 989.

SCOTT, C.J. and SHAH, J.

Reference:—25 B. 470 = 3 Bom. L.R. 249, *Dist.*

Act VI of 1886 (Karachi Port Trust Act).

(1) S. 87—Suits filed under—Period of limitation—General Provisions of Limitation Act not applicable. See COMMON CARRIERS, No. 2, 45 Ind. Cas. 168.

(3) Ss. 87 and 88—"Person," meaning of—Scope of sections.

"Person" in S. 87 technically includes, and was intended to include, the Board.

Ss. 87 and 88 do not distinguish suits against private individuals from suits against the Board; but S. 87 deals with the limitation of suits against the Board or any servant or officer of the Board, and S. 88 defines the responsibility of the Board for acts of their officers and servants. *Mossaji Ahmed and Co. v. Karachi Port Trust*, 45 Ind. Cas. 410.

PRATT, J.C. and CROUCH, A.J.C.

Reference:—10 Ind. Cas. 972, *Appr.*

(8) S. 88. See No. 2, *supra*.

4.—Bombay Acts—(Continued).

Act III of 1888 (City of Bombay Municipal).

(1) Ss. 140 (a), 143 (1) (a) and (2) (d)—*The Indian Universities Act* (VIII of 1904), Ss. 21 (1) (c), (f), 25 (1) and (2) (m)—*Fee paid by a student residing in a hostel is not 'rent'*—*Hostel of a College is not exempt from general taxation*—Meaning of 'charitable purposes' in S. 143 (2) (d) of the City of Bombay Municipal Act—A special case may be reopened by consent only.

The part of a hostel of a College occupied by students and the Superintendent of the hostel is occupied for 'charitable purposes' within the meaning of S. 143 (1) (a) of the City of Bombay Municipal Act, and is, therefore, exempt from general taxation leviable under S. 140 (c) of the City of Bombay Municipal Act (a).

Where a part of a hostel of a College was occupied by a Professor and Assistant Superintendent in addition to the Superintendents of the hostel:

Held, that such part of the hostel was liable to be rated for general tax leviable under S. 140 (c) of the City of Bombay Municipal Act, unless it was shown that the duties of the Professor and Assistant Superintendent for purposes of supervision, physical welfare and education of students, where such as to make their presence on the premises absolutely necessary (b).

The extra fee paid by a student residing in a hostel of a College is not 'rent' within the meaning of S. 143 (2) (d) of the City of Bombay Municipal Act.

Where a special case is stated to the Court by consent of parties, it can only be re-opened by mutual consent (c). *Monie v. Scott*, 20 Bom. L.R. 839 = 47 Ind. Cas. 642.

KAJIJI, J.

References:—(a) 16 B. 217, R. (b) (1877) 3 Ex. D. 66; (1867) 8 Et & Bl. 184, R. (c) (1884) Solicitors' Journal, p. 478, F.

(2) S. 143 (1) (a) and (2) (d). See No. 1, *supra*.

(3) Ss. 297, 300, 301—*Municipality*—*Regular line of the street*—*Powers of the Commissioner to prescribe it*—*Acquisition of land*—*Compensation*.

There is no word in the City of Bombay Municipal Act, 1888 (Bombay Act III of 1888 as amended by Bombay Act V of 1905) which prescribes the frame of mind in which the Municipal Commissioner is to exercise the powers given by S. 297 of the Act, or which restricts the objects for which he is to exercise them to the mere regulation of the street in question or to the creation or preservation of a regular line in it. "Preservation of regular line in public streets," the heading to the group of sections beginning with the said section, does not limit the exercise of the powers given by the express words of the Act.

For the purpose of building a bridge to carry a street over a railway line on the level of the street the Municipal Commissioner wished to acquire additional land on a side of the street, and so he first of all prescribed a regular line

4.—Bombay Acts—(Continued).**Act III of 1888 (City of Bombay Municipal)
—(Concluded).**

of the street under S. 297, and then under S. 299 acquired a part of the appellant's land which fell within the line.

Held, that the exercise of the powers was within the terms of the Act, and that the appellant was entitled to compensation for the land acquired under S. 301 of the Act and not under the Land Acquisition Act.

Held, also, that the cases in which it has been held that powers conferred only for a statutory purpose cannot be validly exercised for a different purpose are not in point, such an exercise of the powers being outside the statute which confers them. **Abdul Rahim v. The Municipal Commissioner for the City of Bombay**, 24 M.L.T. 297=20 Bom. L.R. 937=8 L.W. 548=(1918) M.W.N. 840=23 C.W.N. 110=42 B. 462 (P.C.).

EARL LOREBURN, LORD DUNEDIN and LORD SUMNER.

(4) S. 299. See No. 3, *supra*.

(5) S. 301. See No. 3, *supra*.

Act VI of 1888 (Gujarat Talukdars).

S. 29-E—Decree against talukdar—Application to execute decree in absence of certificate—Exclusion of time from date of decree to date of application for certificate—Application in accordance with law. See EXECUTION OF DECREE, No. 8, 20 Bom. L.R. 872.

Act III of 1901 (District Municipalities).

(1) S. 96 (2) (3)—Notice of new buildings—Permission to build Privy—Permission cannot subsequently be revoked.

The plaintiff applied, on the 1st December 1918, to the defendant Municipality for permission to build a privy on his own land, which permission was granted on the 19th idem. The Municipality gave notice to the plaintiff on the 6th January 1914 requiring him not to build the privy until further orders. The plaintiff sued for cancellation of the last named order and for a perpetual injunction restraining the Municipality from preventing the plaintiff in the work of constructing the privy:

Held, that the first order made by the Municipality granting permission to the plaintiff to build the privy was a final order under S. 96 (2) of the Bombay District Municipalities Act, 1901; and that the subsequent order which purported to be provisional in its character was not referable to sub S. 3 of S. 96, nor to any other section of the Act; and was, therefore, not legal; and that consequently the plaintiff was entitled to the injunction claimed, he having commenced the work within a year within the meaning of S. 96 (4) of the Bombay District Municipalities Act, 1901. **Vithal v. Alibag Municipality**, 20 Bom. L.R. 756=42 B. 629=47 Ind. Cas. 145.

SHAH and MARTEN, JJ.

Reference:—19 Bom. L.R. 65, R

4.—Bombay Acts—(Concluded).**Act III of 1901 (District Municipalities)
—(Concluded).**

(2) S. 160 (3)—Jurisdiction of District Court—Revision—Civ. Pro. Code, S. 115—Compensation—Its meaning, and determination.

Under S. 160, cl. (3) of the Bombay District Municipal Act, 1901, the matter of compensation is to be determined by the District Court, and its proceedings are subject to revision by the Court of the Sind Judicial Commissioner.

The word "procedure" in S. 160 (3) is used in its popular and not in its strictly legal sense.

The scope of S. 115, Civ. Pro. Code, is to empower the High Courts with powers of supervision and superintendence. The High Court is to see that its subordinate Courts do not interfere in matters of which they have no cognizance, that they do not fail to exercise their jurisdiction and that they do not abuse their powers or act illegally in the exercise of them.

Compensation is not the same as market value; it is the equivalent in money of the value of the land to the owner. The old common law rule for ascertaining compensation for expulsion was that it was that it should be determined on the same principles as damages in an action of trespass; and it was the usual practice to add a certain percentage to the market value for compulsory purchase. And this old common law rule is closely followed by S. 23 of the Land Acquisition Act. **Hydrabad Municipality v. Moorjimal Mushtakram**, 44 Ind. Cas. 363=11 S.L.R. 93.

PRATT, J.C. and CROUCH, A.J.C.

References:—36 B. 47, R.; 21 B. 279; 40 B. 509, Dist.; 8 S.L.R. 126; 11 M. 26; 26 M. 85, Appr.

5.—Burma Acts.**Act XIII of 1898 (Burma Laws).**

(1) S. 13—No promise of marriage—Mere seduction—Cause of action for damages—Question regarding marriage if arises. See BUDHIST LAW (MARRIAGE), No. 1, 42 Ind. Cas. 539.

(2) S. 13—Person to whom section applies—Chinaman if governed by section. See CHINESE CUSTOMARY LAW, No. 1, 9 L.B.R. 179.

6.—Central Provinces Acts.**Act XX of 1875 (C.P. Laws).**

(1) Ss. 5 and 6—Hindu Law, applicability of, to non-Hindu—Gond, whether Hindu—Burden of proof—Custom, its weight—Hindu law, which is *lex loci* in Central Provinces.

The term "Hindus" in S. 5 of the Central Provinces Laws Act, 1875, refers to persons who profess some form of the Hindu religion whatever be the branch or school to which they may belong, but it does not extend to persons who have never professed any form of the Hindu religion or to those who have been converted

6.—Central Provinces Acts—(Continued).

Act XX of 1875 (C. P. Laws)—(Concl'd.).

from it to some entirely different religion. The word will apply to dissenters and non-conformists, but not to apostates. It seems to be accepted now, as a rule of law, that, where such apostasy takes the form of conversion to a religion which in itself regulates the devolution of property, e.g., the Muhammadan religion, then, except on proof of a well established custom to the contrary, and that only in regard to inheritance and succession, the convert becomes subject to the law of his adopted religion.

A Gond is not a Hindu at all and it follows that he cannot be brought within the category of 'sudras'. A person who is from birth a non-Hindu, cannot be subject to the personal law of the Hindus.

A man does not become a Hindu by calling himself one, nor is the adoption by a non-Hindu of usages resembling some parts of the Hindu Law a sufficient ground for applying the whole of that law to him *en bloc*, in the same way and to the same extent as if he were a Hindu.

An unconscious application of wrong law cannot set up a principle of *stare decisis*, merely because it has been left unchallenged for a few years owing to the ignorance of the people affected by it.

The onus of proving that a non-Hindu family has accepted the Hindu law rests on him who alleges it. It has been laid down that in a case of a family which is not originally Hindu, but which has adopted Hinduism, the burden of proving that the family is governed in a particular matter by the Hindu Law is upon the person who asserts that it is so governed. The adoption by a family of some parts of a law foreign to it does not raise any presumption in favour of its adoption of other parts thereof. A Hindu is presumed to be governed by the law of the locality in which he resides. The Mitakshara of the Benares School is the Hindu *lex loci* in Central Provinces.

Clear proof of usage will outweigh all but statute law. *Ujjare v. Tilochan Gond*, 44 Ind. Cas. 435.

STANYON, A.J.C.

References:—3 B. 273; 5 B.H.C.R. O.C.J. 172, R; 31 C. 11; 9 M.I.A. 195; 10 B. 1; 4 A. 343; 35 B. 264; 29 B. 85; 19 B. 789; D.C.R. Part VII, No. 35; 20 C. 409; 11 C. 463; 20 W.R. 341; D.C.R. Part VIII No. 102; 2 C.P. L.R. 18; 11 C.P.L.R. 49; 10 M.I.A. 511; 33 M. 342, *Appr.*; D.C.R. Part VIII No. 25, *overruled*.

(3) S. 6. See No. 1, *supra*.

Act XVIII of 1881 (C. P. Land Revenue).

(1) S. 39. See No. 3, *infra*.

(3) Ss. 65-A, 132, 152 (a)—Gaontia tenure and its incidents discussed. See GAONTIA TENURE, 3 Pat. L. J. 229.

(2-a) S. 69 (4) (1), Suits under, Limitation for, if governed by S. 6 of the Limitation Act,

6.—Central Provinces Acts—(Continued).

Act XVIII of 1881 (C. P. Land Revenue)—(Concluded).

(1908). See LIMITATION, No. 7, 46 Ind. Cas. 879.

(8) Ss. 82 and 89—Record-of-rights—Suit for ejecting a tenant—Burden of proof.

There is nothing in C. P. Land Revenue Act to justify the view that the record-of-rights prepared under S. 82 of the Act cannot be considered complete until the Chief Commissioner has under S. 39 declared the settlement to be completed.

Where a plaintiff landlord sues to eject a recorded tenant, the burden of proving that the defendant was not a tenant lies on the plaintiff (landlord). *Tukaram v. Dinaji*, 45 Ind. Cas. 470.

BATTEN, A.J.C.

(4) S. 132. See No. 2, *supra*.

(5) S. 136 (7)—Partition proceedings under, when become contentious. See LAMBARDAR, 14 N.L.R. 18.

(6) S. 137—Lambardar and Mukaddam—Mukaddam Gomastha—Whose agent he is—Whether co-sharers liable to contribute towards remuneration of Mukaddam gomastha.

The Land Revenue Act does not seem to favour the view that Mukaddam is an agent of the proprietary body and his gomastha a sub-agent: on the contrary the gomastha is treated as agent of the Mukaddam. There is nothing to show that the co-sharers impliedly promised to contribute towards the remuneration of the Mukaddam Gomastha. *Babran v. Narain Rao*, 43 Ind. Cas. 967.

BROCKMAN, J.C.

References:—11 C.P.L.R. 27; 7 N.L.R. 101, R.

(7) S. 152 (a). See No. 2, *supra*.

Act IX of 1883 (Tenancy).

S. 35 (4)—Scope and object of. See LANDLORD AND TENANT, 14 N.L.R. 107.

Act XI of 1898 (Tenancy).

(1) Tenancy of share of land not divided by metes and bounds. See LANDLORD AND TENANT, 14 N.L.R. 62.

(2) S. 35. See No. 5, *infra*.

(3) S. 35 (4)—Implied surrender—Knowledge of landlord—Payment of rent by one tenant—Presumption.

There can be no implied surrender under S. 35 (4) of the Central Provinces Tenancy Act, without the knowledge of the landlord.

When a holding is in the name of an uncle and two minor nephews, there is no presumption that the rent paid by the uncle is on his own sole behalf. *Surti v. Munni*, 43 Ind. Cas. 180.

BATTEN, A.J.C.

6.—Central Provinces Acts—(Continued).

Act XI of 1898 (Tenancy)—(Continued).

(3-a) Ss. 35, (4), 94—*Applicability of S. 94, where ouster of the real tenant at the instance of the landlord—Implied surrender, Rule of, under S. 35 (4), Applicability of, where rent paid in advance. See LANDLORD AND TENANT, No. 52-d, 47 Ind. Cas. 28.*

(4) S. 35 (4)—*Surrender of land if implied from non-cultivation and non-payment of rent by tenant prevented from taking possession by landlord. See RELINQUISHMENT OF PORTION OF CLAIM, No. 2, 14 N.L.R. 176.*

(5) Ss. 35, 36 (1), 46 (3)—*Surrender by occupancy tenant to landlord for consideration—Heir of tenant put in possession by Revenue Officer—Landlord's right to recover purchase-money with interest. See LANDLORD AND TENANT, No. 66, 14 N.L.R. 126.*

(6) S. 36 (1). See No. 5, *supra*.

(7) S. 41—*Mortgage by occupancy tenant—Whether Malguars can sell the holding in execution of money decree free of mortgage—What can be sold under S. 60, Civ. Pro. Code.*

Where an absolute occupancy tenant under C.P. Tenancy Act (XI of 1898) mortgaged his holding to defendants and where the *malguars* brought a suit for declaration that they are entitled to sell the holding in execution of a money decree against the tenant free of defendants' mortgage, *held* that, under S. 60, Civ. Pro. Code, as the Court can attach and sell such property over which the judgment-debtor has a disposing power, it can attach and sell the equity of redemption of the tenant.

An auction-purchaser in a money decree does not derive his title from the decree-holder, but only from the judgment-debtor. *Narain Rao v. Fathelal*, 43 Ind. Cas. 907.

MITTRA, A.J.C.

Reference:—18 W.R. 89, *Appr.*

(8) S. 41 (7)—*Sub-lease by absolute occupancy tenant—Assignment of such sub-lease by sub-lessee to another, if also requires landlord's consent. See LANDLORD AND TENANT, No. 68, 14 N.L.R. 183.*

(9) S. 45—*Sir lands—Mortgage registered before the commencement of the Act—Conciliation Board's award, Effect of.*

A registered mortgage, dated January 17, 1881, of fifteen villages in Central Provinces included *sir lands*, on which there was a second registered mortgage, dated December 11, 1884. On June 30, 1899, the mortgages obtained the usual preliminary decree for foreclosure in a suit on both the mortgages. The matter was then referred to a Conciliation Board, which made its award on February 20, 1905. It provided that the amount payable under the said decree should be considerably reduced, that the reduced amount should be paid in the manner therein stated, and that, in default of payment, only seven of the mortgaged villages should be foreclosed. No mention was made

6.—Central Provinces Acts—(Continued).

Act XI of 1898 (Tenancy)—(Continued).

of *sir lands*. The award was filed in Court under S. 525 of the Code of Civil Procedure, 1882, and a decree was passed in terms of the award, and on June 16, 1910, the decree was made final as the foreclosure decree, in which the names of the seven villages to be foreclosed were given, but no mention was made of the *sir lands*. In execution, the mortgagee-decree-holder claimed actual possession of the *sir lands* in the seven villages.

Held, affirming the Court of Judicial Commissioner, that the conciliation award was a fresh origin of rights between the parties, and, although it came into existence in consequence of the registered mortgages and the transactions thereunder, it was, both for the purpose of enforcement and for the purpose of the application of S. 45 of the Central Provinces Tenancy Act, 1898, as amended by Act XXI of 1899, the transaction between the parties which was the foundation of their rights; and that accordingly sub-S. 1 of that section must be applied and not sub-S. 6, and the mortgagor having become an occupancy tenant of *sir lands*, the mortgagee-decree-holder could only obtain symbolical or constructive possession of the *sir lands* the physical or actual possession remaining with the mortgagor as occupancy tenant. *Narayan Ganesh Ghatate v. Ballram*, 24 M.L.T. 345 = (1918) M.W.N. 885 = 14 N.L.R. 165 = 23 C.L.J. 447, (P.C.).

LORD SUMNER, SIR JOHN EDGE,
MR. AMBER ALI and SIR WALTER
PHILLIMORE, BART.

(10) S. 46—*Applicability—Hindu Law—Widow's right of gift—Occupancy tenant—Testamentary direction for disposal of tenant right—Whether valid—Devolution of occupancy tenant right from widow.*

Where a Hindu widow being an occupancy tenant attempts to alienate anything more than her life interest, the deed of gift is invalid irrespective of the provisions of the Central Provinces Tenancy Act.

Where a Hindu during his lifetime made an abortive attempt to gift certain property to his nephew, it raises no presumption that he left authority behind to his widow to complete his intention.

An occupancy tenant cannot leave any testamentary direction for disposal of his tenant right in Central Provinces by his widow after his death.

In the Central Provinces on the death of a widowed mother the occupancy tenant right devolves by operation of law upon her daughters as co-tenants. *Kalwa v. Bhawar Singh*, 44 Ind. Cas. 1001.

STANYON, J.C.

Reference:—8 N.L.R. 22, R.

(11) Ss. 46, 47, 95—*Surrender by occupancy tenant to co-sharers—Lease of surrendered land to others—Lambardar if can claim to eject lessees—Position of lambardar. See LANDLORD AND TENANT, No. 72, 3 Pat. L.J. 89.*

6.—Central Provinces Acts—(Continued).

Act XI of 1898 (Tenancy)—(Concluded).

(12) S. 46 (3). See No. 5, *supra*.

(13) S. 46 (5)—Registration obtained by false recitals—Effect.

Where registration is obtained by deceiving the Registering Officer, the document must be considered as not registered and ineffective. **Khadak Singh v. Deepchand**, 43 Ind. Cas. 16.

BATTEN, A.J.C.

References:—13 Ind. Cas. 909; 8 N.L.R. 22; 1 N.L.R. 112, R.

(14) S. 47. See No. 11, *supra*.

(15) S. 55—Bhumak of village servant—Right to hold lands as bhumak. See **SERVICE TENURE**, No. 1, 14 N.L.R. 152.

(16) Ss. 60, 85—Lease of malik mabuza land for so long as rent paid and remission of rent for short fixed term in consideration of receipt of money advance—Lessee not constituted proprietor but only permanent sub-tenant. See **MORTGAGE (REDEMPTION)**, No. 18, 14 N.L.R. 117.

(16-a) S. 81 (b), conditions necessary to bring a case under—Rent, Suit for—Amount claimed less than Rs. 100—Second appeal, if lies. See **RENT, SUIT FOR**, No. 2, 47 Ind. Cas. 540.

(17) S. 85. See No. 16, *supra*.

(18) S. 94—Limitation—Lambardar and mortgages—Difference in the act of taking possession.

Where a person took possession of a holding *qua* mortgagee, and not *qua* lambardar, his action in taking possession as mortgagee was an action adverse to that of other co-sharers and not for the benefit of the proprietary body as a whole. Therefore there is no ground on which the limitation prescribed by S. 94 of the Central Provinces Tenancy Act applies to the case. **Bhikam Chand Gokul Chand v. Harprasad**, 45 Ind. Cas. 184.

FINDLAY, A.J.C.

(18-a) S. 94. See No. 3-a, *supra*.

(19) S. 95. See No. 11, *supra*.

(20) S. 97—Jurisdiction of ordinary Courts—Interpretation of Statutes—Determination of the nature of suit.

An act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly.

The policy of the C.P. Tenancy Act as declared in S. 97 of the Act is that all questions concerning the right of a tenant, as such, of an agricultural holding which arise out of the relationship of tenant, and landlord should, except so far as appeals are concerned, be tried by a Judge who is also a Revenue Officer.

The venue in a case is determined by the nature of the claim as laid, but not by the nature of the defence set up. **Kama v. Bhanjalal Chantanlal**, 45 Ind. Cas. 654.

BROCKMAN, J.C.

References:—19 Ind. Cas. 759; 31 Ind. Cas. 5; 4 N.L.R. 68; 8 W.R. 428; 15 A. 387, *Appr.*

6.—Central Provinces Acts—(Concluded).

Act XXIV of 1899 (C.P. Court of Wards).

S. 16 (9) (b)—Interpretation of. See **GUARDIAN AND WARD**, No. 1, 45 Ind. Cas. 192.

Act XVI of 1903 (Municipal).

(2) Ss. 52, 53—Municipality, if owner of all land within limits of Municipality—Adverse possession, Plea of, when to be raised—Points to be proved on such plea.

The land within the limits of a Municipal town is not, in the absence of evidence to the contrary, to be taken to belong to the Municipal Committee.

A claim of title by adverse possession raises a mixed question of law and fact and should, therefore, be raised in the Court of the first instance so that the opposite party may plead to the claim and evidence may be adduced thereon. A person to establish such a claim must show that his possession was adequate in continuity, in publicity and in extent to extinguish the title of the true owner (a). **Prahlad Singh v. Abdul Aziz Khan**, 47 Ind. Cas. 392.

BROCKMAN, J.

References:—(a) 27 C. 943; 14 C. 592, F.; 31 Ind. Cas. 307, R.

(2) S. 53. See No. 1, *supra*.

Act II of 1904 (C. P. Courts).

S. 15—Jurisdiction in the matter of appeal—"Value of suit", meaning of—Amendment of plaint, effect of—Appeal.

The words "value of suit" for the purposes of appellate jurisdiction, mean the value of the relief claimed by the plaintiff in his plaint. It may be the value originally claimed or original claim increased or reduced by voluntary amendment.

A Court cannot ordinarily adjudicate itself out of the jurisdiction given to it by law over a suit as instituted.

Where the value of the suit is Rs. 999-3-7, appeal from the decree of the trial Court lay to the Court of the District Judge and not to the Divisional Court, according to S. 15, C.P. Courts Act. **Dindayal v. Deonath**, 44 Ind. Cas. 287.

STANYON, A.J.C.

References:—8 C.P.L.R. 86; 20 Ind. Cas. 928; 27 Ind. Cas. 988; 20 B. 675, Diss.

7.—Madras Acts.

Act VII of 1863 (Irrigation Cess).

S. 2—"Engagement"—Whether includes natural rights of a riparian owner—Riparian land—Definition of—Riparian owner, rights of—Whether includes right of irrigation—Limits of such right—Natural rights—Whether limited to carrying water direct to land—Right to store in wells—If not included in riparian right—Indian Easements Act (V of 1889), S. 7.

Per **Sadasiva Aiyar, J.**—(1) Every riparian owner has the right to enjoy without disturbance the natural advantages arising from the

7.—Madras Acts—(Continued).

Act VII of 1863 (Irrigation Cess)—(Concl'd.).

situation of his land including the right to irrigate his land from the natural stream provided he does not by the exercise of such right cause material injury to other like owners.

Such riparian right extends not merely to lifting the water from the natural stream and carrying it to the land direct but also storing it in wells in his land temporarily as a measure of prudence before actual distribution.

(II) The Government has no right to levy a separate water-cess for the use of the water of the river in irrigating a riparian land irrespective of the fact whether the bed of the stream belongs wholly to Government or partly to Government and partly the riparian owner or wholly to the riparian owner (a).

(III) All land must be regarded as riparian land (a) when it is within the natural watershed of the stream, (b) the title to which is in one owner, and (c) the boundaries of which have been established with the requirements of the conditions which will best serve the interests of individual land-owners; but in India, riparian land must be confined to land which is on the bank of the stream and which extends from that bank to a reasonable depth inland.

Per Phillips J.—The *Uram case* (40 M. 886 = 6 L.W. 340 (P.C.)) has not decided the question whether an engagement with the Government could be implied, as arising out of the natural or prescriptive right of a riparian owner.

Per Curiam :—Where the plaintiffs, owners of certain land alleged to be situate on the bank of the Musi river, who brought a suit to question the legitimacy of the imposition of a cess by the Government for the use of the Musi water in irrigating their fields, raised *inter alia*, the ground of riparian right, for the first time, only in second appeal nine years after suit and two years after the filing of the second appeal after three remands on other questions, on the basis of the Privy Council judgment in the *Uram case* and prayed for an opportunity to adduce proof that the lands in question were riparian lands.

Held (1) that the plaintiffs ought to have adduced all their proofs on the prior opportunities and that under the circumstances of the case, they were not entitled to any further indulgence so far as the establishment of facts necessary to support their claim as riparian owners is concerned :

and (2) that there being no proof on the record that the plaintiff lands were riparian lands, the plaintiffs' claim must fail. *Emanal Lakshminarasu Aradhanulu v. Secretary of State for India*, 7 L.W. 1 = 34 M.L.J. 223 = 23 M.L.T. 235 = 13 Ind. Cas. 113.

BADASIVA AYYAR and PHILLIPS, J.J.

References :—(a) 40 M. 886 (P.C.) ; 2 L.W. 763, R. ; 40 M. 886 (P.C.), *Expt.*

7.—Madras Acts—(Continued).

Act II of 1864 (Revenue Recovery).

(1) S. 25, Revenue sale for default—Service on the pattadar who was not the real owner at the date thereof—Sufficiency of—Agreement between some of the bidders not to bid against each other—If renders the sale void.

Held, that an agreement between certain bidders before the sale that they would not bid against each other or that they would divide the property among themselves after the sale would not be a ground for setting aside the sale (a).

Quere.—If fraud would be a sufficient reason to set aside a sale under Act II of 1864 ?

Per Oldfield, J.—In regard to the question of want of notice under S. 25 of Act II of 1864.

Held that, by the real owner suffering the registry to stand in the name of another, the real owner put him forward as the ostensible owner and, as between him and the Government, the service upon the pattadar must be taken in law to be sufficient service upon the real owner (b). *Manakari Venkappa Chari v. Holagundi Pompana Gowd*, (1916) M.W.N. 191 = 7 L.W. 372 = 23 M.L.T. 297 = 45 Ind. Cas. 474.

ABDUR RAHIM and OLDFIELD, J.J.

References :—(a) 23 M. 227 (P.C.) ; F. (b) 7 M. 405, F.

(2) Ss. 38, 59—Purchase of land at revenue sale—Sale confirmed by Deputy Collector and Collector—Sale cancelled by Board of Revenue—Suit to set aside Board's order, maintainability of. See REVENUE SALE, 35 M.L.J. 177.

(3) S. 42—Section if applies to sales under Land Improvements Loans Act, S. 7 (1) (c). See MAD. ACT XIX OF 1883 (LAND IMPROVEMENTS LOANS), 31 M.L.J. 446.

(4) S. 59—Sale without notice to defaulter and purchase from him—Jurisdiction—Limitation.

Plaintiff was a private purchaser of the property in suit. His vendor had obtained a loan from Government under the Agricultural Improvements Act. Some instalments were unpaid and the property was brought to sale in 1910 under the Revenue Recovery Act but without notice to the plaintiff or his vendor. The plaintiff came to know of the revenue sale in 1912, when the purchaser tried to get possession under the Act. The plaintiff brought this suit in June 1913 more than six months after the order for possession and three years after the sale.

Held, that failure to give notice of the sale did not deprive the Collector of jurisdiction to effect the sale but was a mere irregularity and the sale was one that ought to have been set aside within six months.

Held, also, that as in any case the plaintiff had knowledge of the sale more than six months before suit, the suit was barred under

7.—Madras Acts—(Continued).

Act II of 1864 (Revenue Recovery)—(Concl'd.).

S. 59 of the Revenue Recovery Act (a). *Yadur Chinnu Nagi Reddy v. Devulani Venkatramanah*, 23 M.L.T. 231 = (1918) M.W.N. 224 = 7 L.W. 468 = 45 Ind. Cas. 653.

• SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 12 M. 168, *ff.*; 44 C. 326, *D.*

(5) S. 59—Section if applies to sale of minor's property for default in payment of Government Revenue. See *MAD. REG. X OF 1811 SALE OF MINORS' ESTATES*, 34 M.L.J. 536 (F.B.).

(6) S. 59. See No. 2, *supra*.

Act VIII of 1865 (Madras Rent Recovery).

S. 11—Enhanced rent for garden crops raised by ryots with the aid of their own wells—If enforceable without consideration—Implied contract—Nature and meaning of—What is legal consideration—Custom—How far can be invoked in support of payment of enhanced rent—Effect of acquiescence in a particular mode of disposal.

Under Madras Act VIII of 1865 (Rent Recovery Act) an agreement to pay enhanced rent for garden crops raised by the ryots with the aid of their own wells could not be enforced for want of consideration (a).

The expression 'implied contract' is an English term of art and must be construed. It involves the legal incident of some consideration moving from the landlord as that incident is understood in English law.

There must be consideration for the subsequent implied agreement to pay the garden rate and the mere letting of the land by the landlord will not do; for it was let at the dry rate already and the ryot was entitled to occupation at that rate; and no fresh consideration therefore moved from the landlord for the ryot's assumed promise to pay at the higher rate. Nor can the landlord's abstention from exercising his right to resort to the "warum system" be held to be consideration, as, under the Act, the implied contract for the four fanam rate must be enforced and there could be no question of resorting to the "warum."

Even if the question arose before the Act of 1865 was passed, in the absence of evidence, that there was any 'warum' in the village, the same result would follow.

Likewise, the landlord's forbearance from putting the tenants to trouble by raising a hopeless and groundless dispute of their right cannot be valid consideration for the abandonment of the tenant's rights.

Where a custom to charge enhanced rate for garden crops was pleaded but was negatived by the Court below, and the appellant acquiesced in its being so disposed of, the point was not allowed to be taken as a ground of appeal by their Lordships.

Their Lordships, however referring to the question of custom, laid down the following propositions.

If the custom was meant to refer to the determination of rates of rent according to

7.—Madras Acts—(Continued).

Act VIII of 1865 (Madras Rent Recovery)—(Concluded).

local usage, the evidence was irrelevant, unless and until it appeared that no contract, express or implied, had been made on the subject.

If, on the other hand, it was meant to be a general custom to enhance rent if the tenant enhanced the value of the land at his own expense, then the zemindar was asking the Sub-Collector to do what the Act forbade him to do. *Zemindar of Ettlapuram v. Alawarasa Asari*, (1918) M.W.N. 732 (P.C.).

LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI and SIR WALTER PHILLIMORE, BART.

Reference:—(a) 35 M. 134, *Affir.*

Act III of 1873 (Madras Civil Courts).

S. 14—Valuation of suit for pre-emption for purposes of jurisdiction. See *SUITS VALUATION ACT (VII OF 1867)*, 34 M.L.J. 397.

Act XIX of 1883 (Land Improvements Loans).

(1) Ss. 4, 7 (1) (c)—Sale under, free from prior incumbrances—Madras Revenue Recovery Act (II of 1864), S. 42—Whether provisions of latter Act apply to sales under former Act—Loan for agricultural improvement, if affected by work begun in anticipation of loan—First instalment of loan not utilised within period allowed by Government rules—Disbursement of second instalment before such realisation, if affected—Proviso, construction of.

The provisions of S. 42 of Mad. Act II of 1864 (Revenue Recovery) apply to a sale under S. 7 (1) (c) of the Land Improvements Loans Act (XIX of 1883), and such a sale is free of prior incumbrances (a).

The essential object for which a loan for the agricultural improvement of land is taken from the Government on the borrower's liability under the Act is not affected by the mere fact that work satisfying the term improvement was started in anticipation of the loan from the Government; nor does the fact that the first instalment of the loan was not utilised within the period allowed by the Government rules in any way affect the validity of the subsequent advances.

The words of a proviso cannot be used to extend the operation of the section to which it is attached; but where there is doubt as to the true meaning of the substantive part of a section it is surely legitimate to use the words of a proviso to it in order to determine which interpretation is correct (b). *Sankaran Numbudripad v. Ramaswamy Iyer*, 34 M.L.J. 446 = 23 M.L.T. 346 = 41 M. 691 = 8 L.W. 12 = 47 Ind. Cas. 301.

AYLING and SESHAGIRI AIYAR, JJ.

References:—(a) 7 M. 434; 25 M. 572, *D.*; 26 M. 230; 28 M. 420; 34 M. 493; 38 M. 356, *R.* (b) 39 M. 1164 (1195); *West Derby Union v. Metropolitan Life Assurance Society*, (1898) A.C. 647, *R.*

(2) S. 7 (1) (c). See No. 1, *supra*.

7.—Madras Acts—(Continued).

Act IV of 1884 (District Municipalities).

- (1) Ss. 21, 27—*Powers of Municipal Council—Court when will interfere with operations of Council.*

Under S. 21 of the District Municipalities Act, the Council of a District Municipality is a corporation with power to contract and to do all things necessary for the purpose of its constitution, the Municipal Fund being held by it under S. 27 for the purposes of the Act. And if it is keeping within its authorisation and acting *bona fide*, the Court will not interfere with its operations. It will be deemed the best judge not only of what is most conducive to its own interest, but also of what is most fitting as regards third parties, and it will be left unchecked to take or not to take lands. *Krishnaswami Iyer, In re*, 35 M.L.J. 251.

OLDFIELD, J.

References:—*Bundee Harbour Trustees v. Nicol*, (1915) A.C. 550; 22 B. 646, Dist.

- (2) S. 27. See No. 1, *supra*.

- (3) S. 53—*Carrying on business within Municipal limits, what is Profession tax—Liability to tax, facts creating, to be examined in their legal significance.*

The plaintiffs, the Clan Line Steamers, Ltd., a Company incorporated under the English Companies Act having their registered office and head office of business in Glasgow, owned a line of steamers plying between English ports and the East coast, among other places, at ports in Southern India, among them Madras and Cocanada in Godavari District. The agents for the Clan Line in Madras were Gordon Woodroffe and Co. Ripley and Co. of Cocanada, by an arrangement with Gordon Woodroffe and Co. as representing the Clan Line, disbursed the Clan Steamers at Cocanada, negotiated with the Shippers for shipment of their cargo on Clan boats and received payment by commission. The question, in this suit by the Clan Line against the Cocanada Municipality for recovery of profession tax paid under protest was whether the activities of the Clan Line at Cocanada constituted a carrying on of business there by the Clan Line within the Statute. *Held* under the circumstances of the case and the facts in evidence, that in substance the business of making contracts of the Clan Line was carried on and controlled at Madras, that the said Clan Line do not carry on the business of ship owners in Cocanada, though, Ripley and Co. at Cocanada put the name of the Clan Line on their office paper and described themselves as its agents and that the plaintiffs were entitled to a refund of the amount of tax paid by them, as the levy of the profession tax on the plaintiffs was not warranted by law. English Cases reviewed. *Clan Line Steamers, Ltd. v. Municipal Council of Cocanada*, 34 M.L.J. 145=46 Ind. Cas. 500.

COUTTS-TROTTER, J.

- (4) Ss. 172, 173—*Relation between sections and their scope—Liability of Municipality to*

7.—Madras Acts—(Continued).

Act IV of 1884 (District Municipalities)—(Concluded).

pay damage for injury caused to persons by obstacles in road under repair. See TORT, No. 1, 41 M. 538.

- (5) S. 173. See No. 4, *supra*.

Act V of 1884 (Local Boards).

S. 73—*Suit for declaration of being landholder within meaning of section—Suit for land. See AGENCY RULES (VIZAGAPATAM)*, 7 L.W. 564.

Act II of 1894 (Proprietary Estates Village Services).

S. 15—*Jurisdiction of Civil Courts to try claim to be appointed to any hereditary village office on its creation. See JURISDICTION (OF CIVIL COURTS)*, No. 10, 24 M.L.T. 489.

Act III of 1895 (Madras Hereditary Village Offices).

(1) Statutory prohibition against alienation of service lands if repealed by. See UNSETTLED PALAYAM, 34 M.L.J. 563.

(2) S. 10 (2) — *Service inam attached to karnam's office—Enfranchisement—Inam lands if vest in joint family only or also in divided branches of original grantee. See SERVICE INAMS*, No. 1, (1918) M.W.N. 849.

(3) Ss. 19, 21—*Claim to succeed to hereditary village office, Prohibition in section of Civil Courts from considering—Prohibition, if applies to claim to be appointed to any such offices on its creation. See JURISDICTION (OF CIVIL COURTS)*, No. 10, 24 M.L.T. 489.

- (4) S. 21. See No. 3, *supra*.

Act IV of 1896 (Malabar Marriage).

(1) Ss. 17, 18—*Right of female member of tarwad married under Act to claim against tarwad for herself and children, if barred. See MALABAR LAW*, No. 8, 35 M.L.J. 509.

- (2) S. 18. See No. 1, *supra*.

Act I of 1900 (Malabar Compensation for Tenants' Improvements).

(1) Ss. 3 (3), 5, 6, 9 and 19—*Act of 1887, S. 7—Onus of proving that improvements have been effected—Tenant is entitled to compensation for improvements made by any person—Increase in income if criterion of improvement to land—Reclamation of land on assurance of jenny to supply water—Commissioner's report, use of—Appointment of second Commissioner if direction for revaluation—Admissions, value of.*

Under Ss. 3 (3) and 5 of the Malabar Compensation for Tenants' Improvements Act, I of 1900, the burden is on the tenant to prove before he claims compensation that he has made the improvements or that his predecessor in interest has made them.

It is not the law that the tenant is entitled to compensation by whomsoever other than

7.—Madras Acts—(Continued).

Act I of 1900 (Malabar Compensation for Tenants' Improvements)—(Continued).

the landlord the improvements might have been effected (a).

Increase in the income is no criterion for increased value having been imparted to the lands by the tenants (b).

Under Ss. 7 and 8 of the Malabar Compensation Act of 1887, a settlement as to compensation came to in 1889 for improvements effected prior to it is not bad (c).

When the tenant reclaimed the land on the faith of a contract by the jeemi to supply water it is an improvement within S. 9 (1) of Act I of 1900, though no water was supplied. The tax payable for the water may be deducted as a cost of the cultivation in estimating the net produce.

A Commissioner's report is not to be relied upon unless supplemented by evidence of the Commissioner.

Under S. 6 (3), the appointment of a second Commissioner is not a direction for revaluation. The second Commissioner could only take into account the value prevalent when the first Commissioner made his report.

Admissions of parties should not be lightly ignored (d). *Kunnath Madampil Kunjunnal v. Mooppil Nalyar Avergal*, 35 M.L.J. 219= (1918) M.W.N. 666.

SESHAGIRI AIYAR and BAKEWELL, JJ.

References:—(a) 17 Ind. Cas. 433, *Not F.* (b) 28 Ind. Cas. 389, *criticised.* (c) 20 M. 435, *Not F.* (d) 29 A. 184 (F.G.), *F.*

(2) Ss. 5, 6, scope of—Decree in ejectment against Malabar tenant—Decree allowed to become barred by limitation—Effect—Fresh suit based on title, if and when can be brought for the same relief—Cause of action.

Per Sir John Wallis, C.J.—Ordinarily when a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, *transit in rem judicatum* and his remedy thereafter is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone and cannot again be enforced in another separate suit.

On the same principle, when a lessor sues to eject a lessee and gets a decree and allows that decree to be barred his remedy is gone and he cannot bring a fresh suit based on his title; and especially in the case of Malabar tenants, the effect of Ss. 5 and 6 of the Malabar Compensation for Tenants' Improvements Act and of the general scheme of the Act itself is to leave the decree passed under the Act for ejectment on payment of compensation to be governed by the law of limitation with regard to the execution of decrees and not to interfere with the general proposition stated above with the result that a landlord in Malabar who obtains a decree in ejectment and allows it to become barred cannot maintain another suit on his title for the same relief (a).

Per Sadasiva Aiyar, J.—When a person has obtained in one suit based on some legal title,

7.—Madras Acts—(Continued).

Act I of 1900 (Malabar Compensation for Tenants' Improvements)—(Continued).

a decree for the relief which he was entitled to as against a defendant and has allowed that decree to become barred he cannot be allowed to bring another suit for obtaining the *very same relief* against the *very same defendant* though on a different basis, provided that the latter ground of claim is founded on a right or title which existed and could have been relied upon in the first suit itself.

But if he had failed in the first suit on the basis on which it was brought he may claim the same relief in a second suit on another basis if this latter basis could be treated as affording a different cause of action. *Nynam Yeethi Mayan Kuttil v. Yalappillakath Kunhammad*, 7 L.W. 143=34 M.L.J. 167=28 M.L.T. 156=(1918) M.W.N. 205=44 Ind. Cas. 110=41 M. 641.

WALLIS, C.J. and SADASIVA AIYAR, J.

References:—(a) 23 M. 629, *Diss.*; 25 M. 800, *Rel. on.*; 29 Ind. Cas. 559, *R.*

(3) Ss. 5, 6—Mortgagee tenant—Tender of mortgage amount including compensation for improvements into Court—Tenant whether liable for mesne profits from date of tender—Construction of statute—Reference to object and preamble of Act, when permissible. *Parameswara Aiyar v. Kuttunil Yalla Mannadlar*, 33 M.L.J. 591=48 Ind. Cas. 173. See Final Part, 1917, Col. 91.

(4) S. 5. See No. 1, *supra*.

(5) S. 6. See Nos. 1 to 3, *supra*.

(6) Ss. 6 (1), (3) and (4)—Civ. Pro. Code, Ss. 4 (1), 47, O. XXXIV, rr 7 and 8—Preliminary and final decree—If applicable to suits against mortgagees in Malabar.

The Malabar Compensation Act, by S. 6, cl. 1, treats a suit in redemption as one in ejectment and provides only for one decree, *vis.*, a decree in ejectment, and has made some special departures from the Transfer of Property Act and the old Civ. Pro. Code.

The new Civ. Pro. Code, O. XXXIV, rr. 7 and 8, do not affect the Malabar Compensation Act and there could only be one decree passed in suits against mortgagees in Malabar under S. 6, cl. (1) of the Act. *Naul Nair v. Kandan Ashtamoorthi Nambudri Pad*, (1918) M.W.N. 551=8 L.W. 275=47 Ind. Cas. 914.

OLDFIELD and SADASIVA AIYAR, JJ.

(7) Ss. 9, 11—Contract as to value of improvements—Digging of tanks and channels—Reclamation of forest into paddy lands—If S. 9 applies.

S. 9 of the Malabar Compensation for Tenants' Improvements Act is intended to apply to cases where the Court has to give the entire valuation under the Act ignoring the contract, if any between the parties. There cannot be first a valuation under the contract and then under S. 9.

7.—Madras Acts—(Continued).

Act I of 1900 (Malabar Compensation for Tenants' Improvements)—(Concluded).

S. 9 deals with cases where at the time of the demise the land was of some value and an additional value was imparted to it by the labour of the tenant.

Where a forest was reclaimed from paddy fields by means of tanks and channels dug by the tenant and the contract provided for compensation at Rs. 7 per para of seed area.

Held, the tenant cannot claim compensation for the tanks and wells under S. 9 but only under S. 11 of the Act. The tenant is not entitled to the value of timber cut from the landlord's forest and utilised for constructing farm houses and granaries. *Thathamangalam Parakat Samu v. Vengannat Swaroopam Raja Yasudeva Ravi Yarna*, (1918) 41 W.N. 141 = 7 L.W. 237 = 44 Ind. Cas. 242.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—40 A 594 = (1917) M.W.N. 195, R.; (1917) M.W.N. 309, Diss.

(8) S. 9. See No. 1, *supra*.

(9) S. 11. See No. 7, *supra*.

(10) S. 19. See No. 1, *supra*.

Act I of 1902 (Court of Wards).

S. 41—*Secured creditor not notifying claim—Effect of—Court of Wards withdrawing from superintendence effect of.*

The provision as regards cessation of interest contained in S. 41 of the Madras Court of Wards Act, as regards claims not notified is final and the right does not revive when the Court of Wards withdraws its superintendence but the provision that such creditors "shall not be paid until after the discharge or satisfaction of the claims notified or admitted under S. 38" is not intended to affect the rights of secured creditors. It only prevents the Court of Wards paying such creditors out of the unincumbered fund, at its discretion and in preference to notified claims.

The secured creditor, though as not notified, is not prevented from proceeding to realise his security (a). *Silivasa Ranga Row Pantulu v. Raja Kumara Yenkata Perumal Raja Bahadur Yaru*, 7 L.W. 206 = 23 M.L.T. 127 = 41 M. 603 = 31 M.L.J. 454 = 11 Ind. Cas. 15.

WALLIS, C.J., BAKEWELL and KUMARA-SWAMI SASTRI, JJ.

Reference:—(a) (1911) M.W.N. 75. Cons. and Expt.

Act III of 1904 (Madras City Municipality).

(1) Ss. 199 145, 148—*Taxes on buildings and lands—Lease of land—Covenant by lessee to pay, building taxes—Lessor covenanting to pay land tax—Municipal tax on land as distinct from building—Incidence.*

Where a lessee of land within the Municipal limits of Madras covenanted with his lessor that he the lessee will pay . . . all taxes, rates and assessments. . . that may

7.—Madras Acts—(Continued).

Act III of 1904 (Madras City Municipality)—(Concluded).

become payable in respect of any building hereafter to be erected upon the said land . . . except only the land-tax or quit-rent payable to Government which shall be paid by the lessor.

Held that the covenant operated to modify the provisions of the Act whereby the Municipal taxes were leviable from the lessor as owner and to make the lessee liable for house tax, water and drainage and lighting taxes.

The fact that the Municipal taxes are leviable on all buildings and lands does not operate to shift the burden or a portion thereof on to the lessor under the covenant. *K. Ramachandra Aiyar v. C. Daralvelu Mudaliar*, 7 L.W. 140 = (1918) M.W.N. 130 = 43 Ind. Cas. 634.

WALLIS, C.J. and OLDFIELD, J.

(2) S. 145. See No. 1, *supra*.

(3) S. 148. See No. 1, *supra*.

Act III of 1905 (Madras Land Encroachment).

(1) S. 3—*Levy of penal assessment—Public having a right of way over a person's private land—Pathways obstructed by owner—Government, it can levy penal assessment.* *Alauddin Sahib v. Secretary of State for India in Council*, 6 L.W. 43 = 45 Ind. Cas. 30 See Final Part, 1917, Col. 91.

(2) S. 14—*Suit by person deeming himself aggrieved—Limitation—Starting point for.*

The Collector of Tanjore gave notice of eviction to the plaintiff tenant under Act III of 1905 and he was evicted in June 1914 and the building on the land was demolished. The plaintiff appeared to the Collector and final orders were passed in June 1915. The plaintiff brought the suit for possession within six months of the final orders of the Collector.

Held that the suit was barred by limitation under S. 14 of Act III of 1905. The starting point for such a suit is the date of notice and not the date of any order refusing access.

A suit for possession by such a person is a suit "for redress by a person deeming himself aggrieved by a proceeding under the Act" and is subject to the rule of limitation prescribed by S. 14 of the Act. *Secretary of State v. Sami Chettiar*, 35 M.L.J. 410 = 24 M.L.T. 358 = (1918) M.W.N. 675 = 4 L.W. 432.

SPENCER and KRISHNAN, JJ.

Reference:—3 L.W. 315, F.

Act I of 1907 (Motor Vehicles)

Omission to take out license under Act, if affects right to damages against Municipality for negligence in keeping road under repair. See TORT, No. 1, 41 M. 536.

Act I of 1908 (Madras Estates Land).

(1) Act if applies to case of inamdar owning Kudavaram also. See LANDLORD AND TENANT, 23 M.L.T. 161.

7.—*Madras Acts—(Continued).*

Act I of 1908 (Madras Estates Land)—(Old.).

(2) Ss. 8 and 8—*Acquisition through gift by one of many inamdars of kudivaram right in entire village—Lease by such inamdar of portion of such land—Suit for rent by such inamdar whether lies to Civil or Revenue Court—Inamdar, meaning of*

The plaintiff one of the fractional share holders of the Melwaram right in an inam village, that is, one of the inamdars, acquired by gift the kudivaram right in the whole village, not in a portion of it and leased a portion of it to the defendant. Held that a suit for rent should be filed in the Revenue Court. The term "Inamdar" in the exception to S 8 of the Estates Land Act should be read in its strict sense as equivalent only to "the owner of the entire interest in the inam," and the exception should be treated as applicable only to sub S (1) of S 8. *Rajachari v. Manager, Thimmugoor Devasthanam* 34 M L J 419-41 M 724-7 L W 568=(1919) M W N. 506=45 Ind. Cas. 71.

OLDFIELD and SADASIVA AIYAR JJ.

(3) Ss 3 (4) 13 (3)—*Landlord and tenant—Wells sunk by tenants on other lands of landlord to drain garden rates—Long course of payment—Implied contract—Consideration of can be implied—Mathur Kasuvu—Sadihar.*

Mathur Kasuvu and *Sadilvar* are charges incidental to the tenure of the land and are payable with rent.

An improvement which prejudicially affects another land of the landlord if made without his consent in writing, would not be an improvement of which the ryots could claim the advantage provided by S 13 (3) of the Estates Land Act.

Where the wells which irrigated ryots' holding were sunk by the ryots on lands for which the landlord might legally charge a rate but did not

Held that the landlord was entitled to charge garden rates for crops grown with the aid of water from such wells as also for second crops on dry land raised with the aid of such water.

A usage to pay enhanced rent might be the result of a valid contract. A contract to pay enhanced rent might be presumed from a continued payment for a number of years at such rates. It is equally open to Courts to imply a consideration for such a contract from the long course of payment (a) *Sri Mahant Prayaga Dass Jee v. Venkama Naidu*, 7 L W 477=(1918) M W N. 346=23 M L T 137=44 Ind. Cas. 641.

SADASIVA AIYAR and BAKERWELL JJ.

References—(a) 39 M. 84 F., 28 M L J. 136; 35 M 134 (136), R; 38 M 444, Diss., (1916) 1 M W N 237, *Not F.*

(4) Ss 8 (11), 40 (3)—*Commuation of rent—Basis for fixing rent, what is—Rent for ten years, when to be computed from—Swamibogam—"Pattam"—Rent agreed upon between*

7.—*Madras Acts—(Continued).*

Act I of 1908 (Madras Estates Land)—(Old.).

parties—If parties can go behind same—Market price. Sivannapandia Thevar v. Meenakshisundara Vinayaga Vinakaperumal Sethurayar, 6 L W 412=34 M L J. 139=41 M. 109=43 Ind. Cas. 498. See Final Part, 1917, Col. 96

(4-a) Ss. 3 (16), 20—"Tank beds" in S. 3 (16), *Explanation of—Tank beds, if communal land under S. 20—Rights of landholders over, if affected by S. 20.*

In using the expression "tank beds" in S. 3 (16) of Madras Estates Land Act (I of 1908), what the Legislature was alluding to was such class of tank beds as are cultivable, i.e. as are capable of being cultivated when the tank has become dry or when there is no water in the tank in certain years.

The rights of the land holders over tank beds capable of being cultivated or used in any such manner, are not affected by the enactment of S. 20 of the Act. *Boluwamy v. Venkatadri Appa Rao* 47 Ind. Cas. 34

ABDUR RAHIM and BAKERWILL, JJ.

(5) S 4—*Waste land—Rent, whether payable—House site—Punja rate.*

In a case where the village system of payment of rent was in vogue and the land was claimed rent for lands left uncultivated by the tenant.

Held, that the landlord is entitled to claim rent for land left uncultivated if the tenants do not establish (1) a contract or custom exempting them from payment of rent for lands allowed by them to be waste or (2) that the lands were so left was without their fault. If the land was left uncultivated through the neglect of the landlord to repair the tank the tenant is not bound to pay the rent.

For house sites the landlord can claim rent only at punja rates and not at village rates. *Ramasami Serrvaigaran v. Athivaraha Chariar*, 23 M L T 193=7 L W 471=(1918) M W N 340=41 Ind. Cas. 641.

SADASIVA AIYAR and BAKERWILL, JJ.

Reference—(a) 20 M L T 70, F.

(6) S 6 (2) See No. 15 *infra*

(7) S 8. See No. 2, *supra*

(8) S 8, cl 1—*Union of the Kudivaram interest with the right to Melwaram of Inamdar—If effects extinction of occupancy right—If the interest—If excludes Inamdar who has to pay kattubadi to Zamindar—Presumption—Occupancy right—If any exists in favour of Inamdar where tenant has none*

Where an Inamdar of a portion of Melwaram of an estate after the permanent settlement was found to own also the Kudivaram interest in the land, held assuming the finding to be correct that S 8, cl 1, applied and the effect of such union was that the occupancy right ceased to exist and there was only the Melwaram left in the landholder. Thus to whosoever the landholder thereafter lets the land to, he comes

7.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land) — (Old.).

in not as tenant of occupancy right but as a ryot of ryoti land within S. 6 (1). The mere facts that the Inamdar has to pay something by way of rent to Zamindar cannot make his interest as landholder anything less than 'entire interest' within the meaning of S. 8, cl. (1), since the ryot has to pay rent to the Inamdar alone as 'landholder.'

The words 'entire interest' were intended to exclude such interests as those of a mortgagee.

The third defendant who was admitted as a lessee and was in possession at the date of passing of the Act acquired the occupancy right therein under S. 6 of the Act.

Napier, J.—Held that the Inamdars did never acquire the occupancy right in the land in the sense that they had a permanent right of occupancy. There is no presumption that the occupancy right is in the Inamdar where it is shown that the tenant had not acquired occupancy right. The true test is cultivation and where that is not shown the Inamdar could not acquire the occupancy right under the Act. *Duddampudi Venkatarayudu v. Bikkina Subbarayudu*, (1918) M.W.N. 643 = 24 M.L.T. 376 = 8 L.W. 595.

ABDUR RAHIM and NAPIER, JJ.

References:—38 M. 843, *Diss.*; 24 C. 272; 38 M. 891, 1155; (1915) M.W.N. 1; 38 M. 891; 16 M. 371; 20 M. 299; 23 M. 318; 30 M. 592; (1916) 2 M.W.N. 180; 21 M.L.J. 803; 31 M.L.J. 339; 19 A. 46, R.

(8-a) Ss. 9, 153, 163—*Suit to eject a non-occupancy tenant holding over—Old waste—Trespasser—Jurisdiction—Revenue Court or Civil Court.*

A suit against a non-occupancy tenant of old waste who came into possession under a lease before the passing of the Act which expired after the Act came into force must be brought in the Revenue Court and not in the Civil Court. The mere fact that a lease under which a man occupies ryoti land has expired does not make him a trespasser within the meaning of S. 163 (a). *Yelikapalli Yenkeya v. Yenkatamayya Apparao*, 33 M.L.J. 757 = 43 Ind. Cas. 711.

• ABDUR RAHIM and BAKEWELL, JJ.

References:—(a) 29 M.L.J. 184; 24 M.L.J. 112; 38 M. 163; 35 Ind. Cas. 121; 21 Ind. Cas. 916; 38 M. 843, R.

(9) S. 13 (3). See No. 3, *supra*.

(9-a) See S. 13 (16). No. 4-a, *supra*.

(10) S. 26—*Proper rate, presumption as to—Faisal rate—Lower rate by contract with predecessor in title—If binding on the successor—Res judicata—If successor is a person claiming under the same legal title with the previous holders.*

Where, in a muchilika, a faisal rate was specifically mentioned, but it appeared that the ryot had been paying for over a long period a lower rate called iamabandi rate, *Held*:

7.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land) — (Old.).

Phillips, J.—That although there is no presumption raised by the Estates Land Act as in S. 11 of Act VIII of 1865, yet the faisal rate should ordinarily be taken as the proper rate that can be levied on the land.

In the absence of proof of the existence of the grounds specified in cl. (1) of S. 26 at the date of suit, any contract as to the lower rate with the previous holder cannot be binding on the successor.

Held, further, that in respect of the right of enhancement, the claim of a mittadar is peculiar to himself and it cannot be said that prior mittadars are 'persons under whom the successor claims litigating under the same title.'

Hence, a decision as between the previous holder and the plaintiff as to the rate of rent is not *res judicata* in the suit against the successor.

Held, per *Bakewell, J.*—The faisal rate must be presumed to be the proper rate and in the circumstances of the case that presumption had not been rebutted.

Unless it was shown that the previous holder had an absolute interest in the property in suit, he would not be a predecessor in title to the succeeding holder.

S. 26 (3) of the Madras Estates Land Act applies to a grant by a limited owner. A grant by him would, therefore, not be among the persons entitled to the rents after the lifetime of the landholder. *Karuppa Kayundan v. Narayana Chettiar*, (1919) M.W.N. 188 = 7 L.W. 376 = 24 M.L.T. 36 = 45 Ind. Cas. 406.

BAKEWELL and PHILLIPS, JJ.

(11) S. 26 (1). See No. 15, *infra*.

(12) S. 40—*Scope of section—Commulation of rent, Principles for determination of, and points and pleas to be taken into consideration by Courts—Maramat charges, if rent in kind.*

S. 40 of the Madras Estates Land Act, read as a whole, is intended to cover something more than a mere arithmetical calculation of averages or application of a market price to commute grain into money. The mere presence of cls. 3 (b) and 3 (c) is sufficient indication that something more than commutation in the narrowest sense was contemplated. The Collector in determining the rent to be paid is not intended to confine his attention simply to ascertaining the rent actually paid year by year and the proper market value of grain at the time of each harvest, but is authorised and directed to have regard to other considerations, viz., the ryots' plea that the rents actually levied during the decennial period were in excess of what was legally due.

Maramat charges are not "rent in kind or otherwise" within the purview of S. 40 (2) of the Estates Land Act and they lie outside the scope of the Collector's determination. *Pydi Appalastryanarayana v. Inuganti Rajagopala Rao*, 35 M.L.J. 547.

AYLING and PHILLIPS, JJ.

7.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Old.).

(18) Ss. 40, 205—Scope of.

S. 40 is distinct and imperative; the Collector finding that commutation should take place is bound to proceed to determine the money rent and the time from which commutation should have effect. If he fails to do so, it is a failure to exercise a jurisdiction vested in him justifying interference by District Collector under S. 205. *Petro Kalbalya Prasad Goswami v. Arjuna Gowda*, 43 Ind. Cas. 63.

BUTTERWORTH, B. M.

(14) S. 40 (3).. See No. 4, *supra*.

(15) Ss. 45, 163, 6 (2), 26 (1)—Rent suit against occupiers of ryoti land if within jurisdiction of Revenue Court—Indefinite grant if confers heritable right. See LANDLORD AND TENANT, No. 54, 35 M.L.J. 11.

(16) Ss. 46 (1), (3), 189—Jurisdiction of Collector where no dispute as to rate of rent—Jurisdiction of Collector to confer occupancy rights on one who is not a non-occupancy ryot—Jurisdiction of Civil Courts.

If there is no dispute about the rate of rent under the proviso to S. 46 (1) of the Estates Land Act, there is nothing in S. 139 or in the schedule to the Act to confer jurisdiction on the Collector as a Revenue Court to dispose of applications for settlement of rent or to oust the jurisdiction of the Civil Court.

Under S. 46 (3) of the said Act the right to apply for a permanent right of occupancy is conferred only on a non-occupancy ryot and the power conferred on the Collector to execute an instrument conferring it is subject to the same limitation. If he purports to confer occupancy rights on one who is not a non-occupancy ryot, he acts *ultra vires* and the jurisdiction of Civil Court is not ousted. *Madura Devasthanam v. Kondama Naloken*, 23 M.L.T. 352=47 Ind. Cas. 858.

WALLIS, C. J. and SADASIVA Aiyar, J.

(17) S. 77—Case brought under, by plaintiff allegations—Revenue Court has jurisdiction—Plea of defendant immaterial. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 7, 34 M.L.J. 309.

(18) Ss. 77, 125—Rent decrees, Execution sale under—Sale if passes property free from incumbrances. See EXECUTION SALE, No. 4, 35 M.L.J. 443.

(19) S. 125. See No. 18, *supra*.

(19-a) S. 153. See No. 8-a, *supra*.

(20) S. 163. See Nos. 8-a and 15, *supra*.

(21) S. 185—If excludes evidence of a class not mentioned in the section—*Muchilika* executed in 1904 containing admission of landlord's title—Whether admissible in evidence—Documents later than 1st July 1898—If excluded by the section.

7.—Madras Acts—(Concluded):

Act I of 1908 (Madras Estates Land)—(Old.).

S. 185 of the Madras Estates Land Act, 1908, does not exclude evidence of letting as private land after 1st July 1898 and it is open to the landlord to produce any evidence which may be relevant to prove that the land is his private land irrespective of the fact whether it is or is not one of the classes of evidence expressly mentioned in that section (a).

A document by the tenant which contains an admission of the landlord's title is relevant to prove that the land is the latter's private land even though it was executed after 1st July, 1898. *Appu Row v. Kaveri*, 7 L.W. 271=23 M.L.T. 154=(1918) M.W.N. 171=44 Ind. Cas. 519.

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 36 M. 168, *Diss.*; (1914) M.W.N. 766, R.

(22) S. 189. See No. 16, *supra*.

(23) S. 192—Provisions of Civ. Pro. Code applicable under Act. See APPEAL (SECOND APPEAL), No. 11, 34 M.L.J. 309.

(24) S. 192. See No. 25, *infra*.

(25) Ss. 205, 192—Summary rejection by Revenue Court of right of one of two rival claimants to be made legal representative of deceased plaintiff—High Court or Board of Revenue proper authority to revise such illegal order of rejection. See REVISION No. 18, 35 M.L.J. 632.

(26) S. 205. See No. 13, *supra*.

8.—Oudh Acts.

Act XIX of 1868 (Oudh Rent).

Status of under-proprietor, and of tenant—Under-proprietor declared by decree to be without right of transfer—Effect.

Under a compromise effected in 1867 between an Oudh Talukdar and a relation of his who claimed a half share in the taluk, the latter was granted the under-proprietary right in village D. Before the Settlement Officer before whom the matter came up for orders on the 8th June 1869 the grantor did not appear and the grantees to avoid further harassment agreed to the passing of a decree declaring his status to be that of an "under-proprietor without right of transfer."

Held—That the Settlement Officer's order is a contradiction and the law attaches certain rights to the status of an under-proprietor and so long as he retained that status he remained clothed with those rights which could not be divested unless and until he lost that status; and the words "without right of transfer" in the decree do not affect his rights.

Oudh Act XIX of 1868 draws a sharp distinction between an "under-proprietor" and "a tenant." *Lal Sripat Singh v. Lal Basant Singh*, (1918) M.W.N. 638=28 C.L.J. 468=22 C.W.N. 985=16 A.L.J. 817=35 M.L.J. 595=8 L.W. 828=24 M.L.T. 434=28 C.L.J. 468=21

S.—Oudh Acts—(Continued).**Act XIX of 1868 (Oudh Rent)—(Concluded).**

O.C. 180=20 Bom. L.R. 1101=47 Ind. Cas. 424 (P.C.).

VISCOUNT HALDANE, LORD DUNEDIN,
LORD SUMNER, SIR JOHN EDGE and
MR. AMEER ALI.

Act I of 1869 (Oudh Estates).

- (1) *Proclamation of Lord Canning, Effect of—Second Summary Settlement, Effect on—Governor-General's letter of 10th October, 1859, Effect of—Sanads, Grant of—Hindu widows and reversioners, Effect of confiscation and regrant of rights on—Pleadings in the alternative based on inconsistent facts—Res judicata—Civ. Pro. Code, S. 11, Expl. IV—Limitation Act, Art. 141—Pedigree, Contents of.*

The effect of Lord Canning's proclamation issued on the 15th March, 1858, was to divest all landed property from proprietors in Oudh and to transfer it to and vest it in the British Government. Where any such property was in possession of a Hindu widow at the time of the proclamation, the result of it was to destroy any interest which the lady, or, any of the reversionary heirs of her husband, had in the property.

Held, that the Second Summary Settlement in Oudh was a temporary measure and meant no more than that the person, with whom it was made, was permitted to engage for the payment of revenue for a period of three years. It did not amount in any way to the acknowledgment of the existence of any proprietary title, nor did it of itself vest the absolute proprietary and heritable right in the taluqa.

When the Governor General issued his letter of the 10th of October, 1859, it was not intended to declare any particular terms regarding the estates which were in possession of widows, and the general declaration in paragraph 2 of this letter ought to be deemed to include cases in which the person admitted to engage for the revenue was a woman. It was not the intention to bestow in any case anything less than the full estate described in the letter.

This letter purported to grant a fresh title altogether and not merely to acknowledge and restore a title which had vested prior to the confiscation and had been destroyed thereby.

Held, further, that it was not the effect of this letter and the sanads, which followed upon it, to revive all rights which might have been enforced against the talukdars prior to the time of confiscation. Such, for example, as those of the reversionary heirs of a deceased Hindu expectant on the death of the Hindu widow in possession of the estate.

The rules of pleading do not prohibit a party from alleging two or more inconsistent sets of material facts and from claiming thereunder in the alternative.

A pleading is not embarrassing, merely because it puts forward inconsistent sets of facts.

A party to a suit cannot constitute himself the arbiter of what is likely to have been

S.—Oudh Acts—(Continued).**Act I of 1869 (Oudh Estates)—(Concluded).**

embarrassing or confusing to the trial; that is a matter for the Court and must be left to the Court.

The rule laid down in Explanation IV to S. 11, Civ. Pro. Code, can only be properly applied to cases where the subject of the two suits is the same.

Held, further, that in order to constitute *res judicata*, the matter must, not only be directly and substantially in issue, but it should also be heard and decided.

There can be no decision by necessary implication, except in respect of those matters which might and ought to have been made, a ground of defence or attack.

Art. 141 of the Limitation Act (IX of 1908) lays down a rule of limitation for the suits in which it is sought to recover estates, which, having once been estates in expectancy, have been vested in the heir of the last male owner on the determination of a limited estate held by a Hindu or Muhammadan female. It does not apply to cases in which the Hindu or Muhammadan female had been in possession of the full estate. A pedigree which does not set out the various degrees of relationship in a fixed systematic order is of no value at all. *Bisheshar Bakhsh Singh v. Raja Rameshar Bakhsh Singh*, 21 O.C. 1=44 Ind. Cas. 368.

LINDSAY and STUART, JJ.

References:—Berdan v. Green, (1878) 3 Ex. D. 251; *Owen v. Morgan*, (1887) 35 Ch. D. 492; *Henderson v. Henderson*, 67 Eng. Rep. 313; 38 I.A. 166; 5 I.A. 1; 4 I.A. 308; 21 B. 709; 3 C. 645; 18 O.C. 289; 20 C. 79 11 M.I.A. 112; 14 M.I.A. 112; 37 I.A. 161 Sup. Vol. 1 I.A. 220; 3 I.A. 259; 4 I.A. 178; 8 I.A. 215; 9 I.A. 41; 26 I.A. 229, *Dist.*

(2) Ss. 13-A, 22—First exception to S. 13-A, Scope of. See WILL, No. 14, 21 O.C. 374.

(3) Ss. 15, 22, 23—Estate entered in List II and held under primogeniture Sanad—Bequest in favour of a person not a talukdar or grantee and outside the line of succession—Sanad, application of—Ordinary law, whether it includes terms of the Sanad—Hindu Law—Will, necessary elements of. *Balraj Kuar v. Mahadeo Pal Singh Babu*, 20 O.C. 360=4 O.L.J. 589=44 Ind. Cas. 59. See Final Part, 1917, Col. 110.

(4) S. 22. See Nos. 2 and 3, *supra*.

(5) S. 23. See No. 3, *supra*.

Act XVII of 1876 (Oudh Land Revenue).

S. 174—Whether protection offered by section extends to profits or acquisitions after Court of Wards releases corpus from its superintendence.

The language used in S. 174 of the Oudh Land Revenue Act points to the property which was actually under the superintendence of the Court of Wards and not to any profits that may be derived therefrom after its release or to any acquisition made from the same and

8.—Oudh Acts—(Continued).

Act XVII of 1876 (Oudh Land Revenue Act) —(Concluded).

the protection offered by that section will not be extended to such profits or acquisition. *Debi Bakhsh Singh v. Bed Nath*, 45 Ind. Cas. 219.

KANHAIYA LAL, A.J.C.

References:—24 A. 136; 38 A. 271, R.

Act XVIII of 1876 (Oudh Laws).

(1) S. 9—Muafidar when acquires status of under-proprietor.—Rent free grantee if member of village community for pre-emption purposes. See PRE-EMPTION, 21 O.C. 124.

(2) Sch. II, S. 9—Pre-emption, Right of under Oh. II.—It arises in case of sale of house by *riyaz*—Conditions essential for, under S. 9. See PRE-EMPTION, No. 14-c, 47 Ind. Cas. 673.

(3) S. 25—Transferred, Meaning of, in. See JURISDICTION (OF CIVIL COURTS), No. 9, 47 Ind. Cas. 652.

Act XXII of 1886 (Oudh Rent).

(1) S. 27—Improvement by tenant—Compensation, amount of.

Where a tenant obtained written permission from landlord for building a well in the holding and the tenant built a well therein which was worth at least Rs. 1000, held, that the Court was not justified in reducing the amount claimed as compensation, on the ground that a cheaper well would have answered the purpose of the tenant equally well, inasmuch as that plea was not put forward by the landlord and formed no part of the considerations enumerated by S. 27 of the Rent Act. *Dwarka v. Bhawati Prasad Singh*, 45 Ind. Cas. 227.

CAMPBELL, S.M. and LOVETT, J.M.

(2) Ss. 52, 141—Village, grant of, for maintenance—Grantee a tenant under special agreement under S. 52—Rent, arrears of, interest on. See LANDLORD AND TENANT, No. 40, 45 Ind. Cas. 855.

(3) Ss. 53 and 107-B—Special provision of law, applicability of, to special cases.

When there is a special provision governing a special class of cases, the latter should be dealt with under it, and not under the general provisions governing general cases. In view of this principle, S. 107-B supercedes S. 53, Oudh Rent Act, in the case of tenants holding at a favourable rate of rent.

Where the rent is deliberately and not accidentally favourable, ejectment by notice is inadmissible. *Ram Kumar v. Partab Bahadur Singh*, 44 Ind. Cas. 614=4 O.L.J. 757.

CAMPBELL, S.M. and FERARD, J.M.

References:—*Hanuman Datt v. Thakurain Sri Ram Kuar*, Selected Decisions No. 5 of 1909, Diss.

(4) S. 107-B. See No. 3, *supra*.

8.—Oudh Acts—(Continued).

Act XXII of 1886 (Oudh Rent)—(Contd.).

(4-a) S. 107-G—Declaration by Revenue Court under, a person to be a tenant—Suit by such person that he is under-proprietor, not a tenant, maintainability of, by Civil Court. See JURISDICTION (OF CIVIL COURTS), No. 9, 47 Ind. Cas. 652.

(5) S. 107-H—Under-proprietary right, Declaration of—Civil and Revenue Courts, jurisdiction of, to declare. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 6, 46 Ind. Cas. 357.

(6) S. 107-H—Declaration under section necessary for muafidar to become under proprietor. See PRE-EMPTION, No. 18 21 O.C. 124.

(7) S. 108—Jurisdiction of Revenue Court—Jurisdiction of Civil Courts.

Where a superior proprietor issued a notice of ejectment against an under-proprietor, who contested it and succeeded in getting it cancelled in a Revenue Court, on the ground that he was a *Zamindar*, held that such an adverse order by the Revenue Court against the superior proprietor was enough to set limitation running as against him and his successors in interest.

S. 108, Oudh Rent Act, gives to the Revenue Courts exclusive jurisdiction over suits for the recovery of the occupancy of any land which has been treated by the landlord as abandoned or from which an under-proprietor or a tenant has been illegally ejected by the landlord. It does not, however, give to the Revenue Court exclusive jurisdiction to decide questions of under-proprietary title or the right to under-proprietary possession. It does not oust the jurisdiction of the Civil Courts, to decide whether or not a person in possession of land holds a proprietary or under-proprietary right therein. *Khadija Hussain v. Jamil Bibi*, 44 Ind. Cas. 557=4 O.L.J. 577.

KANHAIYA LAL, A.J.C.

References:—13 O.C. 189, R., 3 O.C. 167; 4 O.C. 267; 8 O.C. 30; 16 O.C. 105; 12 O.C. 90; 20 O.C. 8, *Appr.*

(8) Ss. 120 A, 135—Power of Oudh Judicial Commissioner's Court to review its decision in rent appeal. See REVIEW, No. 6, 21 O.C. 254.

(9) S. 127—Ejectment by notice—Mortgagor, Possession of mortgaged land by, as lessee and holding over, Position of. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 5, 46 Ind. Cas. 73.

(10) S. 135. See No. 8, *supra*.

(11) S. 141. See No. 2, *supra*.

(12) Chap. 7 A—Thikadar—Enhancement of rent.

Chapter 7-A of the Oudh Rent Act (XXII of 1886) applies to the *thikadars*, and consequently a favourable rent payable by the *thikadar* or person to whom the Collector of rents in a *mausa* has been leased, is liable to be enhanced in the circumstances and subject to the

8.—Oudh Acts—(Concluded).

Act XXII of 1886 (Oudh Rent)—(Concl'd.)

condition therein provided. **Rani Parbati Kanwar v. Deputy Commissioner of Kheri**, 24 M.L.T. 292=28 C.L.J. 449=35 M.L.J. 525=16 A.L.J. 865=40 A. 541=8 L.W. 586=(1918) M.W.N. 980=20 Bom. L.R. 1095=23 C.W.N. 125=47 Ind. Cas. 394 (P.C.).

VISCOUNT HALDANE, LORD DUNEDIN,
LORD SUMNER, SIR JOHN EDGE and
MR. AMBER ALI.

9.—Punjab Acts.

Act IV of 1872 (Punjab Laws).

S. 5—Presumption in favour of custom. See CUSTOM, 16 A.L.J. 17 (P.C.).

Act XVI of 1877 (Tenancy).

(1) S. 77—Suit for possession—Plea of defendants that they were at tenants-at-will, but occupancy tenants. Plea of defendants determines jurisdiction. See JURISDICTION (OF REVENUE COURTS), No. 9, 68 P.W.R. 1918.

(2) S. 77 (3) (d)—Suit by landlord against reversioners of deceased occupancy tenant to recover his holding alleged to have wrongly been taken possession of by them—Suit if falls within section. See JURISDICTION (OF CIVIL COURTS), No. 11, 179 P.W.R. 1918.

Act XVI of 1887 (Punjab Tenancy).

(1) S. 3. See No. 18, *infra*.

(2) S. 4. See No. 4, *infra*.

(3) S. 4 (6)—Landlord if includes mortgagee in possession. See PRE-EMPTION, No. 29, 149 P.W.R. 1918.

(4) Ss. 4, 11, 50, 51, 77 (3) (7)—Decree for possession obtained by tenant against landlord dispossessing him—Suit by tenant for compensation against landlord after more than one year from dispossession—Suit lies in Revenue Courts. See JURISDICTION (OF REVENUE COURTS), No. 3, 50 P.W.R. 1918 (F.B.).

(5) S. 8—Condition essential for acquiring occupancy tenancy under section. See OCCUPANCY TENURE, No. 10, 5 P.W.R. 1918 (Rev.) and App.

(6) Ss. 8, 77, 100—Application to serve notice of ejectment on tenant—Suit by tenant in Revenue Court contesting liability to ejectment—Allegation of occupancy tenure—Dismissal of suit—Subsequent suit in Civil Court for possession of land as occupancy tenant—Suit cognizable by Revenue Court. See JURISDICTION (OF REVENUE COURTS), No. 11, 147 P.W.R. 1918.

(7) S. 18—Mortgagee's right to commute rent in kind into cash rent. See LANDLORD AND TENANT, No. 74, 3 P.W.R. 1918 (Rev.).

(8) Ss. 14, 77 (3) (n)—Plaintiff not in possession of land, though entitled to it during period for which suit for mesne profit brought—Revenue Court if can try suit. See JURISDICTION (OF REVENUE COURTS), No. 7, 53 P.W.R. 1918.

9.—Punjab Acts—(Continued).

Act XVI of 1887 (Punjab Tenancy)—(Concl'd.).

(9) S. 14. See No. 4, *supra*.

(10) S. 19 (2)—Application for appraisal of produce—Omission to confirm or vary order—Refusal by tenant to accept result of appraisal—If valid reason for declining to confirm it—Landlord's right to share of produce—Appraisal record admissible for ascertaining share due to landlord. See LANDLORD AND TENANT, No. 75, 4 P.W.R. 1918 (Rev.).

(11) S. 50. See No. 4, *supra*.

(12) S. 51. See No. 4, *supra*.

(13) Ss. 56, 111—Unrestricted power of alienation by occupancy tenants—*Wajib-ul-ars*. See MORTGAGE (REDEMPTION), No. 22, 26 P.W.R. 1918.

(14) S. 59—Succession to occupancy holdings—Finding of fact based on conjecture if conclusive in second appeal. See APPEAL (SECOND APPEAL) No. 24, 102 P.W.R. 1918.

(15) S. 59—Joint tenants recorded as having defined shares in occupancy tenancy—Single tenancy with benefit of survivorship collectively constituted—Death of one of joint tenants if extinguishes occupancy right. See OCCUPANCY TENURE, No. 11, 95 P.W.R. 1918.

(16) S. 77. See No. 6, *supra*.

(17) S. 77 (3 a). See No. 20, *infra*.

(18) S. 77 (3-g). See No. 4, *supra*.

(19) S. 77 (3-n). See No. 8, *supra*.

(20) S. 77 (3) (a)—Suit for possession of land held by deceased occupancy tenant—Claim by defendant of being in possession by virtue of gift from last occupancy tenant—Suit cognizable by Revenue Court. See JURISDICTION (OF REVENUE COURTS), No. 10, 141 P.W.R. 1918.

(21) S. 100. See No. 6, *supra*.

Act XVII of 1887 (Land Revenue).

(1) Ss. 3, 110, 111, 125—Rights of mortgagee to intervene in partition proceedings. See PARTITION, No. 4, 2 P.W.R. 1918 (Rev.).

(1-a) S. 36, cls. (1) and (2)—Power of Revenue Officer under S. 36 (2), to eject third party in possession—Applicability of section—Power of Revenue Officer to order entry as to ownership—Such order if order of competent Court under S. 146 (1) of Crim. Pro. Code. See MUTATION PROCEEDINGS, 1d Ind. Cas. 216.

(1-b) Ss. 45, 48 and 158 (1)—Declaratory suit by Jagirdar to receive revenue in kind—Civil Court, Jurisdiction of, to entertain. See DECLARATORY SUIT, No. 6-a, 110 P.W.R. 1918.

(1-c) S. 48. See No. 1-b, *supra*.

(2) S. 110. See No. 1, *supra*.

(3) S. 111. See No. 1, *supra*.

(3 a) S. 117—Revenue Officer, Decision of, in partition proceedings as to measure of parties' rights in *shamilat*, if *res-judicata*.

9.—Punjab Acts—(Continued).

Act XVII of 1887 (Land Revenue)—(Concluded).
when proceedings neither in essence nor form proceedings under. See RES JUDICATA, No. 87-a, 105 P.R. 1918.

(4) S. 125. See No. 1, *supra*.

(5) S. 144—Division of produce by Revenue Officer—Division in spite of objection by a party—Punjab Tenancy Act (XVI of 1887), Ss. 12, 17, 18, 19. *Muhammat Murad Bibi v. Khadim Hussain*, 9 P.R. 1917 (Rev.)=43 Ind. Cas. 495. See Final Part, 1917, Col. 118.

(5-a) S. 158 (1). See No. 1-b, *supra*.

(6) S. 158 (2) (xvii)—Legal right to claim partition to be decided by Civil Courts—Question whether partition allowable to be decided by Revenue Courts. See JURISDICTION (OF CIVIL COURTS), No. 12, 123 P.W.R. 1918.

Act I of 1900 (Punjab Limitation).

Suit for possession by reversioner after death of alienor's widow—Death of alienor after Punjab Limitation Act came into force—Suit governed by what Act. See LIMITATION ACT (1908), No. 193, 95 P.R. 1918.

Act XIII of 1900 (Alienation of Land).

(1) S. 10—Mortgage of revenue paying land made after commencement of Act—Condition operating by way of conditional sale, validity of. See MORTGAGE (CONDITIONAL SALE), No. 4, 27 P.L.R. 1918.

(2) S. 10—Clause as to conditional sale in mortgage created by decree of 1909, Validity of—Right of mortgagor to redeem. See MORTGAGE (REDEMPTION), No. 20, 56 P.R. 1918.

(3) S. 16—Sale—Land—Mortgage—Debt due to a member of an agricultural tribe not saleable in execution of money decree.

Held that in execution of a money decree against a member of an agricultural tribe the mortgage-debt due to him cannot be sold by separating the debt from security of land inasmuch as under S. 16 of the Punjab Act, XIII of 1900, the sale of his mortgage rights in revenue paying land is prohibited and the sale of the debt would naturally carry with it the security. *Lal Chand v. Allah Dad*, 16 P.L.R. 1918=16 P.R. 1918=37 P.W.R. 1918=44 Ind. Cas. 528.

RATTIGAN, C.J. and CHEVIS, J.

References:—39 P.R. 1918=102 P.W.R. 1918; 20 B. 305, R.

Act I of 1904 (Loans Limitation).

Suit to enforce claim in respect of grain advances—Extension of time under this Act if permissible. See LIMITATION ACT (1908), No. 185, 41 P.R. 1918.

Act III of 1911 (Punjab Municipalities).

(1) Ss. 86, 242—Profession tax, Levy of—Munsif, whether follows profession—Jurisdiction of Civil Courts to determine legality of tax—Suit for recovery of amount paid as tax, whether cognisable by Small Cause

9.—Punjab Acts—(Continued).

Act III of 1911 (Punjab Municipalities)—(Concluded).

Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 1.

Held, that the power conferred by the special Act on a local authority to impose a particular tax for particular purposes in a specified manner does not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers.

A Civil Court has jurisdiction to determine the question whether the imposition of tax is illegal and *ultra vires* and to give relief, if a tax has been levied from a person who is not liable to pay the same.

The Punjab Government imposed a profession tax in the Una Notified Area and the plaintiff a Munsif, was assessed to pay the tax. He paid it under protest and then brought a suit for the recovery of the amount.

Held, (1) that the suit was not one concerning an act purporting to be done by any person by order of the Local Government and was not, therefore, excluded from the jurisdiction of a Court of Small Causes;

(2) that the Munsif could not be said to follow a profession in the popular sense of the term and the Government could not have intended that he should be liable to pay a profession tax. *The Committee of Notified Area, Una, District Hoshiarpur v. Chahar Behari Narain*, 74 P.L.R. 1918=74 P.W.R. 1918=44 Ind. Cas. 910.

SCOTT-SMITH, J.

(2) S. 121—Order under section—Court's power to interfere with such order. See JURISDICTION (OF CIVIL COURTS), No. 13, 135 P.W.R. 1918.

(3) S. 242. See No. 1, *supra*.

Act I of 1913 (Pre-emption).

(1) S. 3 (3)—Pre-emption—Mahatpur in Tehsil Nakodar, Jullundhur District, is a village.

Held, that Mahatpur in Tehsil Nakodar of the Jullundhur District is a village for the purpose of the Punjab Pre-emption Act (I of 1913). *Ram Kishan v. Ganga Ram*, 65 P.W.R. 1918=46 Ind. Cas. 173.

SHADI LAL, J.

(2) S. 15 (a) and (b) Thirdly—Claim to pre-emption of sister and sister's son. See CUSTOMS (PUNJAB—SUCCESSION), No. 2, 65 P.R. 1918.

(3) Ss. 19, 20—Notice to pre-emptor not specifying property to be sold or its price, whether valid—Omission of pre-emptor to reply to notice—Suit, whether maintainable.

In a suit for possession by pre-emption, it appeared that the vendor on the 13th June, 1918, applied to the Court stating that he proposed to sell certain property and praying that action be taken under S. 19 of the Punjab Pre-emption Act and notices issued to persons

9.—Punjab Acts—(Continued).**Act I of 1913 (Pre-emption)—(Concluded).**

entitled to pre-empt. The Court issued the notices, but in those notices there was no mention of the actual property to be sold or of the price at which it was to be sold. The notices were served on 16th June, 1913, and the 1st of July was fixed for the appearance in Court of the persons to whom they were issued. On that date plaintiff appeared and protested that the notice had not given him all the requisite information. Thereupon the Court handed over to him for perusal the original application of the vendor and on the same day he filed certain pleas with regard to the price, etc. The hearing was adjourned to the 21st of July and on that date to the 11th of August, when a further postponement to the 12th of November was ordered. On that date the Court recorded an order to the effect that none of the parties was present, but that the three months' limitation had expired and that the proceedings should, therefore, be filed. On the 9th June, 1914, the vendor sold the land and the plaintiff instituted his suit on the 8th June 1915.

Held, (1) that under the circumstances there was sufficient notice of the sale given to the plaintiff within the meaning, and for the purposes of S. 19 of the Pre-emption Act but that on the other hand the plaintiff had failed to prove that he had complied with the provisions of S. 20;

(2) that the right of pre-emption had been extinguished before the suit was instituted and the plaintiff was, therefore, not entitled to any relief. *Jessa Ram v. Mehr Chand*, 104 P.W.R. 1918=45 Ind. Cas. 935.

RATTIGAN, C.J.

Reference:—53 P.R. 1917=115 P.W.R. 1917=41 Ind. Cas. 206, R.

(4) S. 20. See No. 3, *supra*.

(5) S. 25—"Fixed in good faith or paid," meaning of—*Paying more than market value to deter pre-emptors, whether permissible—Difference between S. 22 of Act II of 1906 and S. 25 of Act I of 1913, pointed out. Thakar Singh v. Nabl Bakhsh*, 67 P.W.R. 1917=138 P.L.R. 1917=39 Ind. Cas. 735=2 P.R. 1919. See Final Part, 1917, Col. 122.

(6) S. 30—Applicability of, to suit for pre-emption *vs* sale of land and of share in Shamlat. See LIMITATION ACT (1908), No. 110, 68 P.R. 1918.

Act III of 1914 (Punjab Courts).

(1) Interference with interlocutory orders by Chief Court. See REVISION, 58 P.L.R. 1918.

(2) S. 41 (3)—Question of onus of proof of custom—Question if one in which certificate of second appeal should be given—*Srivya Jats of Tahsil Kharian, Gujrat District—Right of collaterals of ninth degree to succeed to sonless Jat—Daughter—Sister*.

Where, in a suit for possession of the land of a deceased *Srivya* Jat of Tahsil Kharian, District Gujrat, filed against his sister who had got

9.—Punjab Acts—(Concluded).**Act III of 1914 (Punjab Courts)—(Concluded).**

into possession of it on the death of the Jat's daughter, the lower appellate Court's refusal to grant a certificate under S. 41 (3), Punjab Courts Act, on the ground that the question of onus was a question of law, was held to be erroneous and that Court was directed to reconsider the question, because the question of onus arising in the case, not being a question of law pure and simple but a mixed question of law and custom it can be raised in second appeal only on a certificate under S. 41 (3).

The question of *onus probandi* in a custom case is not a pure question of law unconnected with custom; on the other hand it is not, under all circumstances, a question relating to the validity or the existence of a custom exception so far as, in proving or disproving the validity or existence of custom, a party to a suit may be held to be entitled to an initial presumption in his favour on the strength of a generally accepted rule of custom as laid down by judicial decisions or otherwise (a). *Musammam Bhai v. Khannu*, 7 P.R. 1918=44 Ind. Cas. 162.

SHAH DIN, C.J. and LE-ROSSIGNOL, J.

References:—(a) 4 P.W.R. 1914; 96 P.R. 1915, F.

(2-a) S. 41 (3)—Certificate granted under—Second appeal, Admission of, where certificate not in strict compliance with wording of section. See APPEAL (SECOND APPEAL), No. 17-a, 145 P.L.R. 1917.

(2-b) Ss. 41 (3), 44—Refusal to grant certificate. See REVISION, No. 22, 18 P.R. 1918.

(3) S. 41—Suit erroneously held to be within time or barred by application of wrong article of limitation. See LIMITATION ACT (1908), No. 138, 129 P.W.R. 1918.

(4) S. 44—Application of wrong article of Limitation Act—Error a ground under S. 44 of Punjab Courts Act, 1914. See REVISION, No. 26, 59 P.L.R. 1918.

10.—United Provinces Acts.**Act II of 1901 (Agra Tenancy).**

(1) S. 10—Proprietor of mahal making usufructuary mortgage of his share—*Usufructuary tenancy of sir and khudkasht—Agreement with mortgagees to pay a certain rent for each land—Whether suit by mortgagees alone for such rent maintainable—Estoppel—Scope of S. 10 whether law forbids that an agreement between parties to pay certain rent should not be taken into account by Assistant Collector.*

The defendant was a proprietor in a certain mahal. He had in his possession lands of three descriptions, namely, *sir*, properly so called, *khudkasht*, cultivated as such for over 12 years and having all the incidents of *sir* though not so recorded and *khudkasht* of less than 12 years. He made a usufructuary mortgage of his share to the plaintiff and

10.—United Provinces Acts—(Continued)
Act II of 1901 (Agra Tenancy)—(Continued).

entered into a contract with him to the effect that he would hold all the lands of each of the three descriptions as tenant of the plaintiff at a certain specified rent for each class of land. Plaintiff brought three suits for arrears of rent. The defendant, *inter alia*, contended (1) that the plaintiff was not entitled to sue alone, the right to collect the rents of these lands being vested in the entire body of the co-sharers of the mahal, and (2) that the rent agreement between the parties was unenforceable being in contravention of S 10 of the Tenancy Act. — **Held** (1) that the defendant was estopped from raising the first plea inasmuch as he had entered into a rent agreement with the plaintiff in respect of these particular lands, and (2) that the Revenue Court was not precluded from accepting an agreement whereby the defendant undertook to pay to the plaintiff a certain rent for the ex propriety holdings.

The provisions of S 10 of the Tenancy Act fix a maximum rent, but the parties are not thereby prevented either from contracting for the payment of a lower rate of rent, or from coming to a compromise with reference to S 10 as to what rent is likely to be fair and they may agree to pay the same. Such an agreement is not enforceable in itself, who is wanted, in order under S 10, cl 5, fixing the rent to be paid by a proprietary tenant, but the law does not lay down that this order cannot be based upon an agreement come to between the parties or that its terms cannot be taken into account. **Jahangira v Karrar Hussain**, 16 A.L.J. 212=44 Ind. Cas. 513.

PIGGOTT and WALSH, JJ.

- (2) Ss. 10, 21.—Two documents executed on the same day—Usufructuary mortgage of sic land with covenant that mortgagors will not set up ex propriety rights—Deed of relinquishment of ex propriety possession of such land given to mortgagors. One transaction under colour of two deeds—Covenants void—Invasion of law.

If a covenant to relinquish the sic lands is part of transaction to sale or usufruct, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If a Court is satisfied that the c was first of all a transaction by way of sale or mortgage and that the transferee, having obtained the status of an ex propriety tenant, with full knowledge of that fact and of the rights preserved to him by statute, deliberately chooses as a separate transaction, to relinquish his ex propriety tenancy into the hands of the new proprietor, or of the mortgagee in possession, the law cannot protect a reckless and imprudent man against the consequence of his own acts. **Mir Dad Khan** and others owned certain zemindari property with 90 bighas of sic land. They were indebted to certain persons for a sum of Rs. 9,000. On June 19th, 1913, two documents were executed by one of which the zemindars covenanted to mortgage with possession the 90

10.—United Provinces Acts—(Continued).
Act II of 1901 (Agra Tenancy)—(Continued).

bighas of sic. The mortgage-deed contained not merely an express stipulation to put the mortgagors in actual cultivating possession of the sic lands, but a penalty clause binding the mortgagors not to assert their rights as ex propriety tenants. By the other document, which was a deed of relinquishment, the mortgagors purported to surrender or to relinquish in favour of the mortgagees, in lieu of Rs. 1,000, their rights as ex propriety tenants in the 90 bighas of sic. — **Held** that the transaction was one single transaction effected under cover of two deeds, and the covenants relating to the surrender of ex propriety rights and the transfer to the mortgagees of actual cultivating possession thereon were void and unenforceable, the attempt in this way being to evade the provision of Ss. 10 and 20 of the Tenancy Act. **Mir Dad Khan v Ramzan Khan**, 16 A.L.J. 329=40 A. 449=44 Ind. Cas. 948.

PIGGOTT and WALSH, JJ.

References.—39 A. 173, 31 A. 389, 6 A.L.J. 713, **Maas v. Pepp v.** (1905) A.C. 103, R.

- (3) S. 20.—Transfer—Occupancy tenancy acquired by a member of joint Hindu family. Profit thrown in to common stock—Whether such property may be joint family property—Personal law of the parties inapplicable.

A special statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters.

Hence, where a zamindar granted the lease of certain land to M, who formed with certain other persons a joint Hindu family, and it was found that M threw the profits derived from this land into the common stock of the joint family, **held** that the tenancy did not become part of the assets of the joint family, inasmuch as its doing so would amount to the Court sanctioning the transfer of a tenancy otherwise than under S. 20 of the Tenancy Act. **Kalla v. Sital** 16 A.L.J. 225=40 A. 314=44 Ind. Cas. 717.

PIGGOTT and WALSH, JJ.

- (4) S. 21. See No. 2, *supra*.

- (5) S. 22.—Occupancy holding. Succession.

Several persons were entitled to an occupancy holding. The holding is between the Zemindar and the persons entitled thereto was one holding of which the rent was jointly paid. One Bhim Sen was in possession of a three eighths share. The plaintiffs who were the nearest reversioners of Bhim Sen brought a suit against one Roshan Singh to recover possession thereof. Bhim Sen died before the Tenancy Act came into operation and was succeeded by his widow, who died after the Act had come into force. The plaintiffs cultivated the "holding" jointly with Bhim Sen, but they did not cultivate the particular plots constituting Bhim Sen's share. The suit was dismissed on the ground that the plaintiffs did not share in the cultivation with Bhim Sen of his plots. — **Held** that S. 22 of the

10.—United Provinces Acts—(Continued).**Act II of 1901 (Agra Tenancy)—(Continued).**

Tenancy Act did not apply, and the plaintiffs were entitled to succeed. *Bhup Singh v. Jai Ram*, 16 A L J. 459=46 Ind Cas 387

RICHARDS, C.J. and BANERJI, J.

- (6) S. 34—*Person occupying land without consent of landlord—Ejectment decree in Revenue Court—Usufructuary mortgage of sir before Tenancy Act—Mortgagee in possession—Dispossession by person owning equity of redemption—Status of such owner.*

Plaintiffs were in possession of certain plots of sir land under a usufructuary mortgage made prior to the passing of the Agra Tenancy Act. Defendants who had acquired a part of the equity of redemption managed to get into possession of those plots, whereupon the plaintiffs sued to eject them in the Revenue Court. The defendants denied the relationship of landlord and tenant and also raised other pleas. They were referred by the Revenue Court to the Civil Court. The Civil Court held that the plaintiffs were entitled to remain in exclusive possession as mortgagees and that the defendants had acquired a share in the equity of redemption. In accordance with this decision the Assistant Collector held that the defendants were non-occupancy tenants and he decreed their ejectment—*Held* that the defendants had been properly ejected under S. 34 of the Tenancy Act.

Per Walsh, J.—The words “a person occupying land without the consent of the landlord” (in S. 34 of the Tenancy Act) mean one who enters into occupation without express consent or without any previous arrangement. *Jagardeo Singh v. Ali Hamad*, 16 A.L.J. 249=40 A 300=44 Ind Cas 919

PIGGOTT and WALSH, JJ

References—(a) 9 A L J. 771, 33 Ind Cas 70, F. 35 A 512 (F B), commented upon

(7) Ss. 57, 65, 167—*Cutting down of trees on occupancy holding if not detrimental to land—Suit for such act if lies in Civil Courts* See LANDLORD AND TENANT, No. 2, 16 A L J 621.

(8) S. 50—*Ejectment suit under section decreed—Dismissal of appeal to District Judge—Power of High Court to interfere* See REVISION, No. 9, 16 A L J 859.

(9) S. 65. See No. 7, *supra*.

(10) S. 95—*Suit for declaration under section—Court-fee for suit* See COURT FEES ACT (VII OF 1870), No. 30 16 A L J. 167.

(11) Ss. 95, 167—*Jurisdiction of Civil Courts and Revenue Courts—Suit for occupancy right*

Where both parties come into Court admitting that there is a plot of land held under occupancy rights and each party claims to be entitled to the holding, then the matter is within the jurisdiction of a Civil Court, where both parties claim the position of *samindar* and occupancy tenant according to what suited

10.—United Provinces Acts—(Continued).**Act II of 1901 (Agra Tenancy)—(Continued).**

their interest, then such a matter is exclusively within the jurisdiction of a Revenue Court, according to the provisions of Ss. 167 and 95, Agra Tenancy Act. *Madan Lal v. Mansur Ahmad*, 43 Ind Cas. 652.

RICHARDS C.J. and BANERJI, J.

(12) Ss. 95, 177 (f) See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 1, 40 A. 177.

(13) S. 150—*Muafi land—Resumption—Proprietor—Perpetual lessee entitled to resume.*

In S. 150 of the Agra Tenancy Act, the Legislature has used the word “proprietor” and not “landholder,” and it may thereby have intended that the right to resume should lie only in the proprietor and nobody else. Consequently, a holder of a perpetual lease of certain land, under which the lessor reserved to himself the right to receive an annual payment together with the right to re-enter in case of default, is a proprietor of the *mahal* for the purposes of S. 150 and is entitled to resume. *Mata Badal Singh v. Gourish Narain Singh*, 16 A L J. 619=40 A 656=46 Ind. Cas. 920.

TUDBALL and RAOOF, JJ

(14) Ss. 154, 158—*Resumption—Rent free grant—Portion of area converted into grove—Character of area not altered—Grant held for fifty years and by two successors to original grantee—Land not liable to resumption.* *Muhammad Isa Khan v. Muhammad Khan*, 15 A L J 867=40 A 60 See Final Part, 1917, Col. 105.

(15) Ss. 158, 167—*Suit for resumption of rent free grant—Court in which suit to be instituted* See JURISDICTION (OF REVENUE COURTS), No. 1 16 A L J 881

(16) S. 158. See No. 14, *supra*

(17) S. 164—*Suit for profits—Co sharer in possession of sir and khudkash in excess—Basis of calculation of profits*

Where some of the co sharers in a *mahal* are found to be in possession of considerable areas as sir and *khudkash*, in calculating the profits the following matters should be taken into consideration—(1) Where different co sharers are entitled to different portions of the *mahal* as their sir and *khudkash*, he would not be obliged to account for those profits to other co sharers, (2) if, on the other hand, any co-sharer had in his hands and in his own cultivation an excess of land, over and above his proper share of sir and *khudkash* he should account for the excess. In this case the quality of the land in excess will have to be taken into consideration, (3) if some of the co-sharers neglect to cultivate their sir and *khudkash* they cannot call upon the others to account for the profits of the sir and *khudkash* of those co-sharers unless such sir and *khudkash* were in excess of their own. *Angad Singh v. Zurawar Singh*, 16 A L J 146=44 Ind. Cas. 542.

RICHARDS, C J. and BANERJI, J.

10.—United Provinces Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

- (18) S. 164—*Suit for profits against lambardar—Death of lambardar during pendency of suit—Suit continued against representative of lambardar—Liability of such representative—Construction of statute.*

The word 'defendant' in sub-S. (2) of S. 164 of the Agra Tenancy Act contemplates the original defendant to a suit, and therefore the amount to which the plaintiff would be entitled would include such sums as remained uncollected owing to the negligence or misconduct of the original defendant, that is of the lambardar. In view of the provisions of S. 164, the question of gross negligence or misconduct of the original lambardar would have to be gone into and if such negligence or misconduct was shown, his representative would be liable to the extent of assets of the deceased which came into his hands. The liability, however, of the representative of the lambardar would not be a personal liability. The assets of a deceased lambardar should not escape liability simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct, happened to die after the expiry of the year during which the collections had to be made.

A suit for profits actually collected and also such as remained uncollected owing to his gross negligence and gross misconduct was brought against a lambardar. He died during the pendency of the suit and his legal representative was made defendant in his place. He contended that he would not be liable for such sums as were left uncollected owing to the negligence and misconduct of the original defendant:—*Held* that he would be liable for such sums, the decree being confined to the assets of the deceased lambardar in his hands. *Bharath Singh v Tej Singh*, 16 A L J 193 = 40 A 216 43 Ind Cas 636 (F B)

BANERJI, PIGGOTT and WALSH, JJ

References.—10 A. 73; 29 A. 15, D.

- (19) S. 164—*Suit by co owner for his share of profits Interest on the amount—Whether lambardar liable.*

In a suit by a co sharer against the lambardar for his share of profits with interest thereon, *held* that, as the lambardar had falsified the accounts, he is liable to pay interest on the amount of profits found due to plaintiff. *Dori Lal v Ram Charan Lal*, 44 Ind Cas. 415 = 4 O.L.J. 708

LINDSAY, J O.

Reference.—6 O.C. 89, Dist.

(20) S. 167—*Ejectment suit in Revenue Court—Defendant ejected as sub tenant—Suit in Civil Court by defendant for declaration of title as co-tenant, if maintainable.* See JURIS DICTION OF REVENUE COURTS, No. 2, 16 A.L.J. 938.

- (21) S. 167. See Nos. 7, 11 and 15, *supra*.

10.—United Provinces Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

- (22) Ss. 175, 177, 193, scope of—*Order staying or refusing to stay a suit pending in Revenue Court—Whether appeal lies to Civil Court from such order.*

S. 175 of the Agra Tenancy Act applies to all appeals, whether these be appeals to the Revenue Court itself or to the Civil Court. S. 177 deals with appeals which lie to the Civil Court and a right of appeal is only given against a "decree," and then only in certain class of cases. No appeal is given against an "order."

Consequently an order staying a suit in the Revenue Court or an order refusing to stay such suit is not a "decree" within the meaning of S. 177 of the Tenancy Act, and no appeal lies to the High Court against such an order. S. 193 of the Act by incorporating the Civ. Pro. Code gives an appeal to the Revenue Court and not to the Civil Court. *Kirpa Devi v. Ram Chander Sarup*, 16 A L J 231 = 40 A 219 = 48 Ind Cas. 531.

RICHARDS, O J. and BANERJI, J.

- (23) Ss. 177 198—*Suit in ejectment in Revenue Court—Defendant denying tenancy from plaintiff—Allegation of lease from other persons—Question of proprietary title in issue in Court of first instance—Appeal—Jurisdiction of Civil Court*

Where in a suit for ejectment instituted in the Revenue Court the defendants pleaded that they were not the plaintiff's tenants but that they were lessees from other persons and the plaintiff had no right to sue them, *held* that this was a question of proprietary title which was in issue in the Court of first instance and was in issue in the appeal, hence an appeal lay to the Civil Court. *Har Prasad v Tajammal Hussain*, 16 A L J 239 = 44 Ind Cas. 720.

BANERJI and TUDBALL, JJ.

- (24) S. 177. See No. 22, *supra*

- (25) S. 177 (f) See No. 12, *supra*.

(26) S. 193—*Order of remand in rent suit—Appeal from order* See APPEAL (SECOND APPEAL), No. 1, 16 A L J. 711.

- (27) S. 193 See No. 22, *supra*.

(27 a) S. 194—*Rent suit by one co-sharer, Maintainability of—Special contract, Existence of, Proof of—Private partition when enough to take case out of section.* See RENT SUIT, No. 2 46 Ind Cas. 652.

(27 b) S. 197—*Notification under Bengal, N W P and Ansam Civil Court's Act (XII of 1887), S. 21 cl. 4—Subordinate Judge empowered to hear appeals from Munsif—But appeals, such notification if confers jurisdiction to hear, also.* See JURISDICTION OF COURTS, No. 3, 46 Ind. Cas. 788.

- (28) S. 198 See No. 26, *supra*.

10.—United Provinces Acts—(Continued).**Act II of 1901 (Agra Tenancy)—(Concluded).**

(39) S. 201—*Suit for profits—Plaintiff not recorded co-sharer—No bar to suit—Procedure to be followed in the case.*

Under S. 201 of the Tenancy Act, the mere fact that a plaintiff is not recorded as a co-sharer is not enough to bar him from maintaining a suit for profits. The procedure to be followed in a case in which a plaintiff is recorded and in a case in which he is not recorded is indicated in the section. In the latter case, if an issue as to the plaintiff's title arises, the Revenue Court should either try it or refer the plaintiff to a Civil Court. *Jaimal Singh v Shih Saran Singh*, 16 A L J. 504 = 46 Ind Cas. 115.

RICHARDS, C J, and BANERJI, J.

(30) S. 202—*Suit brought in Civil Court against defendant as trespasser—Plea of tenancy—Suit referred to Revenue Court—Suit instituted there for declaration of nature of tenancy—Objection to jurisdiction overruled—Appeal to District Judge—Jurisdiction*

Defendant, sued in the Civil Court for ejectment as a trespasser, raised the plea that he was a tenant of the plaintiff. The Civil Court referred the defendant to the Revenue Court under S. 202 of the Tenancy Act. A suit was instituted by the defendant under S. 95 of the Tenancy Act for a declaration of the nature of the tenancy. An objection on the score of jurisdiction was overruled by the Revenue Court. The Revenue Court having made a decree, an appeal was preferred to the District Judge, who entertained it on the ground that the question of jurisdiction having been decided, an appeal lay to him—*Held* that no appeal lay to him, an objection on the score of jurisdiction under the circumstances being absolutely untenable. *Deo Narain Singh v Sitla Baksh Singh*, 16 A L J 590 = 40 A 177 = 47 Ind. Cas 891.

RICHARDS, C J and BANERJI, J

Act III of 1901 (U. P. Land Revenue).

(1) S. 111—*Partition, Application for, before Revenue Court—Title Question of, raised in—Application for postponement pending decision of Civil Court—Civil suit, maintainability of: See JURISDICTION (OF CIVIL AND REVENUE COURTS), No 3, 45 Ind Cas 873.*

(2) S. 111 (1) (b)—*'Civil Court,' meaning of—Inapplicability of Limitation Act to suits coming under S. 111 of Act III of 1901*

It is settled law in Oudh that, in a case in which an officer conducting a partition has ordered under provisions of S. 111 Act III of 1901, an objector to institute a suit within three months in the Civil Court and the objector fails to institute the suit within three months in a Court of competent jurisdiction such a suit cannot afterwards be entertained by a Civil Court.

10.—United Provinces Acts—(Continued).**Act III of 1901 (U. P. Land Revenue)—(Old).**

"Civil Court" in S. 111 (1) (b) means a Civil Court of competent jurisdiction.

Limitation Act does not apply to suits coming under S. 111 of the U.P. Land Revenue Act. *Salyid Nurul Hasan v. Sarju Prasad*, 43 Ind Cas 473 = 4 O.L.J. 559.

STUART, A J.C.

References.—11 O O 114, F., 18 O.O. 348, *Appr*

(3) Ss 111, 112—*Application for partition before Revenue Court—Objectors have no locus standi under the Act—Decision of Revenue Court—Forum of appeal*

A applied to the Revenue Court for partition and notices issued. Defendants objected, whereupon A met the objections of the objectors by the plea that the objectors had no locus standi as they were not recorded co-sharers. The Revenue Court disallowed the plea and decided in favour of the objectors. Thereupon A preferred an appeal to the Court of the District Judge, who allowed the appeal.

Held, that the District Judge had no jurisdiction to entertain the appeal. *Labhu v. Radha Charan*, 45 Ind. Cas 544.

RATIQUE, J

References.—3 A L.J. 481, 2 Ind Cas. 988, *Appr*

Act IV of 1912 (Court of Wards).

S. 54, *Scope of—Notice of pre-emption suit—Civ. Pro Code, 1908, O I r 3 Applicability of—Limitation Act (IX of 1908), S. 22—Addition of parties—Institution of suit against deceased person if extends limitation against his heirs—Pre-emption suit if must include entire property sold*

No suit for pre-emption can lie in respect of any property held by a ward, till the notice required by S. 54 is given. O I r 3, Civ. Pro Code, does not apply to a suit filed against a deceased person whose heirs are subsequently sought to be brought on the record. Such heirs, whether added or substituted, must be treated, for the purposes of S. 22, Limitation Act, as newly impleaded, and the suit against them will be deemed to have been instituted when they were so made parties. The plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs (a).

A right of pre-emption must relate to the whole of the property sold unless the plaintiff is not entitled to claim pre-emption as to any portion thereof but where the share of each purchaser is separate or distinct (b), or divided, it need not embrace the entire property (c). *Nau Nihal Singh v Deputy Commissioner, Unao*, 47 Ind Cas 894 = 5 C.L.J. 546

KANHAIYA LAL, A J C

References:—(a) 21 B. 580, 31 M 86, F.; 10 W R 317, *Dist.* (b) 21 A. 119, 8 Ind. Cas. 272 = 13 O C 260, F. (c) 8 A. 462; 19 A. 148; 2 A.L.J. 199, F.

**10.—United Provinces Acts—(Concluded).
Act II of 1916 (U.P. Municipalities).**

S 326 (4)—Suit for establishment of title to chabutra and injunction against order to remove the same—Necessity of notice. See NOTICE, No. 1, 16 A.L.J. 793.

Additional Evidence.

(1) Appellate Court, Remand to, by Chief Court—Appellate Court, Power of, to order original Court to record. See CIV PRO. CODE (1908), No. 505-a, 147 P L R 1917

(2) Appellate Court, Power of to let in—To cure inherent defect. See RES JUDICATA, No. 22 a, 47 Ind. Cas 141.

Additional Judges

Power to appoint — Validity of See GOVERNMENT OF INDIA ACT (1915), No. 1, 33 M.L.J. 787.

Aden Settlement.

(1) Rating—Assessment of Salt Works—Principles of rating

In 1903, the plaintiff obtained from Government a lease of certain lands at Aden for the purpose of constructing salt works at an annual rent of Rs. 7,000 for the land and a royalty of eight annas per ton of salt exported. They proceeded to erect a factory for crushing salt on the land; and the works first commenced to yield salt in the year 1911-12. Prior to that year the defendants who were the assessing authority for the Aden Settlement, assessed the plaintiff, in the annual rent of Rs. 7,000 payable under the lease. From the year 1911-12, when the works commenced to produce salt, the defendants adopted a different basis of assessment and assessed the plaintiffs on the basis of half the produce of the works less ten per cent, representing landlord's deductions. The value of the salt was taken at Rs. 580 and Rs. 5 per ton of crushed and uncrushed salt respectively f. o. b. at Aden. In adopting this basis of assessment, the defendants followed the method of assessment adopted for one other salt-work in Aden and which they considered was also in practice with reference to the assessment of salt-pan in Bombay in 1891 but without reference to the particular conditions of the plaintiff's salt-pan. The plaintiffs appealed unsuccessfully against the assessment for that year to the Court of the Resident at Aden. Being assessed on the same basis for the years 1912-13 and 1913-14 they filed a suit in the Court of the Resident to set aside the assessment. On a reference to the High Court by the Resident under S. 8 of Aden Courts Act, 1864, of the questions in the suit including the question whether the assessment was wrong and illegal.

Held, that the assessment was wrong and should be quashed, and that the defendants should consider what a tenant from year to year with a reasonable prospect of the continuation of his lease would give for these particular premises *rebus sic stantibus*.

Held, further, that though the volume of business done by the works, the rent and

Aden Settlement—(Concluded).

royalty reserved by the lease, the actual yearly receipts with the usual deductions, the value of the land and the factory and any other buildings on the premises, were all factors which would assist the Court in determining the mode of assessment to be applied to the works in question, yet it was no recognised method of assessment to take the output of the works at so much a ton and assess the plaintiffs at half that figure less landlord's deductions.

Per Kemp, J.—In assessing any particular property the assessing authority must consider what a tenant from year to year with a reasonable prospect of the continuation of his lease would give for the premises. In considering this, the assessing authority must regard the then occupier as a likely tenant but must not assess the premises at the highest rent that can be extorted from him, *i. e.*, which he would rather pay than be turned out. The assessment is to be fixed on the highest rent that a hypothetical tenant might reasonably be supposed to be willing to give. Further, the premises must be valued for rateable purposes *rebus sic stantibus* *i. e.*, as they exist at the date of the valuation.

So long as the assessing Court applies one of the recognised 'formulae' for valuation and in doing so does not take into consideration evidence which it should not take into consideration and does not exclude evidence which it should take into consideration it is left to that Court to select its particular 'formula' and it is no objection to the valuation to say that it should have adopted some other 'formula.' **Abdullah Lalji v The Executive Committee, Aden** 20 Bom L.R. 639 = 42 B 691 = 46 Ind Cas 721.

BATCHFLOR, A.C.J. and KEMP, J.

References —18 Bom L.R. 296, *The Queen v School Board for London*, (1886) 17 Q.B.D. 738, *London County Council v Churchwardens of Parish of Erith and Assessment Committee of Dartford Union*, (1893) A.C. 562; *Great Central Railway v Banbury Union*, (1900) A.C. 78, *Darves v Seisdon Union*, (1908) A.C. 315; *The Queen v Fletton*, (1961) 3 E. and E. 450 *Kirby v Hunslet Assessment Committee*, (1906) A.C. 43, *N.S.W. J Ry Co v Assessment Committee of the Brentford Union* (1888) 13 A.C. 175, *Mercsey Docks and Harbour Board v Birkenhead Assessment Committee*, (1901) A.C. 175, R.

(2) See REG. VII OF 1900.

Adjournment

(1) Court, Power of, to grant—Order refusing adjournment, If appeal lies from—Appellate Court Discretion of, to interfere with such order—Civ. Pro. Code (Act V of 1908), O. XVII, r. 1 (1)—Government servant, Summoning of, to produce document—Discretion of Court—Procedure—Evidence Act (1872), S. 162

Under r. 1 (1), O. XVII of the Civ. Pro. Code, a Court may at any time grant an

Adjournment—(Concluded).

adjournment, if sufficient cause is shown; but no appeal is allowed from an order refusing adjournment, and even where the refusal is impeached in an appeal from the decree, an appellate Court is generally disinclined to interfere with the trial Judge's exercise of his discretion.

If a Court decides to summon a Government official for the production of certain documents, it should only do so after careful consideration, and once the summons has issued, production should ordinarily be insisted on, if the party who obtained the summons so desires. *Laxman Rao v. Vithoba*, 45 Ind. Cas. 898.

DRAKE BROCKMAN, J.C.

(2) Scope and meaning of O. XVII, rr. 2 and 3, Civ. Pro. Code, 1908. See CIV. PRO. CODE (1908), No. 286, 23 M.L.T. 1 (F.B.).

(3) Delay in production of evidence—Reasonableness of delay within discretion of trial Court—Appellate Court, Interference by. See CIV. PRO. CODE (1908), No. 277, 27 C.L.J. 119.

(4) Civ. Pro. Code, O. IX, r. 9, O. XVII, r. 3 and S. 115—Application for adjournment of suit on ground of plaintiff's illness—Application rejected and suit dismissed—Petition to restore suit—Duty of the Court—O. XVII, r. 3, inapplicable. See RESTORATION OF SUIT, No. 1, 42 Ind. Cas. 649.

Adjustment of Decree.

(1) Civ. Pro. Code (XIV of 1882), S. 257-A—Agreement giving time to judgment-debtor—Sanction of Court not obtained—Agreement, if enforceable—Agreement by decree-holder to accept payment by instalments—Consideration, want of—Payment of first instalment—Whether sufficient consideration.

Where a judgment-debtor and decree-holder entered without the sanction of the Court into an agreement whereby the decree-holder consented to receive an amount less than the decree amount in several instalments covering a period of two years but the decree-holder after receipt of two instalments realised the whole decree amount by execution.

Held (in an action by the judgment-debtor for damages for breach of the agreement),

(i) that the agreement was void for want of consideration, and (ii) that it amounted to an agreement to give time to the judgment-debtor and was unenforceable without the sanction of the Court (a). *Situ Seetharamayya v. Tadapalle Sodamma*, 7 L.W. 508 = (1918) M.W.N. 392 = 24 M.L.T. 16 = 45 Ind. Cas. 16.

ABDUR RAHIM and NAPIER, JJ.

Reference:—(a) 26 M. 19, R.

(2) Civ. Pro. Code (Act V of 1908), O. XXI, rr. 2 and 53, cl. 6 and S. 47—Application by holder of attached decree to enter satisfaction—Judgment-debtor not made a party but attaching creditors brought on the record by Court—Adjustment after

Adjustment of Decree—(Concluded).

attachment—If effective as against attaching creditors—Question whether covered by S. 47.

The holder of an attached decree made an application to the Court for recording satisfaction of his decree. The Court, of its own motion, finding that the decree had been attached, issued a notice to the attaching creditor and had him brought on record.

No notice was given to the judgment-debtor of the attached decree, and he was not brought on record. It was found, however, that the attachment was before the adjustment and that the judgment-debtor was aware of the attachment, though no notice of the attachment was issued to him through Court.

Held, that the adjustment of the decree after attachment was invalid and ineffective as against the attaching creditors and that the decree-holder could not, by trying to record satisfaction, affect the rights of his own creditors in the attached decree.

Sembla.—Where the attachment was before adjustment, the attaching creditor's objection to the entering of satisfaction would be a question covered by S. 47, Civ. Pro. Code, though the judgment-debtor was not made a party to the decree-holder's application.

Quære:—Whether the Court, of its own motion, can make the attaching creditors parties to the decree-holder's application?

Per *Abdur Rahim, J.* (Oldfield, J., *dubitante*).—The words "either through the Court or otherwise" in O. XXI, r. 53, cl. (6), refer to 'payment or adjustment' and not to 'notice.' *Subramania Iyer v. Kuppasami Iyer*, (1918) M.W.N. 874.

ABDUR RAHIM and OLDFIELD, JJ.

(3) Attachment of decree—Notice not issued to judgment-debtor on attaching creditor's application—Right of judgment-debtor to make any payment or adjustment—Court if bound to record such adjustment or payment. See CIV. PRO. CODE (1908), No. 81, 24 M.L.T. 496.

(4) Not certified adjustment—Question relating to satisfaction a question of execution—Question to be adjudicated under S. 47, Civ. Pro. Code—Recognition of uncertified adjustment by executing Court. See *LIS PENDENS*, No. 1, 30 Bom. L.R. 929.

Adjustment of Suit.

Civ. Pro. Code, O. XXIII, r. 8—Agreement to abide by decision in connected case, Effect of.

An agreement between the parties to a suit to have it decided according to the final decision of another suit in a connected matter is an adjustment of the suit under O. XXIII, r. 8 of the Civ. Pro. Code and is enforceable by the Court. *Srinivasa Charlar v. Kumara Thathacharlar*, 24 M.L.T. 356 = 8 L.W. 470 = (1918) M.W.N. 746.

SPENCER and KRISHNAN, JJ.

References:—27 M. 406; 33 B. 69, *Dial.*; 29 C. 306; 8 C. 455, R.

Administration.

Temple—Open for public worship—Proper administration of trust—Right of suit. See CIV. PRO. CODE (1908), No. 122, 45 Ind. Cas. 218.

Administration Suit.

- (1) *Civ. Pro. Code (Act V of 1908), O I, r. 10—Original plaintiff's right to a share disputed—One of the defendants seeking to be made plaintiffs—Order allowing the prayer, if proper—No finding as to bona fide mistake.*

In an administration suit, even if it be found that the original plaintiff has no right of suit, one of the defendants, who has an undoubted right to a share, can be made plaintiff. It is not necessary that the Court should expressly find a *bona fide* mistake in instituting the suit. *Bhimaagowd Eswaragowd v. Nagappa*, (1918) M.W.N. 929.

KRISHNAN, J.

Reference:—30 M. 419, F.

- (2) Maintainability of declaratory suit during pendency of. See DECLARATORY SUIT, No. 3, 43 Ind. Cas. 539.

Administration under Decree of Court.

Governed by Civ. Pro. Code, O XX, r. 13—Administration under decree of High Court—Rules governing administration. See CROWN DEBTS, No. 1, 22 C.W.N. 793.

Administrative Act

Order passed by District Judge under S. 33 of Bengal Civil Courts Act dismissing his ministerial officer—High Court, if will interfere with such order. See REVISION, No. 11, 27 C.L.J. 477.

Administrative Order.

Order made by District Judge under S. 33 of Bengal, N.W.P., and Assam Civil Courts Act only an—Order not liable to revision under S. 107, Government of India Act. See REVISION, No. 15, 44 Ind. Cas. 619.

Administrator.

- (1) Suit by minor against Administrator for accounts—Applicability of S. 10, Limitation Act—Question of law—Civ. Pro. Code, S. 110. See CIV. PRO. CODE (1908), No. 150, 45 Ind. Cas. 182.

- (2) Position of administrator *pendente lite* in probate proceedings. See PROBATE AND ADMINISTRATION ACT (V OF 1881), No. 8, 44 Ind. Cas. 657.

Admission.

- (1) *Judgment on, when and how far to be granted—Discretion.*

A Court has jurisdiction under O. XII, r. 6, Civ. Pro. Code, to enter judgment for the amount clearly and unambiguously admitted by the defendants to be due from them to the plaintiffs and it is in its discretion having

Admission—(Continued).

regard to the nature of the case and the allegations contained in the pleadings and the admission made in Court, whether he would allow the plaintiffs to proceed to prove the remainder of their claim. But a judgment on admission is not a matter of right, it is in the discretion of the Court, so that if a case involves questions which cannot be conveniently disposed of on a motion under the rule, the Court may, in the exercise of its discretion, refuse the motion. The discretion is judicial, and an erroneous exercise thereof may be open to correction by a Court of appeal which, however, on well-established principles, will be slow to interfere, unless either of the parties has been manifestly and unfairly prejudiced (a). *Premak Das Agarwal v. Udairam Gangabux*, 45 C. 138 = 28 C.L.J. 498 = 22 C.W.N. 204 = 44 Ind. Cas. 233.

SANDERSON, C.J. and MOOKERJEE, J.

References:—(a) *United Telephone Co. v. Dignohoe* (1886) L.R. 81 Ch. Div. 399; *Andrews v. The Patriotic Assurance Co. of Ireland*, L.R. 18 Ir. 115, D.; *Mellor v. Sidebottom* 6 Ch. D. 342; 13 M.L.T. 282 R.

- (2) *Solanama, Inadmissibility of, in evidence—Solanama Necessity of Registration of—Registration Act (1908), Ss. 17, 49.*

An admission does not require registration under the provisions of the Indian Registration Act.

A Solanama or a petition of compromise filed in a Criminal Court for the purpose of compromising certain criminal proceedings, which proceedings arose out of a dispute regarding possession of certain land, and containing admissions by the defendant as to the possession of that very land is admissible in evidence against him, irrespective of whether the Solanama was or was not registered. *Gadabar Gowami v. Nedhram Modak*, 46 Ind. Cas. 442.

FLETCHER and SHAMSUL HUDA, JJ.

- (3) Value of. See MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS), No. 1, 35 M.L.J. 219.

- (4) Against interest, value of. See CIV. PRO. CODE (1908), No. 134, 23 M.L.T. 44 (F.B.).

- (5) Compromise going beyond questions in dispute—Whether admissible in subsequent suit to prove admissions. See COMPROMISE, No. 3, 43 Ind. Cas. 775.

- (6) In documents, Bindingness of, on executors. See DOCUMENTARY EVIDENCE, No. 1, (1918) M.W.N. 394.

- (7) Registered mortgage—Subsequent oral agreement to accept less, Plea of—Admission of such agreement in pleadings if binds party making it. See DOCUMENTARY EVIDENCE, No. 2, (1918) M.W.N. 680.

- (8) Of execution of document by person claiming through executor—Effect of. See EVIDENCE ACT (I OF 1872), No. 23, 22 C.W.N. 444.

Admission—(Concluded).

(9) Oral agreement to receive less than due, under registered mortgage set up—Admission in pleadings of such oral agreement—Oral agreement if admissible in evidence. See EVIDENCE ACT, No. 18, 35 M.L.J. 555.

(10) Erroneous admission by Counsel on point of law—Effect on party's rights. See LEASE, No. 7, 27 C.L.J. 447.

(11) Of document before its execution if a proper—Nature of—Requirements of law as to, if complied with by admission of executant—Attestation if deals only with proof or validity of document. See MORTGAGE (GENERAL), No. 13, (1918) M.W.N. 853.

(12) Of mortgage in mortgagee's statement—Admission if can be relied upon in favour of redemption. See MORTGAGE (REDEMPTION), No. 13, 7 L.W. 284.

(13) Admission of fact by pleader—Binding on client. See PLEADER AND CLIENT, No. 2, 41 Ind. Cas. 18.

Adna Malika.

Declaratory suit to establish right as, and to declare defendants *ala malika*—Entry in settlement records in favour of defendants *as ala* and *adna* owners—Onus on plaintiffs. See BURDEN OF PROOF, No. 9, 63 P.W.R. 1918.

Adoption.

(1) Question of, cannot be entered into in proceedings under Probate and Administration Act. See PROBATE AND ADMINISTRATION ACT (V OF 1881) No. 7, 10 Bur. L.T. 184.

(2) Person claiming property of deceased Chinaman as his adopted son—Law to be applied to case. See CHINESE CUSTOMARY LAW, No. 1, 9 L.B.R. 179.

Adultery.

Cruelty and, after judicial separation—Marriage, Dissolution of, on ground of. See DIVORCE, 45 Ind. Cas. 914.

Advancement.

(1) *Presumption as to, under English Law—Applicability of, to persons of British nationality in India—Purchase of property by husband in name of wife—Trusts Act (II of 1882), Ss. 81, 82.*

The presumption under English Law that a husband buying property in the name of his wife does so for her benefit applies equally to persons of British nationality resident in India. It is immaterial if after the purchase the husband continues to manage the property and collect rents. *Kerwick v. Kerwick*, 47 Ind. Cas. 376.

MAUNG KIN and RIGG, JJ.

(2) Purchase by father with his own funds in name of one of his sons—Presumption of advancement for that son if generally arises. See BENAMI TRANSACTIONS, No. 7, 73 P.R. 1918.

Adverse Possession.

(1) *Against mortgagor, if adverse against simple mortgages—Limitation Act (IX of 1908), Sch. I, Arts. 132, 140, 144, S. 28—Mortgage suit—Parties—Person who claims title adverse to mortgagor and mortgagee if proper party. Priyasakhi Debi v. Bireswar Sharmanta*, 21 C.W.N. 177=44 C. 425=27 C.L.J. 212. See Final Part, 1917, Col. 196.

(2) *If question of law—Suit for possession—Limitation—Burden of proof.*

A question of adverse possession, where the facts are not in dispute and where therefore it depends upon inferences to be drawn from admitted facts, may be a conclusion of law.

In a suit for possession the plaintiff has to show title, and, where it is alleged that he is out of possession, he must show affirmatively that he has been in possession within 12 years of the suit. *Champalal v. Mangal Chand*, 40 Ind. Cas. 420.

WALSH and STUART, JJ.

Reference:—(1912) A.C. 230, F.

(3) *Encroachment by tenant—Claim by adverse possession—Knowledge of landlord of encroachment—Necessity.*

Where a tenant encroached on the lands of landlord and claimed to have acquired a limited interest by adverse possession, held the landlord should be proved to have had knowledge of the encroachment before the possession became adverse. *Murlidhar Roy v. Sasadhur Pal*, 49 Ind. Cas. 344.

FLETCHER and NEWBOULD, JJ.

(4) *Symbolical possession when sufficient to interrupt adverse possession.*

Symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given. *Thakur Sri Sri Radha Krishna Chanderji v. Ram Bahadur*, 23 M.L.T. 26=34 M.L.J. 97=16 A.L.J. 33=4 Pat. L.W. 9=7 L.W. 149=27 C.L.J. 191=(1918) M.W.N. 163=22 C.W.N. 330=20 Bom. L.R. 502=43 Ind. Cas. 268 (P.C.).

LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE and MR.

AMEER ALI

Reference:—5 C. 584 (F.B.), *Appr.*

(5) *Joint family estate—Loss of joint right if necessarily to be inferred from uninterrupted sole possession of such property by one co-sharer—Adverse possession.*

If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members (a). If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to

Adverse Possession—(Continued).

be the former. *Hardit Singh v. Gurmokh Singh*, 64 P.R. 1918=38 C.L.J. 437=58 P.W.R. 1917=24 M.L.T. 389=30 Bom. L.R. 1064=47 Ind. Cas. 626 (P.C.).

LORD BUCKMASTER, SIR WALTER PHILIMORE, BART. and SIR LAWRENCE JENKINS.

References:—(a) 19 I.A. 48; *Corea v. Appuhamy* (1912) A.C. 230 (236), R.

(5 a) *Possession when is, Criferson as to—Prescription, Title by not based on original right or morality but expediency—Possession, Suit for—Possession of defendant for over 20 years as of right, Finding as to—Title by adverse possession established by.*

The criterion of adverse possession is, whether a person possesses land, claiming it as his own; if he does, he must be held to be in adverse possession.

A prescriptive title is not based on original right or on morality, but solely on expediency.

In a suit for possession of land on the ground that defendants were only *malikan-i qabsa*, that for some years past they had occupied some village *shamilat*, which occupation had become known to plaintiffs 3 years before suit and that having been requested to quit refused a month before suit to do so, the plea of long adverse possession was set up and it was found that the defendants had been in possession for over 20 years.

Held, that the defendants had established a title by adverse possession *Allah Dad v. Fazal Dad*, 16 Ind. Cas. 961

SHADI LAL and LE-ROSSIGNOL, JJ

(6) *Gift by widow holding life-estate—Donee and his heirs in possession for more than 12 years after donor's death—Possession, whether ripens into ownership, Art. 144 of Limitation Act (IX of 1908).*

In a suit for possession of certain land by the reversioners of one S, it appeared that, after the death of S, his widow made a gift of the land to one B, who remained in possession till his death, which occurred 15 years before suit. After B's death, his widow remained in possession until her death 7 years before suit, when mutation was effected in favour of defendant. The original donor herself had died more than 12 years before suit, and it was found, as a fact, that she had merely a customary life-interest in the land, as the widow of S:

Held (1) that, on the death of the donor, it was open to the plaintiffs to sue for possession on the ground that the donee, B, had no legal right to the land after the widow's life-interest had terminated,

(2) that, in consequence of the plaintiffs' failure to do so, B's possession became adverse from the date of the donor's death;

(3) that, as B, his widow and defendant (his heir) had remained in possession for more than 12 years after that date, their possession ripened into ownership and the plaintiffs had no right to succeed. *Khan Bahadur v. Ibrahim Khan*, 181 P.W.R. 1918=46 Ind. Cas. 555.

RATTIGAN, C.J.

Adverse Possession—(Continued).

(7) *Limitation Act (IX of 1908), Sec. 1, Art. 144—Independent trespassers whether can tack on their periods of possession.*

Plaintiffs, as collaterals of one B, sued to recover possession of certain land held by the latter as an occupancy tenant. It appeared that, after B's death in 1903, his mother remained in possession till 1905, when she was ejected by the defendant under due process of law. It was contended that the plaintiff's suit was time-barred as it was open to the defendant to "tack on" to his period of adverse possession the period during which B's mother was in adverse possession:

Held, that it was not open to the defendant to tack on the period during which B's mother was in adverse possession, as both were independent trespassers and he could not assert that he claimed through or under her *Hussain Bakhsh v. Pata Singh*, 153 P.W.R. 1918.

RATTIGAN, C.J.

References:—189 P.R. 1889; 2 C.W.N. 315; 33 A. 274=7 A.L.J. 1184=8 Ind. Cas. 1095; 72 P.W.R. 1914=22 Ind. Cas. 855; 18 P.R. 1895, R.

(8) *Adverse possession—Whether incumbance within the meaning of Bengal Land Revenue Sales Act (XI of 1859). See ACT XI OF 1859 (BENGAL LAND REVENUE SALES), No. 11, 43 Ind. Cas. 461.*

(9) *Person acquiring title by—Duty of person to bring suit for declaration of such acquisition. See DECLARATORY SUIT, No. 6, 3 Pat. L.J. 161.*

(10) *Assertion by tenant of title against landlord must operate as starting point for—To work forfeiture. See LANDLORD AND TENANT, No. 1, 41 M. 629.*

(11) *Right to take wood from trees when fallen or cut—Right disputed on two previous occasions—No uninterrupted and continuous possession—Adverse possession if arises. See LIMITATION ACT (1908), No. 101, 16 A.L.J. 345.*

(12) *Mortgagee, possession of, not through mortgagor if adverse to mortgagor. See MORTGAGE (GENERAL), No. 9 b, 46 Ind. Cas. 872.*

(13) *Mortgagee in possession—Death of mortgagor—Mortgagee's claim to mortgagor's property as heir—Adverse possession of mortgagee, effect of. See MORTGAGOR AND MORTGAGEE, No. 3, 89 P.W.R. 1918.*

(14) *Partition suit—Adverse possession—Evidence. See PARTITION SUIT, No. 1, 44 Ind. Cas. 216.*

(15) *Possession of widowed mother of family residential house for more than twelve years against son's will—Possession not adverse. See PLEADINGS, No. 8, 119 P.W.R. 1918.*

(16) *Suit for possession of land—Allegation, of title and dispossession—Denial of both by defendant in possession—Duty of plaintiff to prove title—Duty of plaintiff also to prove twelve years' possession where title based on possession. See POSSESSION, SUIT FOR, No. 8, U.B.R. (1918), 4th Qr., 126.*

Adverse Possession—(Concluded).

(17) Receiver's possession when adverse. See **RECEIVER**, No. 6, (1918) M.W.N. 689.

(18) Shebait, office of, if can be acquired by. See **RELIGIOUS ENDOWMENTS**, No. 8, 3 Pat. L.J. 927.

(19) Old mukteessars of temple in possession as trustees, if strangers holding adverse possession against trust. See **RELIGIOUS ENDOWMENTS ACT**, No. 1, 20 Bom. L.R. 954.

(20) Possession entered into under doubtful will—Acquisition of absolute title by adverse possession, condition for. See **WILL**, No. 15, 3 Pat. L.J. 199.

Agency Rules (Ganjam).

Agency tract—Application under r. 20 of the Ganjam and Vizagapatam Agency Rules—Scope of jurisdiction—Transfer of suit by the Agent to his Assistant after framing of issues—Priority of—Waiver—Deed—Construction—Lease or license—Contractual rights to be enforced—Contract Act, ss. 39, 64, 73 and 75.

Where, under a registered agreement, it was arranged that the plaintiff should cut and take timber for railway sleepers from the defendant's forests for a term of four years and pay royalty to the defendant upon the timber so removed. *Held* (*Spencer, J.*) on a construction of the document: That it was not a bare license, but an instrument creating certain contractual relations between the parties and intended for their mutual profit, and that it conveyed an interest in immoveable property comparable to the lease which formed the subject of 20 M. 56.

Under the agreement, the parties to it were legally entitled to enforce all its terms as terms of a contract. If either party breaks a contract, the party, who suffers by the breach, is entitled under S. 73 of the Contract Act to receive from the other party compensation for any loss caused to him thereby.

If either party rightfully rescinds it, he is entitled under S. 75 to compensation for any damage which he has sustained through non-fulfilment, and under S. 39 of the Contract Act, when a party to a contract has refused to perform his promise in its entirety, the promisees may put an end to the contract.

Where fresh terms were imposed which formed a material alteration calculated to seriously affect the plaintiff's prospects of working the forests at a profit, he was entitled to treat the lease as no longer subsisting and could also recover damages. Even as a licensee he could be entitled to his out of pocket expenses; and he could also get a return of the deposit under S. 64 of the Contract Act.

Under Rule X, cl. (2) of the Agency Rules, the Agent has power to transfer suits of the value of more than Rs. 5,000 for the decision of his Assistant, even after issues have been framed by him.

Krishnan, J.—Rule XX of the Agency Rules as the High Court only the power to direct Agent to review his judgment on "special" and does not give any right to parties

Agency Rules (Ganjam)—(Concluded).

by way of appeal or otherwise, as under Ss. 96 and 100, Civ. Pro. Code. The High Court should not, therefore, interfere under it on technical grounds or on account of any errors which have not led to any prejudice on the merits; and where the application is in the nature of a second appeal, the High Court should not ordinarily interfere with the finding of facts.

Held, also, that under the agreement, plaintiff was entitled to have his contract performed in its entirety and even where there was only a breach of a part of the contract, the contract was at an end unless the parties waived the breach.

A person is not bound to ask for performance when he has notice from the opposite party that performance will be refused; and he can treat the notice as a breach.

Held, further, the Agent should not ordinarily transfer a part heard case to his Assistant, as the appeal from the decree has to be heard by him. But, if he does so transfer, the question is merely one of an irregularity; and not of want of jurisdiction.

Where, therefore, no objection was taken by the defendant before the trial Court to the course adopted but he awaited the decision of that Court on the merits, he must be taken to have waived all objections. *Zamindar of Bodokimidi v. Kumar Lahiri*, (1918) M.W.N. 772.

SPENCER and KRISHNAN, JJ.

Agency Rules (Ganjam and Vizagapatam).

(1) *Agency Rules 8, 16—'Decree,' meaning of—Order restoring suit dismissed for default, not a decree.*

There is no definition of the word 'decree' in the agency rules and hence it must be understood as meaning the same thing as a decree under the Civ. Pro. Code.

An order directing a suit which had been dismissed for default to be restored to file and tried is not a decree and hence a petition does not lie under rule 8.

Rule 16 of the agency rules provides that all petitions against the proceedings of the Government agent must, in the first instance, be submitted to the Government and then it is open to the Government to refer the matter to the High Court or to the Board of Revenue, as the case may be. *Lagadapati Venkatanagabhushanam v. Orilapati Mahalakshmi*, 43 Ind. Cas. 555.

ABDUR RAHIM and KUMARASWAMI BASTRI, JJ.

Reference:—4 L.W. 499, P.

(2) Rule 16: See No. 1, *supra*.

Agency Rules (Godavari).

(1) *Rules 8 and 16—Godavari District—Dismissal of suit for default by Assistant Agent—Appeal to Agent—Order by Agent directing suit to be restored and disposed of—High Court if can restore Agent's order—Proper remedy is to petition Government.*

Agency Rules (Godavari)—(Concluded).

In an appeal to the Government Agent of the Godavari District from an order of the Assistant Agent, dismissing a suit for default the Agent, without hearing the defendant in the suit, set aside the dismissal order and directed the Assistant Agent to restore the suit to his file and dispose it according to law. In a petition to the High Court under r. 8 of the Agency Rules to direct the Agent to review his order, held that the order of the Agent directing that the suit be restored to the file was not a decree within the meaning of the Agency Rules and that the petition did not lie (a).

The proper remedy of the petitioner would be to submit a petition, under r. 16 of the Agency Rules, to the Government and it would be for the Government, if it so chose, to refer the petition to the High Court for disposal. *Yenkata Nagabushanam v. Mahalakshmi*, 34 M.L.J. 594—41 M. 315.

ABDUR RAHIM and KUMARASWAMI SASTRI, JJ.

Reference:—4 L.W. 499, F.

(9) Rules 10, 16—Employment by Government Agent of Agency Munsif to execute Agent's decree—Order passed in execution by Agency Munsif—Appeal if lies from such order to Government. See *APPEAL (GENERAL)*, No. 26, 34 M.L.J. 473.

(3) Rule 16. See Nos. 1 and 2, *supra*

Agency Rules (Vizagapatam).

Rule 10, cl. 5—Suit for land, Meaning of—Local Boards Act (V of 1821), S. 73.

A suit for a declaration that plaintiff is a land-holder of certain lands within the meaning of S. 73 of the Local Boards Act is one for the determination of an interest in immoveable property and is a suit for land within the meaning of those words in r. 10, cl. 5 of the Agency Rules. *Maharaja of Jaypore v. Sri Rajah Tyadaprasapati Rudra*, 7 L.W. 564=35 M.L.J. 281=(1918) M.W.N. 830=45 Ind. Cas. 739.

OLDFIELD and SADASIVA-AIYAR, JJ.

References:—33 M. 131; 30 M.L.J. 120; 27 M. 157, R.

Agra Tenancy.

See U.P. ACT II OF 1901.

Agreement.

(1) *Sanction to prosecute, Application for, to withdraw, if void as against public policy—Contract Act (IX of 1872), Ss 16, 23—Undue influence, if mere fear of punishment—In pari delicto, potior est conditio possidentis, maxim of. Applicability of—Crim. Pro. Code (Act V of 1898), Ss 190, 245—Non compoundable offence, Sanction to prosecute, Application for, Compounding of—Penal Code (Act XLV of 1860), Ss. 213, 244, Offences under, Proof of commission of offence screened essential for.*

To make an agreement for stifling a prosecution in respect of an offence improper for the purposes of S. 23 of the Contract Act, it is not necessary that a trial for that offence

Agreement—(Concluded).

should actually be in progress. The section is applicable even where the object of the agreement is to cause the withdrawal of an application for sanction to prosecute under S. 195 (1) (b) of the Crim. Pro. Code.

The prohibition in S. 245 (7), Crim. Pro. Code, is a perfectly general one, which governs the composition of offences whether any steps to prosecute the alleged offender have been taken or not (a).

To establish the commission of offences punishable respectively under Ss. 213 and 214 of the Penal Code, it is essential to prove commission of the offence screened (b).

A mere fear of punishment in a criminal case does not constitute undue influence and the law as to obtaining refund of money or return of security given under agreement not to prosecute is laid down to be that the transactions could not be set aside unless the circumstances disclose pressure or undue influence (c).

A person against whom an application for sanction to prosecute for giving false evidence in a judicial proceeding was pending, paid Rs. 2,000, to the applicant for withdrawing the application and on the latter representing their desire not to proceed with the application, the Court dismissed it. On a suit being filed to recover the Rs. 2,000 :

Held (1) that the illegal purpose for which the money was paid having been executed, the plaintiff was not entitled to recover the money in accordance with the maxim *in pari delicto potior est conditio possidentis*;

(2) that the agreement the object of which was to stifle a criminal prosecution and to compound a non-compoundable offence, being void as against public policy, the plaintiff was not even on that ground entitled to recover the money. *Warisall v. Mahomed Azimulla Khan*, 46 Ind. Cas. 424.

DRAKE-BROOKMAN, J. C.

References:—(a) *Jones v. Merionethshire Permanent Benefit Building Society*, (1892) 1 Ch. 173=61 L.J. Ch. 188=65 L.T. 686=40 W.R. 273=17 Cox C.C. 389, *Rel. on.* (b) 23 C. 420 and 20 Ind. Cas. 613=37 B 658=15 Bom. L.R. 694=14 Cr. L.J. 453, F. (c) 28 Ind. Cas. 713=19 C.W.N. 383=21 C.L.J. 642=42 C. 286, F.

(2) Meaning of term, as used in S. 46, Bengal Tenancy Act. See *BEN. ACT VIII OF 1885 (TENANCY)*, No. 16, 22 C.W.N. 558.

(3) Promise to pay annuity—Consideration, past and future services—Enforceability of—Effect where part of agreement void. See *CONTRACT*, No. 3, 46 Ind. Cas. 282.

(4) Widow adopting a son and the natural parents of the boy, Between—How far binding on minor. See *HINDU LAW (WIDOW)*, No. 11-b, 47 Ind. Cas. 55.

Agreement to Lease.

(1) Document containing acceptance of written proposal for lease—Lease for more than a year—Paper containing list of bids with endorsement signed by the successful bidder to

Agreement to Lease—(Concluded).

take lease—Endorsement by lessor confirming sale—Document if requires registration. See REGISTRATION ACT (1908), No. 14, 42 Ind. Cas. 629.

(2) Unregistered agreement for permanent lease—Admissibility of lease in suit for specific performance of agreement—Nature of decree for specific performance and method of execution of such decree. See REGISTRATION ACT, No. 33, 42 Ind. Cas. 633.

Agricultural Holding.

Homestead of *raiyat*, whether or not part of—Bengal Tenancy Act (1885), Applicability of, to. See HOMESTEAD, 46 Ind. Cas. 489.

Agricultural Lease.

Exemption from stamp duty. See STAMP ACT, No. 12, 44 Ind. Cas. 109.

Ala Maliks.

Declaratory suit to establish right as *Adna Maliks* and to declare defendants *ala maliks*—Entry in favour of defendants as *ala* and *adna* owners—Onus on plaintiff. See BURDEN OF PROOF, No. 9, 63 P.W.R. 1918.

Alienation.

Restraint on, in a grant of permanent and heritable lease—Validity of—Construction of document. See LANDLORD AND TENANT, No. 46, 46 Ind. Cas. 73.

Alienation of Land.

See PUNJAB ACT XIII OF 1900.

Alienation of Land (Punjab).

Sonless male proprietor, By—Exchange of ancestral land for another plot—Necessity—Lower appellate Court, Finding of, based on finding of Court of first instance, Validity of, See CUSTOMS (PUNJAB—ALIENATION), No. 9-a, 156 P.L.R. 1917.

Alien Enemy.

(1) Right of, to sue—Suspension of, owing to war if a "disability"—Limitation Act (1908), S. 9—"Disability" and "inability" in, Difference between—Applicability of section to—Limitation Act (1908), S. 16, Applicability of, to judicial injunctions or orders, not to Royal Proclamations—Statutes of Limitation, Construction of—Official liquidator of Bank, officer of crown not agent of Bank.

S. 9 of the Limitation Act applies to alien enemies who are prevented from suing in consequence of a declaration of war and it makes no exception in their favour.

The suspension of an alien enemy's right to sue is a "disability" within the meaning of the section.

The word "disability" in S. 9 of the Limitation Act means want of legal ability. It is different from "inability" to sue.

Statutes of Limitation are in their nature strict and inflexible and not susceptible of equitable construction.

The official liquidator of a Bank cannot be looked upon as an agent of the Bank. He is

Alien Enemy—(Concluded).

an officer of the Crown whose rights depend upon the terms of his appointment.

S. 15 of the Limitation Act relates to injunctions or orders of Court, not Royal Proclamations preventing institution of suits by alien enemies. *Deutsch Asiatische Bank v. Hiralal Burdhan & Sons*, 47 Ind. Cas. 192.

CHAUDHURI, J.

(2) War—Right of, to sue, whether suspended. See LIMITATION ACT (1908), No. 27, 23 C.W.N. 157.

Alluvion and Diluvion.

(1) Reg. XI of 1825—*Damodar*, if a navigable river—Non-navigable river flowing through or by the side of permanently settled estates, *churs* forming in, if resumable and assessable with revenue—Riparian owner's right to the middle of the stream—Exclusive right of fishery as evidence of title in the soil of the river bed.

The test in this country as to whether a river is navigable is whether it allows of the passage of boats at all times of the year (a).

The river *Damodar* was not a navigable river at the date of the Permanent Settlement.

At the date of the Permanent Settlement, the bed of the river *Damodar*, in so far as it flowed through the *chakla* or *Zemindari* of *Burdwan*, formed a portion of the estate permanently settled with the predecessor of the *Zemindar* of *Burdwan*.

Although an exclusive right of fishery does not of itself pass the right to the soil in the bed of the river, the terms of the grant in this case being unknown or uncertain, the fact that the grantee had a several right of fishery in the river was held to support his claim to the soil in its bed.

Churs forming in non-navigable rivers flowing through permanently-settled estates and forming parts thereof are not resumable under Reg. XI of 1825. Before there can be a further assessment of Government revenue, there must be a "gain" from the public domain.

The right to the soil of a river flowing within the estates of different proprietors belongs to the riparian owners *admedium flum aque*.

Where property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or river as the case may be.

Therefore, a permanently-settled estate on the bank of a non-navigable river included half the bed of the river, and *churs* forming on this portion are not assessable with revenue under Reg. XI of 1825, the assessment of the Government revenue on the riparian *mouzas* having been imposed not only on the *mouzas* but on the adjoining half of the river bed also. *The Secretary of State v. The Hon'ble Maharajahdhiraj Sir Bijoy Chand Mahababur*, 22 C.W.N. 872—46 Ind. Cas. 305.

FLETCHER and SHAMSUL HUDA, JJ.

References:—15 W.R. 210, F.; 1 W.R. (P.G.) 11; 17 C. 590; 40 M. 886; 2 Hay 541; (1862) S.D.A. (Ben.) Rep. 166; 5 C.L.R. 97; *Commrs.*

Alluvion and Diluvion—(Continued).

for Land Tax for City of London v. Central London Ry. Co., (1913) A.O. 384; *A. G. for British Columbia v. A. G. for Canada*, (1914) A.O. 158, R.

- (2) *Landlord and Tenant—Tenancy, Accretion to, by formation of chur in river—Tenant, Rights of, as to—Bengal Alluvion and Diluvion Regulation (XI of 1925), S. 4, sub S. (4).*

Gradual accretion of land to a Mukarari holding, forming a chur in a small shallow river belongs to the tenant, subject to the payment of additional rent in respect thereof and cannot be claimed by the Zamindar as a portion of his khas patt. *Gobinda Hota v. Krista-pada Singha Babu*, 45 Ind. Cas. 929.

FLETCHER and SHAMSUL HUDA, JJ.

- (2-a) *Land thrown up as char, Ownership of—Alluvial land by gradual accretions—Bengal Alluvion and Diluvion Regulation (Ben. Reg. XI of 1925), Ss. 4 and 5, Scope of.*

Where a party can show that char land is in fact a reformation *in situ* of land identifiable as his own, he is entitled to that land even though it may have been for a period submerged. It is not enough to show that the accretion is *in situ* of a river bed already settled with the claimant but proof as to its previous existence and its reformation is essential.

Bengal Alluvion and Diluvion Regulation (Ben. Reg. XI of 1925), S. 4, as a whole was not intended to apply to lands which had been previously in existence and the property of individuals but S. 5 was intended to apply to such lands. *Nanda Kishore Jagati v. Nidhi Bihara*, 9 Pat. L.J. 438.

CHAPMAN and ROE, JJ.

References:—13 M.L.A. 467 (475); 4 M.L.A. 403; 3 O. 796; 27 A. 655 (667); 1916 App. Cas. 599; 29 Ind. Cas. 278; 10 Ind. Cas. 311, F.

- (3) *Ben. Reg. XI of 1925, S. 4—Accretion to land from river bed—Accretion if may be gradual merely or should be also slow—Law of accretion if inapplicable where original boundary ascertainable—Accretion claimed must be to claimant's land.*

The only requirement in S. 4, Ben. Reg. XI of 1925 should be gradual, not that it should be slow or imperceptible. Where, therefore, an accretion took place by successive steps in four years, the land so accreted can be held to have been gained by "gradual accretion" within the meaning of the first clause of S. 4 of the Regulation (a).

The fact that the original boundary is known or ascertainable by reference to survey records does not render the law of accretion inapplicable (b).

The land claimed as an accretion must be one to the land of the person claiming such accretion. *Govindrao v. Ganpati*, 14 N.L.R. 37—45 Ind. Cas. 425.

BATTEN, A.J.O.

References:—(a) 13 M.L.A. 467; 19 W.R. 113; 4 O. 499, R.; 40 M. 1083, F. (b) A.G. v.

Alluvion and Diluvion—(Concluded).

Chambers, (1859) 4 Ds. G. & J. 55; *A.G. v. M'Carthy*, (1911) 2 Ir. R. 260; *St. Clair Co. v. Lovington*, (1874) 23 Wall. 46, R.

- (4) See BEN. REG. XI OF 1925.

Amendment of Decree.

- (1) *Decree—Amendment, application for—Suit for sale—Decree passed by Munsif—Appeal by defendant—Munsif's decree affirmed.*

In a suit for sale on a mortgage the Munsif granted a decree for the claim as "proved." The defendant appealed and the decree of the Munsif was affirmed. A decree absolute followed. The defendant then made an application to the appellate Court for the amendment of the decree, and it was granted:—*Held* that the Court was wrong in granting the application, inasmuch as the defendant should have shown that the judgment of the appellate Court was at variance with its decree and not that the judgment of the Munsif was at variance with his decree. *Balgobind Rai v. Sheoraj Raj*, 16 A.L.J. 451—46 Ind. Cas. 376.

RICHARDS, C.J. and BANERJI, J.

- (2) *Civ. Pro. Code (Act V of 1908), S. 115—Suit on mortgage—Sub-mortgage—Amount due on sub-mortgage ordered to be paid out of sale proceeds—Decree directing property to be sold for mortgage money as well as for amount of sub mortgage—Wrong decree—Application for amendment—Order that amendment uncalled for—Refusal to exercise jurisdiction—Revision.*

A suit was brought for sale on a mortgage. The mortgagee had created a sub-mortgage, and, in the judgment that was passed, that Court ordered that the property be sold, but that, before the mortgagee was paid any money, the sub-mortgagee should receive the money due under the sub-mortgage out of the sale proceeds. In the decree as drawn up, the property was ordered to be sold for the mortgage money as well as for the money due under the sub mortgage. Upon an application by the mortgagor for amendment of the decree, it was refused with the order that the amendment was "uncalled for." *Held* that this order was tantamount to a refusal to exercise jurisdiction and the High Court's interference in revision was justified. *Pule Bishunath Rao v. Bramhanand Swami*, 16 A.L.J. 749—47 Ind. Cas. 630.

RICHARDS, C.J. and TUDBALL, J.

- (3) *Appeal if lies from order making. See APPEAL (GENERAL), No. 32, 43 P.R. 1918.*

(4) Clerical mistakes and accidental slips in Court's decree or order—Appeal therefrom pending in superior Court—Court empowered to correct mistake is Court that committed error. See CIV. PRO. CODE (1908), No. 302, 7 L.W. 8.

- (5) *Original decree, Suit to rectify error in, Maintainability of—Irregularity or error in drawing decree—Mistake—Relief on ground of mistake, Grant of, Principles*

Amendment of Decree—(Concluded).

guiding—Legal process, money paid under compulsion of, Recoverability of—Money had and received.

A suit lies to rectify an original decree grounded on mistake, if proper facts are established to justify the intervention of the Court in granting relief.

Where a Court has jurisdiction to pronounce a decree and some mere irregularity or error arises in the drawing up of the decree, that of necessity does not justify a Court in granting relief in a subsequent suit to rectify the mistake, though it might afford some ground for supporting an application for review (a).

To warrant a Court in granting relief on the ground of mistake it ought to have regard to the principle which guided the Courts of Chancery in England in granting relief in such suits prior to the Judicature Act of 1876. But whether such relief should or ought to be granted must invariably depend upon the facts of each particular case and the equity, if any, attaching to the rights of the party invoking the aid of the Court. If a decree has been procured by some grave mistake so as to vitiate the whole character of the decree and to permit its execution would amount to an abuse, then there is the right to rectify the error or mistake upon which the decree was founded by an independent suit (b).

A Court is not justified in exercising its jurisdiction to grant relief by independent suit to cure a mere irregularity or error in the original decree acquiesced in by the parties.

It is well settled now that if money is paid under compulsion of legal process, it cannot be recovered as money had and received unless it was realised by fraud or some unconscionable dealing on the part of the decree holder but ordinarily money paid in obedience to a legal process is irrecoverable. Where a decree could be rectified on the ground of mistake, then money paid under such a decree would be recoverable in equity (c). *Sreenath Das v. Ghanashyam Nalk*, 3 Pat. L.J. 466.

MULLICK and ATKINSON, JJ.

References:—(a) 8 C.W.N. 473; 10 C.W.N. 1024, R. (b) 2 Pat. L.J. 313 (318), R. (c) 7 T. R. 369; 23 C.L.J. 163; (1900) 1 Q.B.D. 675, B.

Amendment of Plaint.

(1) *When may be granted—O. v. Pro. Code (Act V of 1908), O. VI, r. 17; O. II, r. 2—Mortgage suit, non inclusion of previous mortgage through bona fide mistake, order of amendment in, how and when may be given—Practice and Procedure—"Judgment"—Letters Patent, 1865, cl. 15—Appeal, if this—Costs.*

The plaintiff-respondents filed this suit on 9th December 1916 which was a suit on a mortgage, dated 1st April 1915, executed by the first defendant-appellant in favour of the plaintiffs. There was a previous mortgage dated 7th January 1914 and a further charge, dated 11th December 1914, not included in the suit,

Amendment of Plaint—(Continued).

which were also executed by the first defendant in favour of the plaintiff which comprised properties outside the jurisdiction. There was a provision in the mortgage of the 1st April 1915 by which properties within jurisdiction were included and charged for the payment of moneys due on the said previous mortgage and further charge (and thus conferring jurisdiction on the High Court in respect of them). The first defendant filed a suit in the Pabna Court on the 16th January 1916 for a declaration that the said previous mortgage and further charge were not enforceable inasmuch as they were not included in this suit and as no leave was taken under O. II, r. 2 of the Civ. Pro. Code, 1908. Upon that on 26th February 1917 the plaintiffs applied for the amendment of their plaint by the inclusion of the said previous mortgage and the further charge alleging that they were not originally included in the suit under a *bona fide* and erroneous impression that the Court had no jurisdiction in respect of them (as the properties charged were situated outside Calcutta) and that they overlooked the above provision in the mortgage of 1st April, 1915.

Ohitty, J., without deciding anything allowed the amendment subject to any contentions which the defendants might raise in answer to the claim as amended. The first defendant appealed:

Held—That the plaintiffs should be given liberty to amend their plaint.

It would have been better and more regular had the question of the right to amendment been determined before the order was made, or, if this would have involved a lengthy enquiry covering the same ground as the evidence in the suit, had the hearing of the application to amend been adjourned to the hearing of the suit and determined on the evidence then taken.

The Court being desirous of getting at the true facts will allow an amendment subject to three chief general conditions: *Bona fides* on the part of the applicant, possibility of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights acquired), and subject to this that the amendment is not such as to turn a suit of one character into a suit of another character (a).

O. II, r. 2, of the Civ. Pro. Code, 1908, refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim and a decree has been made in a suit. In that case a second suit in respect of the portion so omitted is barred (b).

*Quare:—*Whether the order of *Ohitty, J.*, was a judgment within the meaning of cl. 15 of the Letters Patent, 1865? *Upendra Narain Roy v. Bal Janki Math Roy*, 22 C.W.N. 611—45 C. 305—47 Ind. Cas. 129.

SANDERSON, C.J. and WOODROFFE, J.

References:—(a) 8 C. 871 (875); 18 B. 144; 16 W.R. 123; 9 B.E.O.B. 1; 5 Bom. L.R. 329; 9 C. 695 (698); 5 B. 496; 21 W.R. 208; 5 B. 613 (614), R. (b) 11 M.L.A. 551, 624, B.

Amendment of Plaint—(Continued):

(3) *Civ. Pro. Code (Act V of 1908), O. VII, r. 6—Construction of—Court, power of.*

Held, that, the provisions of O. VII, r. 6 of the Civ. Pro. Code, should be construed in a reasonable and liberal spirit, and, save under very exceptional circumstances, the Court of first instance should allow the plaintiff to amend his plaint, so as to state the ground of exemption from the law of limitation as required by that rule. **Ram Suk v Ghulam Muhammad**, 116 P.W.R. 1918=120 P.L.R. 1918=46 Ind. Cas. 495=102 P.R. 1918

SHAH DIN, J.

References:—81 O. 195=8 C.W.N. 168 and 89 P.R. 1914=141 P.W.R. 1914=26 Ind. Cas. 441, *Dist*, 3 Ind. Cas. 77=14 C.W.N. 128=11 C.L.J. 34, F.

(3) *Pleadings and proof—Plaint, wrong statements of facts in—Plaintiff's claim to succeed on these facts—Application containing correct facts filed in course of appeal, does not amount to amendment of plaint—Amendment of plaint, whether can be allowed in second appeal—Civ. Pro. Code Act V of 1908), O. VI, r. 17*

In a suit for possession of land it appeared that the facts had not been correctly stated in the plaint. In the course of appeal the plaintiff's pleader put in a long application in which he gave a correct narration of the facts relating to the land in question, those facts being materially different from the facts as stated in the plaint. No amendment of the plaint was, however, asked for. The suit having been dismissed by the District Judge, the plaintiffs filed a second appeal to the Chief Court.

Held, (1) that, inasmuch as the plaintiffs came into Court with a plaint containing a wrong statement of facts and persisted in succeeding upon that plaint even in the Court of the District Judge, they were not entitled to any relief at all;

(2) that the belated application of the plaintiff's pleader could not be treated as amounting to an amendment of the plaint and the plaintiffs could not be allowed to amend their plaint at such a late stage of the proceedings. **Nanu v. Moti**, 119 P.W.R. 1918

SHAH DIN J

(4) *Civ. Pro. Code, 1908, O. VI, r. 17, O. XXIII r. 1—Amendment of pleadings or withdrawal of suit with liberty to bring fresh suit if permissible in second appeal.*

A plaintiff cannot, in second appeal, be allowed either to amend his pleadings or withdraw from the suit with liberty to bring a fresh suit, so as to introduce a ground as to antecedent debts or legal necessity, where he originally sued for a declaration that a sale-deed executed by his father was a bogus transaction and amended the plaint at a later stage so as to include a claim for possession of the property sold, but both the Courts below dismissed the suit finding that consideration had passed for the sale. **Bahram v. Ganpat**, 47 Ind. Cas. 306.

MIRZA, A J C.

Amendment of Plaint—(Concluded):

(4-a) *Suit for possession by patnidar—Amendment of plaint by addition of new lands—Amendment if one properly so called for purposes of limitation. See CHOWKHIDARI CHAKRAN LANDS, No. 4, 41 Ind. Cas. 728.*

(5) *Cause of action arising subsequent to plaint, amendment of plaint for inclusion of. See HINDU LAW (ADOPTION), No. 11, 7 L.W. 385.*

(5 a) *When to be allowed. See LIMITATION ACT (1908), No. 67 a, 45 Ind. Cas. 241.*

(6) *Whether allowable on verbal suggestion. See LIMITATION ACT (1908), No. 117, 45 Ind. Cas. 173*

(7) *General principles of framing pleadings and rights of parties and powers of Court—Suit for possession—Denial by plaintiff of execution of deed of wakt alleged to have been executed by her and suggestion by her of fraud and undue influence—Pleadings if necessarily inconsistent. See PLEADINGS, No. 1 a, 40 Ind. Cas. 488.*

(8) *Suit against dead person—Amendment of pleadings if allowable. See PLEADINGS, No. 2, 42 Ind. Cas. 539*

(9) *Suit for possession of land alleging title and dispossession—Position and area of land to be definitely given—Any vagueness in this respect to be amended. See POSSESSION, SUIT FOR, No. 3 U.B.R. (1918), 4th Qr., 125.*

(10) *Addition of parties without amendment of plaint—Nature of claim if altered. See RELIGIOUS ENDOWMENTS, No. 9, 11 P.W.R. 1918*

(11) *Suit for personal decree against person creating equitable mortgage and for mortgage decree against latter's mortgagor—Subsequent application to amend plaint by striking out prayer for mortgage decree against mortgagor—Allowing amendment if amounts to entertaining it—Effect of amendment by striking out part of claim. See RELINQUISHMENT OF PORTION OF CLAIM, No. 5 9 L.P.R. 275.*

(12) *Suit for damages—Amendment at late stage claiming increased damages—Amendment, if can be allowed. See TORT, No. 4, 7 L.W. 415.*

Ancestral Property.

Meaning of—Gift void where succession to, is allowed to daughter. See CUSTOMS (PUNJAB—SUCCESSION), No. 5-a, 3 P.L.R. 1918.

Ancient Document.

(1) *Presumption as to, if arises in case of documents not signed and not in handwriting of any particular person. See EVIDENCE ACT, No. 27, 40 Ind. Cas. 450.*

(2) *Presumption as to genuineness of—Interference by appellate Court with presumption made by lower Court. See EVIDENCE ACT, No. 29, 57 P.W.R. 1918.*

Ancient Monuments Preservation.

See ACT VII OF 1904.

Appeal.

- 1.—GENERAL.
- 2.—SECOND APPEAL.
- 3.—TO PRIVY COUNCIL.
- 4.—LETTERS PATENT.
- 5.—REVENUE APPEALS.

—1.—General.

- (1) *Dismissal of appeal for default—Refusal of application to re-hear appeal—Appeal from order of refusal to so re-hear—Bengal Tenancy Act, ss. 106, 109-A—Civ. Pro. Code, 1908, O. XLI, rr. 17, 19 and O. XLIII, r. 1 (i).*

Under O. XLIII, r. 1 (i), Civ. Pro. Code, an appeal lies from an order refusing to re-hear an appeal dismissed for default, even though such appeal has been preferred under S. 109-A, sub-S. (2), in a suit under S. 106 of the Bengal Tenancy Act, 1895. **Maumatha Nath Dey v. Gadadhar Mana**, 45 C. 698=28 C.L.J. 155.

MOOKERJEE and NEWBOULD, JJ.

Reference—7 C.W.N. 440, Dist.

- (2) *Refusal of leave to file written statement by Judge of High Court on original side—Order of refusal, if judgment, within meaning of cl. 15, Letters Patent.*

Held that an appeal did not lie from an order made by a Judge of the High Court sitting on the original side by which he refused an application by the defendant for leave to file his written statement, as the order refusing such leave is not a "judgment" within the meaning of cl. 15 of the Letters Patent. **Muralidhar Chamarla v. Dalmia**, 45 C. 818.

SANDERSON, C.J. and WOODROFFE, J.

References—8 B.L.R. 433, R.; 43 C. 557, Dist.

- (3) *Declaratory suit for stridhanam by mother against son—Suit filed in District Munsif's Court—Execution by son of mortgage in appellant's favour—Subsequent re-institution of suit in Subordinate Judge's Court on ground of valuation—Suit decreed by Subordinate Judge in mother's favour—Abandonment of appeal collusively by son—Application by mortgagee under Civ. Pro. Code, O. XXII, r. 10, for leave to appeal, if lies—Appeal against decree of Subordinate Judge, if lies—Civ. Pro. Code, S. 146, O. XXII, r. 10.*

On objection being made to the valuation of a suit filed in the Munsif's Court, it was returned for presentation to the Subordinate Judge's Court, where it was tried and decreed. During the pendency of the suit in the Munsif's Court, the defendant executed a mortgage of the suit property to the appellant. Finding that the defendant collusively refrained from preferring an appeal, the appellant prayed, under Civ. Pro. Code, O. XXII, r. 10, for leave to appeal, and also appealed against the decree of the Subordinate Judge, but the District Judge dismissed the application and the appeal. *Held* that, as O. XXII, r. 10, governed only application made to continue a suit and as the application in question was presented after the termination of the suit, it was not within the rule; but

Appeal—(Continued).**—1.—General—(Continued).**

that the appeal lay having regard to the language of S. 146, Civ. Pro. Code, which was wide enough to include an appeal, so as to cover cases of devolution, etc., mentioned in O. XXII, r. 10.

When a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court. **Sitaramaswami v. Lakshmi Narasimha**, 41 M. 510.

SESHAGIRI ALYAR and NAPIER, JJ.

References—(a) 36 M. 484, R.; (1917) M.W.N. 306; 18 A. 86, F.

- (4) *Bengal, Agra and Assam Civil Courts Act (XII of 1837), S. 21 (4)—Additional Sessions and Subordinate Judge of Jaunpur—Appeals from Court of Munsif ordinarily lie to his Court—Court of jurisdiction subordinate to him—Crim. Pro. Code (Act V of 1898), S. 195, Jagrup Shukul v. Emperor, 15 A.L.J. 844=40 A. 21=42 Ind. Cas. 915=19 Cr. L.J. 4. See Final Part, 1917, Col. 141.*

- (5) *Code of Civil Procedure (Act V of 1908), O. XLIII, r. 1—Appeal—Memorandum of appeal—Order returning memorandum of appeal to be presented to proper Court.*

No appeal lies against the order of an appellate Court returning a memorandum of appeal to be presented to the proper Court. **Nar-uddin Khan v. Pran Kishan Chakravartty**, 16 A.L.J. 630=40 A. 659=46 Ind. Cas. 16.

BANERJI and RYVES, JJ.

Reference—12 A. 581, R. [31 C. 345.—Ed.]

- (6) *Order in execution proceedings—Specific Relief Act (I of 1877), decree under—Review—Jurisdiction—Civ. Pro. Code (Act V of 1908), S. 151. Kanai Lal Ghose v. Jatindra Nath Chandra, 26 C.L.J. 325=23 C.W.N. 446=45 C. 519. See Final Part, 1917, Col. 140.*

- (7) *Appellate decree passed without justification—'Contrary to law'—Civ. Pro. Code (Act V of 1908), S. 100, sub S. (1).*

No Court can entertain an appeal which it is not expressly authorised by law to hear.

An appeal lies against an appellate decree passed without jurisdiction, as the decision is contrary to law within the meaning of S. 100, sub-S. (1) of the Civ. Pro. Code (a). **Pandiram Mookerjee v. Purna Chandra Roy**, 27 C.L.J. 115=45 C. 926=43 Ind. Cas. 768.

MOOKERJEE and BRACROFT, JJ.

References—(a) 16 C.L.J. 77, F.; 27 C. 362; 24 C.L.J. 235; 13 A. 575; 19 M. 248, R.

- (8) *Suit, Dismissal of, under O. IX, r. 4 of the Civ. Pro. Code (Act V of 1908).*

No appeal lies against an order refusing to set aside a dismissal of a suit under r. 4 of O. IX of the Civ. Pro. Code. **Pitambar Dhal v. Baldyanath Shet**, 27 C.L.J. 117=43 Ind. Cas. 374.

MOOKERJEE and BRACROFT, JJ.

Appeal—(Continued).**—1.—General—(Continued).**

(9) *Civ. Pro. Code (Act V of 1908), O. XLI, rr. 22, 23, scope of—Appellate Court, powers of—Cross-objection against a co-respondent—Test to be applied in such a case—Mortgage by a Hindu female, a limited owner—Legal necessity—Reversioners joining in the mortgage—Reversioners, if can subsequently maintain that the recitals therein were untrue—Estoppel—Indian Evidence Act (I of 1872), S. 115—Question of law, raised for the first time in appellate Court, if to be entertained*

A cross-objection by a respondent as against his co-respondent should not be entertained under O. XLI, r. 22 of the Code of Civil Procedure, where the question raised thereby is entirely distinct from and in no way related to the question in controversy in the appeal (a).

Per *Mookerjee, J*—O. XLI, r. 23 of the Code of Civil Procedure must be cautiously applied, for instance, applied generally in cases where but for recourse to it the ends of justice would be defeated. Thus the rule should not be allowed to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes, such as the Limitation Act and the Court Fees Act (b).

Where some of the sons of a Hindu female, who had only a daughter's interest in the property, joined in the mortgage executed by her (which narrated the circumstances which constrained her to create the incumbrances), and thus represented that the property was being mortgaged by their mother for legal necessity

Held, that the son would not be allowed to go back upon those representations when they were dealing with a party who had changed his position relying upon the representations of fact, and as such they would be estopped from denying the validity of the mortgage (to which they were parties) and the operative character of the consequential execution (c).

Per *Mookerjee, J*.—When a question of law is raised for the first time in a Court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea (d).

A reversioner who has voluntarily signed the deed of the widow cannot legally claim in opposition thereto (e) *Shib Chandra Kar v. A. C. Dulcken*, 28 O.L.J. 123

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References.—(a) 15 C.L.J. 61, *M*. (b) 22 C.L.J. 890; 22 O.L.J. 391; 22 C.L.J. 494; 22 C.L.J. 397; 23 O.L.J. 26; 34 A. 32 R. (c) *Pickard v. Sears*, (1837) 6 A. & E. 469; *Carr v. London and North Western Railway Company*, (1876) L.R. 10 O.P. 307; 41 I.A. 189=42 C. 56=30 C.L.J. 368; 19 I.A. 209; 20 C. 296; 34 I.A. 27=5 C.L.J. 115=29 A. 184; 40 C. 721; 23 C. 637; 31 A. 71, R. (d) *Connecticut Fire Insurance Company v. Kavanagh*, (1892) A.C.

Appeal—(Continued).**—1.—General—(Continued).**

473, R. (e) *Mohun Lal v. Siromanee*, (1812) 2 Mac Sel. Rep. 32, 3 A. 362; 10 A. 407, F.

(10) *Appeal—Dismissal as against a party for non prosecution—Bengal Tenancy Act (VIII of 1885), Ss. 105, 188.*

A and B, landlords, applied under S. 105 of the Bengal Tenancy Act for settlement of fair rents and for enhancement of rent. A died after the decision of the lower appellate Court, leaving a major son C and a minor one D, him surviving as heir. The tenants, defendants-appellants caused the appeal against D to be dismissed for non prosecution:

Held, that the appeal by the tenants was incompetent for want of necessary party (a). *Azmuiddin Mandal v. Tara Sankar Ghose*, 28 O.L.J. 201.

WALMSLEY and PANTON, JJ.

References.—(a) 6 C.W.N. 196; 10 C.W.N. 981; 19 C.W.N. 290, F.

(11) *Appeal competency of—Parties, defect of—Suit by persons named as proprietors of firm—Death of one of the respondents—No substitution—Contract Act (IX of 1872), S. 45—Civ. Pro. Code (Act V of 1908), O. XXX, r. 4*

O. XXX, r. 4 of the Code of Civil Procedure applies only to a case where the suit is brought in the name of the firm.

A suit was brought by A and several other persons. In the plaint the description of the plaintiffs was—"The proprietors and maliks of the firm styled Ray Chowdhury Brothers" and then the names of the plaintiffs were mentioned. The Court below gave a decree to the plaintiffs and in the decree the names of A and other persons were described as the plaintiffs without the addition of the words that they were maliks of the firm of Ray Chowdhury Brothers. After the appeal was filed, one of the plaintiffs respondents died and his legal representatives were not substituted.

Held, that the appeal failed for defect of parties (a) *Monmohan Panday v. Bishu Bhusan Ray Chowdhury*, 28 O.L.J. 268.

N R CHATTERJEE and GREAVES, JJ.

Reference.—(a) 18 C. 86, R.

(12) *Civ. Pro. Code (Act V of 1908), O. XLI, r. 23—Powers of the appellate Court to reverse a finding of the lower Court in the appellants' favour, against which no cross objection was preferred by the respondent under O. XLI, r. 22—Construction of document.*

Plaintiff had a share in some lands and the building thereon, along with a passage, to defendants by a *kobala*. He subsequently sued for recovery of a portion of the passage alleging that it had not passed by the *kobala*. The Munsif gave a partial decree, and the Subordinate Judge partially allowed the defendants' appeal, but reversed a portion of the Munsif's decree which was in favour of

Appeal—(Continued).

—1.—General—(Continued).

the defendants and against which the plaintiff had not preferred any cross-objection.

Held—That, in the appeal by the defendants, the lower appellate Court, under the circumstances of the case, was not justified under O. XLI, r. 23, in interfering with the portion of the Munsif's decree which was in favour of the defendants, as the plaintiff had not filed any cross-appeal or taken cross-objection under O. XLI, r. 22 (a).

Held further, on a construction of the *kabala* with reference to the pleadings and other documentary evidence, that the whole passage was sold, as there were statements in the deed which were inconsistent with the plaintiff having reserved any portion of the passage. **Gopal Chandra Das v. Nadlar Chand Das**, 22 O.W.N. 526—46 Ind. Cas. 142.

SANDERSON, C.J., NEWBOULD and N.R. CHATTERJEA, JJ.

References :—(a) 22 C.L.J. 390; 20 C.W.N. 542—22 C.L.J. 394, F.

(13) *Civ. Pro. Code (Act V of 1908), O. IX, r. 13—Compromise decree, application to set aside by one not a party to it—Appeal.*

Held, per curiam (Richardson, J., dubitante).

—An application by a party to a suit to set aside a compromise decree on the ground that, as against him, the decree was *ex parte*, comes under O. IX, r. 13, *Civ. Pro. Code*, and an appeal lies against the order refusing the application (a). **Shelkh Basruddin v. Shelkh Badhu Tantl**, 22 C.W.N. 571—45 Ind. Cas. 690.

RICHARDSON and WALMSLEY, JJ.

References :—(a) 6 W.R. (Mis.) 36; 14 W.R. 299; 19 C.W.N. 118; 3 C.L.J. 160 163; 13 C.W.N. 1197—10 C.L.J. 420, 444, R.; 3 C.L.J. 158, F.

(14) *Civ. Pro. Code, S. 47—Order accepting security proffered by decree-holder and delivering possession to him, if appealable—Interlocutory order.*

Where, in pursuance of an order of the Court directing that the decree-holder on furnishing security to the extent of Rs. 50,000 in immovable property was to be at liberty to proceed with the execution, security was offered and accepted by the Court in spite of objection by the judgment-debtor, and an order was made directing delivery of possession to the decree-holder of the property forming the subject-matter of the decree :

Held—That the order was not an interlocutory order and an appeal lay against it. **Rudra Narain Jana v. Naba Kumar Das**, 22 C.W.N. 657—44 Ind. Cas. 156.

TEUNON and NEWBOULD, JJ.

References :—41 C. 160; 38 C. 754; 8 C. 477, R.

(15) *Appeal against preliminary decree, whether competent, when appeal is filed after the passing of the final decree, but before it is signed—Civ. Pro. Code (Act V of 1908).*

Appeal—(Continued).

—1.—General—(Continued).

S. 97—Purchaser from minor, whether gets rights of the minor under S. 6 of the Limitation Act (IX of 1908).

Where, in a suit for declaration of title and for partition instituted on the 6th July 1918, the preliminary decree was made on the 14th August 1916, and the final decree was passed on the 11th November 1916, but was not drawn up or signed till the 18th November 1916, and, in the meantime, on the 16th November, the present appeal was preferred against the preliminary decree, and the respondent raised a preliminary objection that the decree having been passed at the date of the filing of the present appeal, the present appeal was incompetent :

Held—That, at the date when the appeal was preferred, the only decree the defendant could appeal against was the preliminary decree, as clearly he was not able to appeal against the final decree of which he could not obtain a copy. The right of appeal given by S. 97, *Civ. Pro. Code*, is not taken away by the mere fact that the Judge has passed the final decree (a).

The view that the plaintiff having purchased the property from a minor has got by the assignment the rights of a person under disability under S. 6 of the Indian Limitation Act, cannot be supported after the decision of the Full Bench in the case of 9 C. 663. **Bhagaban Chandra Kalbarta Das v. Ishan Chandra Kalbarta Das**, 22 C.W.N. 331—46 Ind. Cas. 802.

FLETCHER and SHAMSUL HUDA, JJ.

References :—(a) 22 C.L.J. 90; 18 C.L.J. 223; 36 A. 632; 27 M. 29; 20 C.W.N. 1174, R.; 18 C.L.J. 321, *Not F.*

(16) *Appellate Court, whether can decide a case on point not raised before primary Court.*

An appellate Court cannot make a case that turns only on evidence, where the point was not set up in the plaint, nor raised before the primary Court either by way of issue or by way of argument. **Lokenath Dey v. Hara Chandra Majumdar**, 43 Ind. Cas. 29.

FLETCHER and NEWBOULD, JJ.

(17) *Dismissal of suit for default, Petition for restoration of suit—Order dismissing, if appeal lies from—Civ. Pro. Code (Act V of 1908), O. XLIII, r. 1 (c), O. IX, r. 9.*

An order under O. IX, r. 9, *Civ. Pro. Code* (1908), of dismissal of a petition to restore a suit dismissed for default is not subject to appeal. **Jagdish Narain Prasad Singh v. Harban Narain Singh**, 43 Ind. Cas. 54—2 Pat. L.J. 720—2 Pat. L.W. 221.

CHAPMAN and ATKINSON, JJ.

(18) *Amendment of decree during pendency of appeal—When appeal becomes appeal against amended decree.*

Where a decree of the lower Court was amended during pendency of appeal and where the

Appeal—(Continued).**—1.—General—(Continued).**

application was made to the appellate Court to attach to the memorandum of appeal a copy of the decree as amended by the Court of first instance and the application granted, held that the pending appeal became an appeal against the amended decree. *Sadupadhyaya Umesha-nand Oja v. Ravaneswar Prasad Singh Bahadur of Gidhour*, 48 Ind. Cas. 772.

• **MOOKERJEE and BEACHECROFT, JJ.**

(19) *Appeal—New case—Whether allowable*. A new case cannot be set up in appeal. *Far-khund Ali v. Mohammad Sahib*, 44 Ind. Cas. 624 = 4 O.L.J. 781.

LINDSAY, J.O.

(20) *Party making an ex parte application*. Duty of—Time for filing appeal, Order granting, if can be cancelled by same Court—Appeal filed out of time, Order refusing to admit, if a decree—Limitation Act (IX of 1908), S. 5—Appeal filed beyond time—Legal adviser, Mistake of, Proof of.

It is the duty of the party making an *ex parte* application to call the attention of the Judge not only to the portion of the law or authority in favour of his case but also to the matters that are against him.

Where an *ex parte* application was made to the District Judge asking under the provisions of S. 5 of the Limitation Act an extension of time for filing an appeal and also to give the appellant time for the purpose of paying the Court-fees, the Judge made an order granting the application. But subsequently he re-considered his order and revoked it before the memo of appeal had in fact been admitted.

Held, that the Judge had ample authority under the law to revoke or alter his previous order at any time before the appeal was admitted.

Before granting an extension of time under S. 5 of the Limitation Act on the ground of the appeal having been filed beyond time owing to a mistake of the appellants' legal adviser, there ought to be proper evidence establishing the fact that a mistake had been committed and that it was *bona fide*.

Quere.—Whether an order refusing to admit an appeal out of time is a decree within the meaning of the Civ. Pro. Code? *Iwar Chandra Kapali v. Shells Arjan*, 45 Ind. Cas. 725.

FLETCHER and SHAMSUL HUDA, JJ.

(20-a) *New case, if can be set up in—Pleadings*. Case not specifically raised in, but put forward in cross-examination.

Plaintiffs brought a suit for arrears of rent and the defendant set up the plea that he was entitled to a suspension of the rent because he had been ousted by the plaintiff from a portion of the holding. The Munsif held that the plaintiff had dispossessed the defendant from a portion of the holding, and there ought to be an abatement of rent. On appeal, the District Judge held that the defendant had, in fact, been dispossessed by the plaintiff but it had

Appeal—(Continued).**—1.—General—(Continued).**

not been shown that those plots of lands formed a portion of the holding for which rent was claimed. On the defendant's contention that he was taken by surprise by the plaintiff's setting up in appeal a new case not specifically raised in the pleadings:

Held, that the defendant could not question the decision of the appellate Court on that ground, as the case was definitely put in cross-examination to one of the defendant's witnesses in the trial Court and as no objection was then raised that evidence of that sort should be excluded as being irrelevant to the issue. *Rajlakshmi Dasya v. Prodyot Kumar Tagore*, 46 Ind. Cas. 184.

FLETCHER and SHAMSUL-HUDA, JJ.

(21) *Suit for confirmation of possession and declaration of title—Possession and title*. Question of, not gone into by appellate Court—Appellate Court, Judgment of, Validity of.

In a suit for confirmation of possession on declaration of title, the first Court went into the matter both of possession and on the question of title. The lower appellate Court however neglected the question of possession altogether and held that title was not proved.

Held that a judgment founded on those particulars without really going into the question of possession or of title was one that could not stand. *Ram Nath Ojah v. Natabar Matti*, 46 Ind. Cas. 328.

FLETCHER and SMITHER, JJ.

(22) *Filing of, Delay in—Extension of limitation—Mistake in calculation, if 'sufficient cause'—Limitation Act (IX of 1908), S. 5*.

To grant an extension of time for filing an appeal, a mistake in calculating the period of limitation is not a 'sufficient cause' under S. 5 of the Limitation Act. *Guru Charan Ghose v. Kashi Chandra Ghose*, 46 Ind. Cas. 480.

FLETCHER and SMITHER, JJ.

(23) *Civ. Pro. Code (V of 1908), S. 9, Explanation—Suit for an office—Maintainability of—Matters to be proved—Characteristics of an office, what are—Rectifying Prabandam in temples and receiving theertham and prasadam—Whether amount to an office—Theerthakars, status of—Whether office-holders—Civ. Pro. Code (V of 1908), O. XXII, r. 4, and O. XLI, r. 22—Death of respondent after memorandum of objections preferred—Appellant's failure to bring representative on record within time limited—Legal representative himself coming on record for the sake of memorandum of objections—Whether enures for the appeal also—Appeal, if does not abate—Practice*.

Under O. XLI, r. 22, cl. (1), Civ. Pro. Code, a person should be a respondent in the appeal before he can file any memorandum of cross-objections. Where, therefore, a respondent who

Appeal—(Continued).**—1.—General—(Continued).**

has preferred a memorandum of cross-objections is dead and the appellant fails to bring his legal representative on record within the time limited by law, but such legal representative brings himself on record for the purpose of prosecuting such cross-objections.

Held (i) that the introduction of the legal representative for the memo of cross-objections would be an introduction for the purposes of the appeal as well, and

(ii) that the appeal did not abate as against such legal representative(a).

A claim which refers merely to a religious honour which consist of receiving *teertham* and *prasadam* in a Hindu temple in a certain order is *prima facie* not one of a civil nature, and unless such honour is attached as an emolument to a religious office, a claim therefor will not be cognisable by a Civil Court.

In order to show the maintainability of such claim in a Civil Court, the plaintiff must prove (i) the existence of the office to which the emoluments claimed are attached and (ii) the connection between the office and the honour, dignities and perquisites claimed (b).

In order to constitute an office, the essential pre-requisites is the existence of a duty or duties attached thereto which the office holder is under a legal obligation to perform and the non-performance of which may be visited by penalties such as suspension, dismissal, etc.

The rendering of any merely voluntary service cannot constitute an office.

Ordinarily temple offices have substantial emoluments attached to them in the shape of income from inam lands and money payments and though the absence of such emoluments is not necessarily by itself evidence of the non-existence of the office, it makes it necessary to scrutinise carefully the evidence of its existence.

Where there were admittedly no emoluments of any value attached to what was alleged to be a *Teertham* office and the duties thereof were alleged to be the recitation of the *Prabandam* and *Vedas* on stated occasions and though the *Teerthakars* did recite *Prabandams* and *Vedas*, the evidence did not establish they were bound to do so, but it appeared that among the *Teerthakars*, there were certain persons called *Adyapakamdars* whose special duty it was to recite these *Prabandams* and they were remunerated by inam lands given to them and not only did the *Teerthakars* join in the recital but so did all *Vaishnavites* present, and the only difference between the *Teerthakars* and the other *Vaishnavites* was that the former had an '*arulpad*' or call of names to which they responded '*Nayinda*' and the *Teerthakars* received the *teertham* and *prasadam* from places specially allotted to them and before the outsiders got them and no penalties such as forfeiture of *teertham* and *prasadam* attached to the *Teerthakars* for failure to recite the *Prabandams* or *Vedas*.

Held that all these showed only that the *Teerthakars* were a recognised and privileged

Appeal—(Continued).**—1.—General—(Continued).**

class of worshippers and not that they held any office in the temple. **Yathiar Venkatas-chariar v. P. Ponnappa Iyengar**, 7 L.W. 614—45 Ind. Cas. 959.

WALLIS, C.J. and KRISHNAN, J.

References:—(a) 6 L.W. 591 (P.O.), P.; 21 Ch. D. 175; D. (b) 4 L.W. 562, F.

(23-a) *Guardian and ward—Sale by certified guardian of minor's property under sanction of District Judge—Re sale, order directing, by District Judge, is appealable.*

Quere.—Order of a District Judge directing re-sale of property of a minor already sold under his orders if appealable? **Prem Sukh. Das v. Lachmi Tewari**, 46 Ind. Cas. 542.

RICHARDS, C.J. and BANERJI, J.

(23-b) *Execution of decree—Suo proclamation issued, Order settling terms of, Appeal if lies against—Civ. Pro. Code (Act V of 1908), O. XXI, r. 66.*

No appeal lies against an order settling the terms of a sale proclamation, to be issued under O. XXI, r. 66 of the Civ. Pro. Code, with a view to the sale of certain properties in execution of a decree obtained on a mortgage. **Girdhari Lal Serowgi v. Altaf Ali Chowdhury**, 46 Ind. Cas. 564.

TEUNON and NEWBOULD, JJ.

(23-c) *Execution-sale, Order setting aside, under S. 173, Bengal Tenancy Act (VIII of 1885)—Auction-purchaser, benamidar of judgment-debtor—Order not appealable—Civ. Pro. Code (1908), S. 47, inapplicable to benamidar—Civ. Pro. Code (1908), O. XXI, r. 90.*

When an execution-sale is set aside under S. 173 of the Bengal Tenancy Act, on the ground that the auction-purchaser is a benamidar of one of the judgment-debtors, the decision is not appealable even where the Court has considered some other matters such as Civ. Pro. Code, O. XXI, r. 90, &c., in arriving at the conclusion. The benamidar has got no right of appeal also under the Civ. Pro. Code, because S. 47 does not apply to the case of a benamidar. **Dhramoyi Das v. Anantaram Chakravartthy**, 46 Ind. Cas. 748.

FLETCHER and NEWBOULD, JJ.

(23-d) *Arbitration—Award—Judgment in accordance with award, Appeal if lies from—Civ. Pro. Code (Act V of 1908), Sch. II, paras. 15, 16.*

When a case has once been referred to arbitration, no appeal lies, if the decision of the executing Court is not in excess of or otherwise than in accordance with the award.

A decree made in accordance with an award cannot be challenged by way of appeal on the ground that there is no valid and legal award; the plain general policy of the Legislature being that in a matter of arbitration the judgment in accordance with an award should

Appeal—(Continued).**—1.—General—(Continued).**

be final. *Shivaprasad Singhal v. Lachman-prasad*, 46 Ind. Cas. 785.

DRAKE BROCKMAN, J.C.

- (28 e) *Appeal, Transfer of, to another Court without notice to parties—Parties absent on day of hearing—Dismissal of appeal for default—Restoration—Sufficient cause—Civ. Pro. Code (1908), O. XLI, rr. 17 and 19.*

An appeal pending in the Court of a Subordinate Judge having been transferred by the District Judge to the Court of the Additional District Judge without any notice to the parties or their pleaders, it was taken up on the day fixed for its hearing by the Additional District Judge and was dismissed for default, while the appellants were in the Court of the Subordinate Judge waiting for their case to come on. An application to restore the appeal was made on the very next day and was dismissed by the Additional District Judge.

Held, that, on the appellants paying within a certain time to the respondents their costs, the appeal should be restored and heard on the merits. *Inaball v. Bhagaban Chandra Shaha*, 46 Ind. Cas. 881.

FLETCHER and SHAMSUL HUDDA, JJ.

- (23-f) *Execution proceedings, Decision in—Fraudulent concealment of certain properties by the judgment debtor—Official Receiver, or judgment-debtor declared insolvent, is entitled to appeal.*

It is only the Official Receiver who can appeal against the decision in execution proceedings that certain properties belonging to the judgment-debtor were fraudulently concealed by him from his creditors and not the judgment-debtor who has been adjudicated an insolvent. *Banomall Dutta v. Lalit Mohan Ghosal*, 47 Ind. Cas. 162.

FLETCHER and SHAMSUL HUDDA, JJ.

- (24) *Bench appeal—Failure to pay translation and copying fees—Dismissal of appeal for default—Civ. Pro. Code (1908), O. XVII, r. 3.*

Where an appellant made default by omitting to take steps necessary for the preparation of Bench copies and translations of vernacular documents without which it was obviously impossible that the case should proceed, *held*, that the Court would not be acting *ultra vires* in dismissing the appeal for default when materials essential to the progress of the appeal were wanting owing to the appellant's default and that O. XVII, r. 3, justified the dismissal. *Ma On Bwla v. Ma Shwe MI*, 9 L.B.R. 266=47 Ind. Cas. 691.

TWOMBLY, C.J. and MAUNG KIN, J.

References:—13 M. 510; 18 M. 466; 23 A. 462, *Dist.*

- (25) *Return of plaint by Munsif—Plaint filed in Subordinate Court—Appeal against Munsif's order returning plaint—Right of*

Appeal—(Continued).**—1.—General—(Continued).**

appeal is forfeited by filing plaint in Subordinate Court.

On the return of a plaint, filed by the plaintiff in the District Munsif's Court, he filed it in the Subordinate Court and it was returned again. He appealed against the order of the Munsif returning the plaint. *Held* that, by electing to file his plaint in the Subordinate Court, he did not forfeit his right of appeal (a). *Narayana Nair v. Cherla Katiri Kutty*, 34 M.L.J. 397=41 M. 721=45 Ind. Cas. 89.

OLDFIELD and SADASIVA AYYAR, JJ.

References:—(a) 5 C.L.J. 580; 7 C.L.J. 547, R.

- (26) *Godaveri Agency Rules, rr. 10, 16—Decree of Court of Government Agent—Employment by Government Agent of Agency Munsif to execute such decree—Appeal from order of such Agency Munsif, if lies.*

The Government Agent, Godaveri, employed under r. 10 of the Godaveri Agency Rules, an Agency Munsif to execute a decree of the Agency Court. In the proceedings in execution held by him, the Agency Munsif passed an order, against which an appeal in the usual form of a petition to the Government under r. 16 was filed by the aggrieved party. *Held* that the Civ. Pro. Code, not applying to the Agency tracts, the order in question was not a decree (a) and hence no appeal lay even to the Assistant Agent and much less a third appeal to the High Court. *Held*, also, that the order of the Agency Munsif was not in the eye of the law a proceeding of the Government Agent himself so as to justify a resort to r. 16 which allows a petition to the Government against all proceedings (including execution proceedings) of the Government Agent; as the proceedings of a subordinate officer of a Court of Justice do not become the proceedings of the Court itself, unless the statute law makes them so in respect of particular matters, or unless those proceedings are submitted to the presiding officer of the Court and adopted or approved by him (b).

Per Sadasiva Ayyar, J.—Where the Government Agent employs the Munsif to apply afterwards by petition under r. 16 (c):

Where the Government Agent employs the Munsif to execute the Government Agent's decree, the Agent retains full control over the proceedings which are being conducted by the Agency Munsif as the Government Agent's employee and that the appellant's proper course was to have made representations to the Agent against the proceeding of the Munsif and if the Agent passes proceedings on such representations against the appellant, to apply afterwards by petition under r. 16. *Manyam Mahalakshamma Garu v. Muchika Appalaraju*, 34 M.L.J. 473=47 Ind. Cas. 713.

SADASIVA AYYAR and BAKEWELL, JJ.

References:—(a) 26 M. 266, R. (b) 27 M. 109, *Dist.* (c) 30 Ind. Cas. 76, R.

Appeal—(Continued).**—1.—General—(Continued).**

- (27) *Practice—Point not raised in the lower Court—Value of statements in judgments—Rule for allowing interest.*

It is a well-settled rule of practice of their Lordships' Board that an appellant, when bringing up the actual decree of the High Court for review, shall not be allowed to ask to have it set aside on the ground that it has wrongly accepted a decision of the Subordinate Court, if he himself has never brought that decision before the High Court for its consideration.

In the absence of evidence to the contrary, a statement in the judgment appealed against that a point (urged later on in appeal) was not pressed by his advocate in the lower Court must be accepted by the appellate Court.

Interest depends on contract, express or implied, or on some rule of law allowing it. *Lala Kalyan Das v. Shaik Maqbul Ahmed*, 35 M.L.J. 169=(1918) M.W.N. 535=16 A.L.J. 693=28 C.L.J. 181=20 Bom. L.R. 864=46 Ind. Cas. 548=40 A. 497=22 C.W.N. 866=24 M.L.T. 110=8 L.W. 179 (F.C.).

VISCOUNT HALDANE, LORD DUNEDIN,
LORD SUMNER, SIR JOHN EDGE and
MR. AMEEB ALI.

- (27-a) *Appeal against order refusing extension of time for payment—Further appeal against final decree which follows an order refusing further time—Civ. Pro. Code, O. XLIII, r. 1 (a).*

An appeal lies under O. XLIII, r. 1 (a), against an order refusing to extend the time for payment of decree amount and a further appeal also lies against the final decree which follows on the order refusing further time. But when an appeal against the order has been dismissed in which the question of the propriety of extending time has been considered, the same point cannot be raised again in an appeal against the final decree. *Mahadeo v. Ganpat*, 14 N.L.R. 25=42 Ind. Cas. 392.

BATTEN, ADDL. J.C.

- (28) *Insufficient Court-fee paid on appeal for appellant's own convenience—Court if bound to receive appeal and give time to make deficiency good—Difficulty in procuring stamps—Limitation Act, S. 5.*

Where an appellant deliberately and to suit his own convenience paid on his appeal insufficient Court-fee, the Court is not bound to receive the appeal and give the appellant time to make good the deficiency assuming that the Court has power to receive such an appeal, and allow time for the deficiency to be made good, it would be exercising its discretion in an unreasonable manner if it were to do so.

Serbie.—If appellants are prevented from filing their appeal within time by difficulties encountered in procuring the necessary Court-fee stamps, they may possibly rely upon those difficulties as constituting "sufficient cause" within the meaning of S. 5, Limitation Act, for

Appeal—(Continued).**—1.—General—(Continued).**

not having filed the appeal within time. *Ram Sahay Ram Pande v. Kumar Lachmi Narayan Singh*, 3 Pat. L.J. 74.

CHAMIER, C.J. and MULLICK, J.

Reference:—12 A. 129, R.

- (29) *Two or more appellate decrees in same suit—Separate appeals to be filed.*

An appellant cannot impugn two or more appellate decrees in one appeal, but must file two separate appeals, even when these appellate decrees arise out of one decree in one suit. *Ram Narain Lal v. Hari Krishna Prasad Sahl*, 3 Pat. L.J. 96=44 Ind. Cas. 418.

ROE and JWALA PRASAD, JJ.

References:—11 M. 280; 7 A.L.J. 861, R.

- (30) *Appeal by one of several defendants—Other defendants how far benefited by result of appeal—Decree in mortgage suit—Appeal by execution purchaser—Exoneration of appellant, effect of, on other mortgagors.*

It is well settled that in any case in which only one of several defendants appeals, the result of the appeal will enure to the benefit of the other defendants only if the interests of the other defendants are inseparable from the interests of the defendant-appellant.

Where, therefore, in an appeal by the auction-purchaser at a revenue sale of one of many properties ordered to be sold under a mortgage-decree, the purchaser was released from liability under the mortgage, held that the result of the appeal by the auction-purchaser was to free only the property in which he had an interest leaving untouched the decree of the original Court in so far as the interests of the other defendants were concerned. *Mahendra Koer v. Sat Narain Lal*, 3 Pat. L.J. 166=44 Ind. Cas. 763.

ROE and IMAM, JJ.

- (31) *Adjournment of appeal to particular date by District Judge—Transfer before such date to Subordinate Judge—Transfer not communicated to parties—Dismissal of appeal—Restoration of appeal—Sufficient cause—Civ. Pro. Code, O. XLI, r. 19.*

Before the date fixed for the hearing of an appeal, the District Judge transferred it to the Subordinate Judge for disposal and the order of transfer was not communicated to the parties. On the fixed date the Subordinate Judge took up the appeal and dismissed it as none of the parties was present. He also dismissed an application for its restoration. Held that the fact that the appellant did not know of the transfer was a sufficient cause within the meaning of O. XLI, r. 19, which prevented him from appearing and that the appeal ought to be restored.

It is desirable in cases where an order of transfer is made that notice should be given in

Appeal—(Continued).**—1.—General—(Continued).**

every case to the parties or their representatives. *Ram Sukhai Pathak, v. Maharajah Kesho Prasad Singh*, 3 Pat. L.J. 218 (F.B.).

MILLER, C.J., CHAPMAN and ATKINSON, JJ

Reference.—26 M 599, R.

(81 a) *Civ Pro Code, O XL, r. 1—Receiver, Appointment of, Objection to, Order dismissing—Appeal, lies from*

An appeal lies from an order dismissing an objection to the appointment of a receiver, by a person exercising or claiming to exercise rights of possession, since such an order comes within O. XL r. 1 of Civ. Pro Code (1908). *Agabeg v. Must Sundari*, 3 Pat. L.J. 573.

MILLER, C.J. and MULLICK, J

Reference.—36 C 713, R

(92) *Order amending decree—Order not one relating to execution or satisfaction of decree—Order not appealable—Civ Pro. Code (1908) S 47*

No appeal lies from the order of a Court amending a decree, as the order amending the decree cannot be said to relate to execution or satisfaction of the decree and is not covered by S 47, Civ Pro Code. *Aziz Baksh v Sultan Singh*, 43 P.R. 1918=48 Ind Cas 9.

SHAH DIN, C.J

33) *Appeals by plaintiff and defendant—Death of defendant appellant before hearing of appeal—Dismissal of defendant's appeal for default—Application on same by plaintiff-appellant to bring defendant's son on record in his own appeal, Grant of—Issue, but non service of notice—Fresh notice issued, but plaintiff's appeal decided ex parte before return of notice finally returned unreserved—Subsequent application by son of defendant to set aside ex parte decree and to make him appellant in his father's appeal—Procedure*

In an appeal by both the plaintiff and the defendant from a decree, the defendant's appeal was dismissed on 14.11.1916 as neither he nor his pleader was present. On the same day the plaintiff, alleging that the defendant had died in October, 1916, applied to bring his son on the record as his representative. Notice was twice issued, but came back unserved, but the appeal of the plaintiff was accepted on 9.1.1917, before the second notice was returned as unserved.

On 13.3.1917, the defendant's son applied to the District Judge to have the *ex parte* decree set aside and to be brought on the record as appellant in his father's place. But the District Judge dismissed it as time barred in regard to the *ex parte* decree and as futile in respect of the prayer to be brought on the record as appellant. *Held* that the defendant's son was entitled to be brought on the record as his father's representative and that the *ex parte* decree should also be set aside.

Where notice has not been served, limitation for an application for rehearing the appeal dates

Appeal—(Continued).**—1.—General—(Continued).**

from the time when the applicant had knowledge of the decree, under Art. 169, Limitation Act. A dead man is not a defaulter and in such a case his representative can get the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar. *Dawlat Rai v Jagat Ram*, 96 P.R. 1918=47 Ind Cas 962

CHEVIS, J

Reference.—35 A 391 (P.C.), R.

(34) *Civ Pro. Code, O. IX, r 4—Execution of decree—Dismissal for default—Sufficient cause—Allegations not supported by affidavit—Appeal*

An application to execute decree was dismissed in default. No application was made to set aside the order passed *ex parte*, but an appeal was filed on the allegation that the appellant had gone to call his pleader and learnt on his return that the application was dismissed. No affidavit from the pleader was filed.

Held that, in the absence of an affidavit from the pleader, the appeal must be dismissed. It was the duty of the appellant to file an application in the lower Court either soon after the *ex parte* order or if the appeal was passed against him on the following day to set aside the order. *Shelkh Piara v Nithianand* 64 P.L.R. 1918

SHAH DIN, J

(36) *Appeal—Right of appeal, when can be exercised*

Held, that, in order to entitle a person to appeal, he must be a party to the suit in which he seeks to appeal against a decree and he must be a person aggrieved by the decree.

Plaintiffs sued for a declaration that an alienation of ancestral land made by their father shall not affect their reversionary rights. It appeared that one K had already brought a suit for pre-emption of the land, and, on the present suit being filed, he was made a defendant at his own request. Both suits were tried together and the plaintiffs' suit was decreed and K's suit was dismissed and K appealed in both cases and succeeded. The plaintiffs filed a second appeal.

Held, that inasmuch as K was a party to the declaratory suit and had a right of pre-emption, which he was seeking to enforce and was aggrieved by the decree granted to the plaintiffs that the sale should not affect their reversionary rights after the death of the vendor, he had a right to appeal. *Faujoo v. Karam Din*, 84 P.W.R. 1918=82 P.L.R. 1918=45 Ind. Cas. 181.

SCOTT-SMITH, J

Reference.—76 P.R. 1902, R.

(86) *Appeal against an order in execution of a decree in suit involving claim to or above Rs. 5,000 lies to Chief Court—Decree-holder competent to execute the decree*

Appeal—(Continued).**—1.—General—(Continued).**

attached in his decree—R. 53 (3) of O. XXI, Civ. Pro. Code, 1908.

Held, that a District Judge has no jurisdiction to hear the appeal against an order in execution of a decree passed in a suit involving claim to or above Rs. 5,000; it lies direct to the Punjab Chief Court.

Held, also, that, under the provisions of r. 53 (8) of O. XXI, Civ. Pro. Code, 1908, the holder of a decree, which is to be executed by attachment of another decree, has the same power of executing that other decree as the holder of that decree. *Mohib-ud din v. Partab Mal*, 86 P.W.R. 1914=85 P.L.R. 1918=46 Ind. Cas. 584.

LE-ROSSIGNOL J.

(37) *Civ. Pro. Code (Act V of 1909), O. XLI, r. 27, scope of—Document submitted with memorandum of appeal, whether admissible—Findings based on such document, whether binding in second appeal.*

Held that the provisions of O. XLI, r. 27 of the Civ. Pro. Code, are mandatory, and an appellate Court is not entitled to admit and consider additional documentary evidence in contravention of those provisions.

Where an appellant attached certain documents to his memorandum of appeal and the appellate Court passed an order that they should remain on the record:

Held, that the appellate Court had contravened the provisions of O. XLI, r. 27, Civ. Pro. Code, in admitting and considering this evidence and that as its findings had been vitiated by the fact that they were based on evidence wrongly admitted, they were liable to be set aside. *Ratna v. Harnam Singh*, 150 P.W.R. 1918=47 Ind. Cas. 12.

SCOTT SMITH and BROADWAY, JJ.

*References:—*31 B. 381=9 Bom. L.R. 671=11 C.W.N. 721=6 C.L.J. 5=4 A.L.J. 461=17 M.L.J. 347=34 I.A. 115=2 M.L.T. 485 (P.C.), F.; 12 O. 37, R.; 3 Ind. Cas. 465=36 C. 838=18 C.W.N. 830=10 C.L.J. 74=6 M.L.T. 7=11 Bom. L.R. 861=19 M.L.J. 435=36 I.A. 221 (P.C.), Dist.; 108 P.R. 1907, cited.

(38) *Failure to furnish security for costs of minor respondent's guardian ad litem appointed ex parte—Dismissal of appeal against minor, if valid.*

The dismissal of an appeal as against a minor for failure to furnish security for costs of his guardian ad litem, appointed ex parte by the District Judge in the appeal pending before him is good until duly set aside, even though at the subsequent hearing of the appeal transferred to the Subordinate Judge a pleader purporting to be instructed by a Nazir of the Munsif's Court treated by the appellant as guardian ad litem for the appeal. *Kallash Chandra Kandoor v. Haribar Patre*, 47 Ind. Cas. 938.

FLETCHER and SHAMSUL HUDA, JJ.

Appeal—(Continued).**—1.—General—(Continued).**

(39-a) *Setting aside order of abatement of appeal—Grounds. See ABATEMENT OF APPEAL, No. 1, 21 O.C. 68.*

(39) *Death of one of three appellants pending appeal—Appeal if abates. See ABATEMENT OF APPEAL, No. 2, 84 P.R. 1918.*

(40) *Application for passing final decree in suit for sale of mortgaged property—Order on application if appealable. See ACKNOWLEDGMENT OF DEBT, No. 4, 35 M.L.J. 552.*

(41) *Bengal Revenue Sales Act, XI of 1859, S. 25—Appeal under, dismissed by Commissioner for default—Restoration of, power of Commissioner re. See BEN. ACT XI OF 1859 (REVENUE SALES), No. 4, 46 Ind. Cas. 621.*

(42) *Suit instituted before Settlement Officer—Transfer to Civil Court—Appeal if lies to special Judge. See BEN. ACT VIII OF 1885 (TENANCY), No. 28, 27 C.L.J. 281.*

(43) *Bengal Tenancy Act—Appeal against decision of Settlement Officer—Commencement of limitation. See BEN. ACT VIII OF 1885 (TENANCY), No. 55, 44 Ind. Cas. 152.*

(44) *Decision as to question of title necessary to allow an appeal under S. 153, Bengal Tenancy Act. See BEN. ACT VIII OF 1885 (TENANCY), No. 72, 44 Ind. Cas. 558.*

(45) *Ejectment suit in Revenue Court—Denial by defendant of tenancy from plaintiff—Allegation of lease from other persons—Proprietary title in issue in first Court—Appeal if lies to Civil Court. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 23, 16 A.L.J. 239.*

(46) *Suit in Civil Court for ejectment—Plea of tenancy—Suit referred to and decided by Revenue Court—Appeal to District Judge on ground of jurisdiction—Competency of appeal. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 30, 16 A.L.J. 590.*

(47) *Application for partition under the United Provinces Land Revenue Act—Objectors have no locus standi under the Act—Decision of Revenue Court—Forum of appeal. See ACT III OF 1901 (U.P. LAND REVENUE), No. 8, 45 Ind. Cas. 544.*

(48) *Erroneous exercise of discretion—Correction by Court of appeal—Principles. See ADMISSION, No. 1, 45 C. 138.*

(49) *Objection to reference to arbitration not taken in first or appellate Court—Jurisdiction—Objection allowed. See ARBITRATION, No. 2, 27 C.L.J. 339.*

(50) *Application to file award on private arbitration—Subsequent reference to new arbitrator through Court—Application to file second award—Order setting aside award—Order setting aside award, if decree—Appeal, if lies from order. See ARBITRATION, No. 10, 154 P.W.R. 1918.*

(51) *Right, title and interest of judgment-debtor, Order directing sale of, Appeal if lies*

Appeal—(Continued).

—1.—General—(Continued).

from—Validity of order where right, title and interest in issue. See ATTACHMENT, No. 1, 47 Ind. Cas. 29.

(52) Application to file award made before delivery of award—Order directing award to be filed—Appeal, if lies from order. See AWARD, No. 13, 90 P.W.R. 1918.

(53) Appeal against unfavourable opinion of Court by party in whose favour decree was passed, not allowed. See BERAR LAND REVENUE (CODE No. 3, 41 Ind. Cas. 723.

(53 a) Burden of proof, Importance of, in. See BURDEN OF PROOF, No. 5 a 46 Ind. Cas. 929.

(54) Powers of the appellate Court to admit additional evidence in appeal. See CIV. PRO. CODE (1908), No. 516, 44 Ind. Cas. 670.

(55) Attachment of decree—Attaching creditors made pursuant to decree-holder's application for recording of auction—Question one under S. 47, Civ. Pro. Code—Order on application appealable. See CIV. PRO. CODE (1908), No. 81, 24 M.L.J. 190.

(56) Auction purchase entitled to benefit of his purchase if Code not strictly complied with—Deposit of money by judgment-debtor not made within time and not made with application to set aside sale—Appeal by auction purchaser from setting aside sale—Appellate Court affirming sale—Judgment-debtor if entitled to revision. See CIV. PRO. CODE (1908), No. 314, 16 A.L.J. 133.

(57) Objections against co-respondents when made but entertained. See CIV. PRO. CODE (1903), No. 493, 16 A.L.J. 587.

(58) Order for delivery of possession under O. XXI, r. 15, Civ. Pro. Code—Appeal from. See CIV. PRO. CODE (1908), No. 363, 16 A.L.J. 150.

(59) Property assigned *lis pendens*—Assignee not made party to suit—Assignee's right of appeal against decree. See CIV. PRO. CODE (1908), No. 908 L.W. 21.

(60) Property of order passed under Civ. Pro. Code, O. XXII, r. 5, only question raised in appeal—Appeal from decree if lies. See CIV. PRO. CODE (1908), No. 377, (1918) M.W.N. 198.

(61) Right of defendant to ask for plaintiff, who does not appeal, what latter did not. See CIV. PRO. CODE (1908), No. 520, 14 N.L.R. 56.

(62) Suit pending in Sub-Judge's Court on Small Cause side—Sub-Judge on leave—said suit yet to be considered as pending on Small Cause side—Transfer of suit, under S. 24, Civ. Pro. Code, to Munsif Court—Decree by Munsif—Appeal if lies from decree. See CIV. PRO. CODE (1908), No. 54, 16 A.L.J. 548.

(63) Company being plaintiff in suit—Appeal or revision arising from such suit—Leave of

Appeal—(Continued).

—1.—General—(Continued).

Court unnecessary. See COMPANIES ACT (VII OF 1913), No. 3, 32 P.L.R. 1918.

(64) Order in winding-up proceedings under Companies Act, 1884—Order passed after new Act came in force—Order directing preferential payment—Appeal if lies. See COMPANIES ACT (V OF 1882), No. 3, 16 A.L.J. 70.

(64 a) Consent decrees, what is a—Decree based on compromise if—Appeal if lies from such decree—Civ. Pro. Code (1908), S. 96 (3), O. XXIII, r. 3. See CONSENT DECREE, 46 Ind. Cas. 775.

(65) Consolidation of appeals—Land acquisition awards—Single appeal from split up awards. See CONSOLIDATION (OF APPEALS), 34 M.L.J. 279.

(66) Discretion of lower Court as to costs—Interference by appellate Court with such discretion. Essential conditions for—Costs incurred unnecessarily—Attorneys personally liable for such costs. See COSTS, No. 2, 20 Bom. L.R. 905.

(66 a) Costs, Personal decrees for, in a foreclosure suit, if appeal lies from. See COSTS, No. 3 b, 47 Ind. Cas. 542.

(66 b) Court-fees, Calculation of—Appeals from original decrees and second appeals—Amount on date of decree, the basis of calculation—Costs, Appeal regarding, Court-fee in—Court Fees Act (1870), Ss. 12 and 17. See COURT FEES, No. 2, 3 Pat. L.J. 443.

(67) Decree against several defendants—Appeal filed only by two, but separately—Each appeal to bear *ad valorem* Court-fee. See COURT FEES, No. 5, 91 P.R. 1918.

(68) Suit for sale on mortgage—Dower debt pleaded as prior charge—Disallowance of plea of dower debt—Appeal—Court fees payable on memorandum of appeal. See COURT FEES ACT (VII OF 1870), No. 7, 16 A.L.J. 81.

(69) Court Fees Act, S. 7 (i) and (vi)—Suit for pre-emption—Consideration stated in sale deed as Rs. 44,000, plaintiff alleges a smaller consideration—Suit decreed in respect of same property on payment of Rs. 21,000—Court-fee payable on memorandum of appeal—Appeal divisible into two parts. See COURT FEES ACT (VII OF 1870), No. 5, 16 A.L.J. 174.

(70) Court fees fixed by the Registrar of High Court as taxing officer on appeal—Order final—No appeal against order—Division Bench of High Court when can question correctness of Court-fees paid. See COURT FEES ACT (VII OF 1870), No. 4, 3 Pat. L.J. 92.

(71) Suit for possession and mesne profits—Court-fee not paid on mesne profits—Decree for possession and mesne profits—Application for ascertainment of mesne profits—Appeal from order dismissing application—Court-fees payable *ad valorem*. See COURT FEES ACT (VII OF 1870), No. 2, 3 Pat. L.J. 101.

Appeal—(Continued).**—1.—General—(Continued).**

(72) Decision on question of value for purposes of Court-fee incidental to decision on question of value for purposes of jurisdiction—Appeal whether competent. See COURT FEES ACT, No. 19, 151 P.W.R. 1918.

(73) Dismissal of application for order under Civ. Pro. Code, O XXXIV, r. 6—Appeal from order—Court fee on appeal to be *ad valorem* on value of appeal. See DECREE, No. 2, 40 A. 553.

(74) Change of case in appeal, if permissible. See ENHANCEMENT OF RENT, No. 2, 22 C.W.N. 856.

(75) Plea of stipulation being in part a penalty—Plea one of fact—Plea not to be raised for first time in appeal. See HINDU LAW (DEBTS), No. 8, 14 N.L.R. 41.

(76) Party willing to accept lower Court's decision, Right of, to resist appeal without filing cross-appeal or objections. See INTEREST, No. 6, 48 P.W.R. 1918.

(77) Difference between Judges hearing appeal against land acquisition award—No appeal under Letters Patent, cls. 15, 36. See LAND ACQUISITION ACT, No. 20, 35 M.L.J. 110.

(78) Memorandum of objections need not be confined to subject-matter of appeal. See LAND ACQUISITION ACT, No. 19, 35 M.L.J. 89.

(79) Order by single Judge of High Court refusing to excuse delay in filing appeal—Judgment—Appeal if lies from order. See LETTERS PATENT (BOMBAY), 20 Bom. L.R. 172.

(79-a) Order of single Judge of High Court staying criminal trial—Appeal if lies against such order. See LETTERS PATENT (PATNA), 3 Pat. L.J. 509.

(80) General plea of limitation set up against suit—Special plea of limitation under local act set up first time in appeal—Court if can decide case under such special plea. See LIMITATION, No. 2, 28 C.L.J. 216.

(81) From decision of Court deciding suit against temple trustees for pay of hereditary office. See LIMITATION ACT (1908), No. 107, 41 M. 528.

(81-a) Admission of, after period of limitation, under *ex parte* order, Validity of—Limitation, Question of, Determination of, Procedure to be followed. See LIMITATION ACT (1908), No. 7-b, 16 A.L.J. 57.

(82) *Bona fide* prosecution of proceedings in wrong Court if sufficient ground for extending time for filing appeal. See LIMITATION ACT (1908), No. 22, 22 C.W.N. 594.

(83) Question of limitation if can be considered for first time in appeal. See LIMITATION ACT (1908), No. 5, 22 C.W.N. 994.

Appeal—(Continued).**—1.—General—(Continued).**

(84) Preliminary decree fixing time for redemption—Confirmation of such decree in appeal therefrom—Application for final decree, computation of time for making. See LIMITATION ACT (1908), No. 219, 35 M.L.J. 507.

(85) Application for certified copy of judgment first made—Application for copy of decree next made—Total time taken for obtaining both the copies if may be said to be requisite, and be deducted from time fixed for appeal—Question as to what time is requisite if question of fact or law. See LIMITATION ACT (1908), No. 47, 100 P.R. 1918.

(86) Mistake in law, if always sufficient excuse for delay in filing appeal—Legal adviser's mistake how far excuse. See LIMITATION ACT (1908), No. 9, 10 P.L.R. 1918.

(87) Appeal presented without power-of-attorney of person authorised to present it and without copy of first Court's judgment—Extreme want of diligence—No excuse for delayed presentation of power and copy—Appeal barred. See LIMITATION ACT (1908), No. 10, 94 P.L.R. 1918.

(88) Time spent in prosecuting review, when and whether can be deducted from period allowed for appeal. See LIMITATION ACT (1908), No. 11, 125 P.W.R. 1918.

(89) Oral evidence—Conflict—Judgment of lower Court, if may be interfered with—Appellant's duty to show finding of lower Court, not supported by evidence. See MAHOMEDAN LAW (GIFT), No. 1, 28 C.L.J. 306.

(90) Offer by one of several plaintiffs to be bound by defendant's oath—Acceptance of challenge by defendant—Dismissal of suit—Right of non-challenging plaintiffs to appeal—Adjustment of suit. See OATHS ACT, No. 3, 50 P.W.R. 1918.

(90-a) Person entitled to intervene in probate proceedings not impleaded as party thereto—Right of such person to become respondent in appeal from order granting probate—Powers of appellate Court. See PARTIES TO SUIT, No. 1-c, 3 Pat. L.J. 409.

(91) Remand for fresh enquiry, "so far as appellants were concerned"—Suit if can be dismissed as a whole. See PARTITION, No. 6, 22 P.L.R. 1918.

(92) Decree right when made—Happening of event subsequent to decree—Proper procedure is to request appellate Court to take additional evidence thereon—Failure to comply with provisions of Code for taking it in the absence of objections. See PRE-EMPTION, No. 28, 111 P.W.R. 1918.

(93) Subordinate Judge invested with jurisdiction, Refusal by, to take action—Appeal if lies to District Judge from such refusal. See PROVINCIAL INSOLVENCY ACT, No. 1, 22 C.W.N. 958.

Appeal—(Continued).**—1.—General—(Concluded).**

(94) Appeal in insolvency proceedings—Memorandum of objections, respondent's right to file—Appeal filed out of time—Memorandum of objections also barred—Objections may be filed against decisions under insolvency law. See **PROVINCIAL INSOLVENCY ACT**, No. 38, 35 M.L.J. 296.

(95) Appeals under Provincial Insolvency Act—Computation of period of limitation for such appeals, Principles governing. See **PROVINCIAL INSOLVENCY ACT**, No. 37, 35 M.L.J. 531.

(96) Computation of period prescribed for appeal under S. 46, Provincial Insolvency Act—Application of S 5 Limitation Act—Review when sufficient cause. See **PROVINCIAL INSOLVENCY ACT**, No. 36, 35 P.W.R. 1918.

(97) Receiver appointed in execution proceedings, Discharge of Order refusing—Civ. Pro. Code (1908), S. 47 Appeal, if lies from order. See **RECEIVER**, No. 7, 3 Pat. L.J. 513.

(98) Dismissal of suit by trial Court—Appeal by plaintiff—Leave to withdraw appeal obtained by plaintiff on ground of inability to adduce necessary evidence to support case—Effect of withdrawal of subsequent suit between same parties on finally same question—Dismissal of suit for want of evidence and dismissal on its facts—Effect of. See **RES JUDICATA** No. 34 a, 3 Pat. L.J. 404.

(99) Execution sale, Delivery of possession of property purchased at, Order for—Review of—Appeal, if lies from order on review—Civ. Pro. Code (1908), S. 47, O. XLVII See **REVIEW**, No. 8, 3 Pat. L.J. 571.

(100) Order granting application for review—General right of appeal against order if exists or lies only on ground mentioned in O. XLVII, r. 7, Civ. Pro. Code See **REVIEW**, No. 9, U.B.R. (1918), 3rd Qr., 104

(101) Ruling Chief or Prince, Suit against, without consent of Government of India requisite under S. 86, Civ. Pro. Code (1908)—Submission to jurisdiction without raising objection—Objection to jurisdiction if can be taken in appeal See **RULING CHIEF OR PRINCE**, No. 1, 46 Ind. Cas. 558

(102) Execution of decree—Sale proclamation, Valuation in, Objection to, by judgment debtor—Order of Court overruling such objection—Appeal if lies from—Civ. Pro. Code (1908), S. 47. See **SALE PROCLAMATION**, No. 1, 47 Ind. Cas. 512.

(103) Sanction to prosecute, Order of—Appeal against—Crim. Pro. Code, S. 195 (7). See **SANCTION TO PROSECUTE**, No. 8, 46 Ind. Cas. 679.

(104) Suit for declaration of absolute ownership of land without liability to partition—Trial by Land Revenue Officer acting under Punjab Land Revenue Act—Appeal if lies to District Judge, See **VALUATION OF SUIT**, No. 6, 115 P.W.R. 1918.

Appeal—(Continued).**—2.—Second Appeal.**

(1) *Agra Tenancy Act* (II of 1901), S. 193—Order of remand—Appeal—Preliminary and final decrees.

Plaintiff brought a suit to be declared the proprietor of a *Muafi*. The Court of the first instance dismissed the suit. The lower appellate Court set aside that decree and allowed the appeal to the extent that it held the plaintiff entitled to be declared a rent free grantee of so much of the land as was entered in his name. It then added that the suit be remanded to the lower Court for determination of the revenue payable by the plaintiff-appellant. Held that the order being one of remand, no second appeal lay to the High Court, and, as there was no provision in the Tenancy Act about preliminary or final decrees, the order could not be appealed against as a preliminary decree. **Anandgir v. Sri Niwas**, 16 A.L.J. 711=40 A. 652=47 Ind. Cas. 1008.

KNOX, A.C.J. and BANERJI, J.

References:—28 A. 88; 14 A.L.J. 84, R.

(2) *Code of Civil Procedure Act* V of 1908), S. 103—Pre-emption—Custom—Pre-emptor and vendee co-sharers with vendor—Pre-emptor brother of vendor—Acquiescence—Issue not decided by lower appellate Court—High Court entitled to decide it.

Certain property was sold. The pre-emptor and the vendee were co-sharers with the vendor; the pre-emptor was brother of the vendor. In the suit for pre-emption, the vendee pleaded, among other defences, that the pre-emptor had acquiesced in the sale being made to him. It was admitted by the pre-emptor that he was in debt, that he had no money, and that, at the time of the sale, he also was selling his own property. The Court of first instance held the custom proved, but the facts did not give rise to an inference of acquiescence on the part of the plaintiff. The suit was decreed. The lower appellate Court held that the custom was not proved, but did not decide the issue of acquiescence. The suit was dismissed. Held that the lower appellate Court not having decided the issue of acquiescence, it was open to the High Court, in second appeal, to decide the question; held, also, that the facts proved that the plaintiff knew of and acquiesced in the sale. **Anchal v. Dalip Singh**, 16 A.L.J. 779=47 Ind. Cas. 400.

RICHARDS, C.J. and TUDBALL, J.

(3) *Question of fact—Custom not established by evidence. Kailas v. Padmakisior*, 35 O.L.J. 618=21 O.W.N. 971=41 Ind. Cas. 969=45 O. 285. See Final Part, 1917, Col. 150.

(4) *Pleadings of both parties found false—Different facts found by lower appellate Court on evidence—Second appeal, High Court if should proceed on pleadings.*

Where the lower appellate Court found the cases set up by both parties to be false:

Held, on second appeal, that the High Court should proceed not on the pleadings but on the

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

facts found. *Ram Naresh Ojha v. Gouri Shankar Misra*, 22 C.W.N. 149=45 Ind. Cas. 795.

SANDERSON, O.J. and N.R. CHATTERJEE, J.

(5) *New point taken in second appeal is to be allowed—New point of law involving questions of fact, if can be taken for the first time in second appeal—Bengal Tenancy Act (VIII of 1895), S. 29, if can be applied in second appeal, where there is no finding by the lower Courts as to whether the tenant is an occupancy raiyat.*

Plaintiff sued for rent at Rs. 48 per year on the basis of a kabulyat, according to the terms of which a remission of Rs. 15 per year was to be allowed till the expiry of the lease and after which plaintiff would be entitled to realise at the full rate of Rs. 48. The suit was brought for rents of years after the expiry of the lease and defendant pleaded that the plaintiff had waived his right to realise at Rs. 48, by continuing to realise at the old rate even after expiry of lease. On second appeal to the High Court a new point was taken that the lease was a mere device to evade the provisions of S. 29 of the Bengal Tenancy Act.

Held—That it was not right, in second appeal, to allow a point to be taken which was not taken in either of the lower Courts and which involved two questions of fact. First, it had to be shown that the defendant was an occupancy raiyat, and even if that were shown, it would further have to be proved that the contract was a mere device to evade the provisions of the statute. *Jadab Chandra Moulik v. Manik Sarkar*, 22 C.W.N. 156=44 Ind. Cas. 91.

WOODROFFE and MOOKERJEE, JJ.

(6) *Record-of-rights, presumption of correctness of—Finding of lower appellate Court as to whether presumption rebutted not liable to be disturbed in second appeal.*

In the record of rights the defendants were stated to be settled raiyats with liability to have their rents assessed. In a suit by the landlord for rent on declaration of title the first Court found that the suit was barred by limitation and adverse possession from an assertion of the defendants' right during the publication of the record-of-rights. The lower appellate Court reversed this finding and held that the presumption as to the correctness of the record was not rebutted.

Held—That the lower appellate Court was entitled on the question of fact to hold that the mere fact that the adverse claim had been made was not sufficient to show that the entry in the finally published record was wrong and this finding was not liable to be challenged in second appeal. *Gour Chandra Chuckerbutty v. Birendra Kishore Manikya*, 24 C.W.N. 449=45 Ind. Cas. 65.

FLETCHER and RICHARDSON, JJ.

References:—16 C.W.N. 929; 22 C.L.J. 192 (140), R.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(6-a) *Small Cause Court decrees, Execution of—Order passed in—Second appeal, If subject to—Civ. Pro. Code (1908).*

No second appeal lies against an appellate order in execution of a Small Cause Court decree. *Manger Slugh v. Khobhari Rai*, 43 Ind. Cas. 15=3 Pat. L.W. 132.

ROE and KINGSFORD, JJ.

(6-b) *Court of second appeal, Power of—Findings of fact, Interference with—Legal inference drawn from facts—When error of law—Power to correct—Fraud, or benami, a mixed question of fact and law.*

A question of benami or fraud is a mixed question of fact and law, and not one of pure fact. A Court commits an error of law, when, on mere suspicion, it draws inferences such as no reasonable man would draw.

A Court of second appeal can correct inferences drawn from proved facts though the findings thereon cannot be interfered with. *Janki Bai Kutiani v. Najaf Ali Khan*, 43 Ind. Cas. 49=3 Pat. L.W. 339.

MULLICK and ATKINSON, JJ.

(7) *Wilful negligence whether question of fact or of law.*

In an action arising from wilful negligence it is the province of the Judge to say whether there is evidence from which negligence may be reasonably inferred and of the jury (if the evidence is left to them) to say whether it ought to be inferred. The decision of Judge on the fact as to the existence of negligence, is as final as jury's verdict would have been. *East Indian Railway Co. v. Jago Ram*, 45 Ind. Cas. 197.

ROE and IMAM, JJ.

References:—26 W.R. 175, F., *Vaughan v. Menlove*, (1837) 3 Bing (N.C.) 463, *Appr.*; 22 W.R. 279.

(8) *Civ. Pro. Code (Act V of 1908), S. 104 (9), O. XLIII, r. 1 (j)—Petition by auction-purchaser to set aside sale, dismissal of, in appeal.*

No second appeal lies against an order passed in appeal upon a petition by an auction-purchaser to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property. *Sundara Singh v. Fazhamalai Padayachi*, 45 Ind. Cas. 701.

SPENCER and KUMARASWAMI SASTRI, JJ.

(9) *Finding of fact of lower appellate Court—Questioning of, in.*

Where a lower appellate Court has failed to consider the entire evidence on record relating to a question of fact, a finding of fact of that Court can be questioned in second appeal. *Sheodaran Lal v. Anneswar Singh*, 46 Ind. Cas. 53.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(10) *Small Cause suit, Execution of decree in, Order passed in, if subject to—Civ. Pro. Code (Act V of 1908), S. 103.*

No second appeal lies from an order passed in execution of a decree obtained in any suit of the nature cognizable by a Court of Small Causes, where the amount or value of the subject-matter of the original suit does not exceed Rs. 500. *Gudar Singh v. Kandhal Lal*, 46 Ind. Cas. 82 = 6 O L.J. 187.

LINDSAY, J.C.

(10-a) *Execution sale, Application to set aside an, Order refusing, Second appeal if lies from—Civ. Pro. Code (Act V of 1908), Ss. 47, 104, O. XLIII, r. 1 (7).*

Even if a case for setting aside an execution sale comes under S. 47, Civ. Pro. Code, the order of the Court refusing to set aside the sale being appealable under S. 104 (a), is outside the definition of a decree and the order passed on appeal from such an order is final under sub S. 2 of S. 101, Civ. Pro. Code, and no second appeal lies against that order. *Jagadiah Narain Paramanik v. Mahamuddin Mohamed*, 46 Ind. Cas. 519.

FLETCHER and SHAMSUL HUDA, JJ.

(10-b) *Costs, Discretion as to, Interference with, by High Court*

The High Court does not interfere in appeal in matters relating to costs, unless it is shown that there is some matter of principle on which the lower Court has gone wrong. *Midnapore Zemindari Company v. Kristo Prosad Sukul*, 46 Ind. Cas. 544.

FLETCHER and SMITHER, JJ.

(10-c) *Inferences legally open - Inference drawn by lower Court, if High Court bound to follow.*

Where more than one inference is legally open, the High Court cannot, in second appeal, refuse to be bound by that drawn in the Court below. *Madho Rao v. Govindbhat*, 46 Ind. Cas. 794.

DRAKE-BROCKMAN, J.C.

(10-d) *Rent suit—Question at issue—Relationship of landlord and tenant—Second appeal if lies from decision in—Bengal Tenancy Act (1885), S. 159.*

Where in a suit for recovery of arrears of rent not exceeding Rs. 100, the lower appellate Court found the relationship of landlord and tenant not to have been proved, no special appeal lies to the High Court as the determination of the question of relationship of landlord and tenant is a finding of fact. *Jahiral Haque v. Sadar Ali*, 47 Ind. Cas. 105.

FLETCHER and SHAMSUL HUDA, JJ.

(11) *Rent suit—Appeal to District Court from decree—Suit held by District Court to be cognizable by Civil, not Revenue Court—Plaint directed to be presented to proper Court—Appeal to High Court if lies from order directing presentation to proper Court*

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

—Revision—Civ. Pro. Code (1908), S. 77 (1).

In an appeal before the District Court from the decree in a suit under Estates Land Act, the District Court holding that the Revenue Court had no jurisdiction to try it directed the plaint to be presented to the proper Court. Held that no appeal lay to the High Court against the order of the District Court as the order was passed under O. VII, r. 10, Civ. Pro. Code, O. LXIII, r. 1, being inapplicable to suits in Revenue Court by virtue of S. 192 of the Estates Land Act, but that a revision was competent as S. 115, Civ. Pro. Code, is not excluded by S. 192 of the Estates Land Act, the question in issue being one of jurisdiction (a). *Yenkata Ramayya v. Chakali Yeeraswami-gadu*, 31 M.L.J. 309 = 23 M.L.T. 251 = 7 L.W. 508 = 41 M. 554 = (1918) M.W.N. 347 = 45 Ind. Cas. 471.

• SPENCER and KUMARASWAMI SASTRI, JJ.

References —(a) 17 M. 443, 39 M. 617; 1 L.W. 89, 661, R.

(12) *Civ. Pro. Code, O. XLI, r. 21, O. XLVII,*

1—*Application to set aside ex parte decree passed by lower appellate Court—Institution of second appeal against such ex parte decree—Ex parte decree set aside before hearing of second appeal—Second appeal if maintainable.*

A lower appellate Court is competent to set aside its ex parte decree on an application made to it under Civ. Pro. Code, O. XLI, r. 21, though, at the time of setting it aside, a second appeal from the same decree is pending admission before the Judicial Commissioner's Court; there being in r. 21 no such conditions as are to be found in O. XLVII, r. 1, to prevent conflict with appellate jurisdiction. Where the application to set aside the ex parte decree is made and decided before the second appeal is heard the ex parte decree is extinguished, so that no second appeal from it can afterwards be maintained, the appellant's cause of appeal having disappeared. Nor can this pending second appeal be treated as one from the final decree passed by the lower appellate Court after the setting aside of its ex parte decree, on the presentation at the hearing of such second appeal of a copy of such final decree, if the period for preferring a separate second appeal from the final decree has then expired. *Sadaram v. Dular*, 14 N.L.R. 30 = 43 Ind. Cas. 902.

STANYON, A.J.C.

References:—9 A. 86; 98 C. 394; 4 N.L.R. 51; 32 A. 295 (300), 28 A. 240; 32 M. 416; 34 A. 282, R.

(13) *Rent suit—Record-of-rights published after decision of first Court—Remand by High Court for fresh hearing—Practice and procedure* *Imtiaz Hussain Khan v. Bengali Nonla*, 2 Pat. L.J. 564 = 49 Ind. Cas. 750. See Final Part, 1917, Col. 162.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

- (14) *Execution sale of property of judgment-debtor—Sale if may be impeached under S. 47, Civ. Pro. Code (1908)—Setting aside sale by Court professing to act under S. 47—Order setting aside sale not decree—Second appeal if lies against order setting aside sale on ground of fraud or irregularity in conducting sale—Civ. Pro. Code (1908), Ss. 2, 47, O. XXI, r. 90 and O. XLIII—Fraud in publishing or conducting sale if includes fraud committed after publication of sale—O. XXI, r. 90, Scope of.*

It is not open to a party to impeach a sale under S. 47 of the Civ. Pro. Code. In any event, if a Court does, professing to act under S. 47, set aside a sale on the objection of the judgment-debtor in a proceeding between the judgment-debtor and the decree-holder, that order will not be a decree under the definition in S. 2 of the Code. O. XLIII of the Code gives a right of appeal against all orders setting aside sales on the ground of irregularity or fraud in the matter of publishing or conducting a sale and, therefore, an order purporting to have been passed under S. 47 of the Code setting aside a sale would not be a decree within the meaning of S. 2, because under O. XLIII it has been made specially appealable otherwise than as a decree. Hence, the order, if made under S. 47, not being a decree, no second appeal will lie from it. The language of O. XXI, r. 90, is sufficiently wide to cover also cases of fraud committed after the publication of the sale proclamation. Where the decree-holder promised not to hold the sale if payment was made within a certain time, but he then fraudulently proceeded to sell the property in contravention of the arrangement made with the judgment-debtor, held that this was fraud in the matter of conducting the sale, that the proper provision of the Code under which the judgment-debtor could impeach it was O. XXI, r. 90, against an order under which section only one appeal was allowed by O. XLIII and that, therefore, a second appeal did not lie. *Sheikh Maula Bux v. Raghubar Ganja*, 3 Pat. L.J. 645.

MULLICK and THORNHILL, JJ.

- (15) *Refusal of certificate under S. 41 (3), Punjab Courts Act to appeal from decision as to custom—No second appeal even if decision erroneous. Musammatt Chintli v. Ishar*, 100 P.R. 1917=171 P.W.R. 1917=43 Ind. Cas. 299. See Final Part, 1917, Col. 153.

- (16) *Defendant's appeal dismissed as not duly presented—Cross objections filed by defendant in plaintiff's appeal on same grounds as in his abortive appeal—Dismissal of cross-objections—Second appeal or revision.*

An appeal preferred by a defendant was dismissed that it had not been filed by the defendant, nor by any one duly authorised on his behalf. In the meantime the plaintiff also preferred an appeal against the decree, and the defendant filed cross-objections challenging the decree on practically the same ground taken

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

in the abortive appeal referred to above. These cross-objections were rejected on the ground that the defendant, whose appeal had already been dismissed, was not entitled to reopen the matter by filing cross-objections in plaintiff's appeal. Held that no second appeal lay against the order dismissing the cross-objections. Held, also, that the defendant's appeal having been held not to have been duly filed by him, he was entitled to file cross-objections, and as the latter had been dismissed without having been considered on the merits, the dismissal was erroneous against which a revision lay. *Allah Baksh v. Nur Baksh*, 20 P.R. 1918=44 Ind. Cas. 812.

BROADWAY, J.

Reference:—10 M. 292, D.

- (17) *Value for purposes of jurisdiction and Court-fees wrong—Forum of appeal thereby changed from superior to inferior Court—Prejudice—Objection if can be taken in second appeal by plaintiff-appellant who undervalued suit.*

In a suit for injunction, the plaintiff valued the suit for the purposes of jurisdiction and Court-fee at Rs. 20, and against the decree passed therein in the plaintiff's favour the defendant preferred an appeal to senior Subordinate Judge who reversed the decree and dismissed the suit. In second appeal the plaintiff contended that the suit had been improperly valued and that, therefore, the appeal to senior Subordinate Judge was wrongly entertained. Held that the plaintiff was competent to raise an objection with regard to his own valuation in second appeal (a).

When an inferior Court disposes of a case which should have been heard by a superior Court, there is ground for thinking that the parties are prejudiced (b): *Cheloo v. Kall Das*, 21 P.R. 1918=44 Ind. Cas. 816.

BROADWAY, J.

References:—(a) 2 P.R. 1915; 16 P.R. 1907, F. (b) 36 P.R. 1903; 125 P.R. 1907, Dist.; 73 P.L.R. 1904; 15 M.L.T. 487; 10 W.R. 6; 31 C. 349, R.

- (17-a) *Defective certificate—Punjab Courts Act (III of 1914), S. 41 (3)—Chief Court's power to grant time for obtaining proper certificate.*

Held, that a second appeal cannot be admitted on the strength of a certificate which has not been granted in strict compliance with the wording of S. 41 (3) of the Punjab Courts Act (III of 1914). *Yad Ram v. Musst. Maubhari*, 149 P.L.R. 1917=4 P.W.R. 1918=44 Ind. Cas. 87.

SHAH DIN, J.

- (18) *Custom—Alienation by widow—Legal necessity—Money required to pay debts due by husband—Debts incurred by widow for her maintenance—Anticipation of immediate wants—Second appeal not competent. A widow is justified in alienating property to pay her deceased husband's creditors and to*

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

raise money for her maintenance. The alienee is not bound to see to the application of his money.

In such a case second appeal is not competent (a). *Hota Ram v Sukha Ram*, 4 P.L.R. 1918=45 Ind. Cas. 530.

LESLIE JONES, J

Reference:—(a) 20 P.W.R. 1911, R.

(19) *Judgment based on conjectures and pre assumptions is liable to be set aside—Punjab Tenancy Act (XVI of 1887), S 59—Succession to occupancy holding—Burden of proof*

Held, that a judgment based on mere conjectures and presumptions is liable to be set aside even in second appeal.

Held, also, that where on the death of an occupancy tenant his collaterals claim to succeed to the tenancy, the onus lies on them to establish affirmatively that their common ancestor occupied the land. *Bhagwan Das v. Shamsher Singh*, 33 P.L.R. 1918=55 P.W.R. 1918=44 Ind. Cas. 433

SHADI LAL, J

References —128 P.W.R. 1903=42 P.R. 1910, R

(20) *Grounds for—Findings of fact—Finding not clear—Finding not based on evidence—Finding arrived at on wrong principles—Legal necessity—Entry in deed—Evidence of extravagance—Antecedent debts—Alienees being surety for such debt.*

Held, that a second appeal is competent when a finding of fact is not clear or has been arrived at on wrong principles and is not based on evidence.

The Court has to take into consideration the circumstances of the alienor in deciding the question of legal necessity for an alienation. *Ganga Ram v. Dewa Singh*, 34 P.L.R. 1918=92 P.W.R. 1918=47 Ind. Cas. 339.

CHEVIS, J.

(21) *Account, Re-opening of—Admission—Cross claims—Appeals against decrees dismissed—Second appeal against one of the decrees passed in appeal—Not barred where the other decree is not open to second appeal—Revision—Chief Court acting suo moto*

A, a contractor, sued B for recovery of a sum alleged to be due to him. B sued A claiming that the amount claimed was overpaid to A by B. B's claim, which was of a Small Cause nature for less than Rs. 500, was allowed, but the claim of A was dismissed. On appeal, the decrees were affirmed. B's allegation was that A had in fact admitted over payment. The trial Judge dismissed A's claim and decreed B's claim finding the admission proved, but the appellate Court was of opinion that the admission was no bar to the claim and went into the account and eventually dismissed the appeal. On second appeal by A, it was contended by B that, since A had not appealed against decree dismissing his appeal, second

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

appeal was incompetent. It was pleaded by A that second appeal was not barred, that accounts could be reopened and that there was no clear finding arrived at by the appellate Court.

Held, (1) that the second appeal was not barred (29 M. 398 (F.B.), followed); (2) that the accounts could be reopened; and (3) that the finding of fact being not clear, the appeal must be remanded. (5 M.I.A. 372 at p. 395 and 32 B. 353, Dist.)

The Chief Court, in the exercise of revisional jurisdiction, directed rehearing the appeal of A also by the lower appellate Court.

There is a distinction between an ascertainment of the exact balance after an examination of the accounts and a settlement by compromise. It is only in the case of a settlement by compromise that the matter cannot be reopened, provided of course that the compromise is not vitiated by fraud or by any other invalidating circumstance. *Khazan Chand v. The Committee of the Notified Area of Sangla Hill*, 62 P.L.R. 1918=139 P.W.R. 1918=46 Ind. Cas. 545.

SHAH DIN and CHEVIS, JJ

(22) *Pre-emption—Pre-emptor failing to deposit extra sum of money ordered to be paid by appellate Court—Final decree dismissing suit—Second appeal against preliminary decree.*

The appellate Court directed that the plaintiff pre-emptor should pay an extra sum of Rs. 129-0 within the term fixed by the original Court for payment to the vendee. He failed to make the payment and a final decree was passed dismissing his suit. He had 12 days within which that amount could have been paid.

Held, that there was no ground for going behind the final decree and accepting an appeal from the preliminary decree of the appellate Court. *Tusa Baz v. Hamid*, 92 P.L.R. 1918.

RA TTIGAN J

(23) *Alienation—Legal necessity—Finding based on wrong assumption of facts and wrong principles open to second appeal—All owners joining in sale—Rs 700 for necessity and Rs 200 cash—Presumption of necessity*

Held that,—

1. A finding of fact based upon unwarranted assumption of fact and wrong principles is open to second appeal.

2. In the absence of any proof as to any immorality, reckless extravagance and wanton waste on the part of the alienor, the mere fact of his owning large area of land is sufficient to presume he had no necessity.

3. Where the sale was for Rs. 900, out of which the sum of Rs. 700 was found for necessity, the presumption is that remaining Rs. 200 paid in cash before the Sub Registrar was also required for some necessary purpose particularly where severe famine exists at the time of the sale.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

4. Where all the three proprietors of a joint ancestral holding, one of whom is not childless, join together in alienating it, there is a strong indication of *bona fides* and the natural inference is that they did not join to injure either their own or their reversioners' interests (a). **Ragbir Das v Munshi**, 27 P.W.R. 1918=46 Ind. Cas. 511.

SCOTT SMITH and SHADI LAL, JJ.

Reference:—(a) C.A. 1028 of 1908, F.

(24) *Finding of fact based on conjecture whether final—Punjab Tenancy Act (XVI of 1887), S. 59—Succession to occupancy holding.*

Held, that, in deciding the question of succession to an occupancy holding, under S. 59 of the Punjab Tenancy Act, XVI of 1887, conjecture must not be allowed to take the place of legal proof.

Where, therefore, in a suit in which plaintiffs' claim to succeed to an occupancy holding, on the ground that they are the collateral heirs of the deceased tenant, the findings of fact arrived at by the lower appellate Court are based on conjecture, they are not judicial findings and cannot be accepted as final in second appeal. **Sultan Ahmed v. Pala**, 102 P.W.R. 1918=45 Ind. Cas. 500.

SHAH DIN, J.

(25) *Construction of document. Question of law—Mortgage with possession—Mortgagor taking mortgaged property on lease—Intention—Right of mortgagee to evict mortgagor.*

Debtors executed a deed of mortgage in favour of the plaintiff on the 7th March, 1913. The mortgage was declared to be with possession and redemption was to take place after two years. On the same date, a rent deed was executed under which the mortgagors agreed to take the mortgaged house on lease at Rs. 3 per mensem, it being definitely stated that the mortgagee was in possession, and that he was entitled to evict the mortgagors, at any time by giving them one month's notice. It was, however, agreed that the rent was to be credited to the interest due under the mortgage-deed. Both these documents were registered on the 30th March, 1913. On the 4th October, 1915, the mortgagee instituted the present suit for the eviction of the mortgagors and recovery of Rs. 91-15-0 due as rent. It was contended that the two documents were not a single transaction and that, therefore, the suit for eviction was not maintainable.

Held (1) that, the question involved in the suit being the construction of the two documents concerned, a second appeal was competent;

(2) that the fact that there was no reference to the lease in the mortgage deed was a strong indication of the separate nature of the two transactions and all that was intended by the lease was that such moneys as were payable thereunder were to be given credit for;

(3) that, at the time of the execution of the rent-deed, the parties clearly intended to

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

establish the relation of landlord and tenant between themselves, and, therefore, the mortgagee was at liberty to evict the mortgagors at any time. **Mangla Ram v. Ganesh Das**, 161 P.W.R. 1918=47 Ind. Cas. 551.

BROADWAY, J.

References:—17 P.W.R. 1908; 26 M. 562; 23 A. 338=A.W.N. (1904) 95; 36 Ind. Cas. 817=31 M.L.J. 712=20 M.L.T. 457=(1917) M. W.N. 55=5 L.W. 304=40 M. 561; 177 P.W.R. 1916=86 Ind. Cas. 209; 71 P.W.R. 1917=41 Ind. Cas. 576, Dist.

(26) *Suit to recover money awarded to plaintiff by arbitrators—Suit is suit for specific performance of contract—Suit is one of Small Cause nature—Second appeal if lies in such case—Specific Relief Act, S. 30—Provincial Small Cause Courts Act, Sch. II, Art. 15.*

Held that a suit to recover Rs. 45 awarded to the plaintiff by arbitrators was a suit of the nature cognisable by a Court of Small Causes, in which no second appeal lay.

Where a claim for compensation has been submitted to arbitration and an award made, the claim for compensation is merged in the award and the payment of any money directed by the award is a simple claim for money of a kind cognisable by a Court of Small Causes (a).

The effect of S. 30 of the Specific Relief Act is merely to apply to awards the provisions of Ch. V, in which it is contained, as to contracts and not to convert an award into a contract. Therefore a suit for the specific performance of an award is not a suit for the specific performance of a contract (b). **Maung Po Tak v. Maung Tha Hlaing**, U.B.R. 1918, 3rd Qr., 109.

SAUNDERS, J.C.

References:—(a) 16 B. 267, R. (b) 13 M. 344, Appr.; 16 Ind. Cas. 868, R.

(26 a) *Weight attached to recital in rent receipt by appellate Court, if may be interfered with in second appeal—Bengal Tenancy Act S. 50.*

The High Court in second appeal will not displace finding of the lower appellate Court to the effect that the mere statement in some rent receipts that a holding was *satasari* would not be sufficient to rebut the presumption arising under S. 50, Bengal Tenancy Act. **Satish Chandra Mustafi v. Abdul Majid Mahamad**, 47 Ind. Cas. 780.

FLETCHER and PANTON, JJ.

(27) *Amendment of plaint, if can be allowed in second appeal. See AMENDMENT OF PLAINT, No. 3, 119 P.W.R. 1918.*

(28) *Appellate decree passed without jurisdiction. See APPEAL (GENERAL), No. 7, 27 C.L.J. 115.*

(29) *Document submitted with memorandum of appeal, whether admissible—Findings based on such document if binding in second appeal.*

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

See **APPEAL (GENERAL)**, No. 87, 150 P.W.R. 1918.

(80) Case decided, not on evidence, but on surmise and conjecture—Power of High Court to interfere. See **BURDEN OF PROOF**, No. 2, 22 G.W.N. 826.

(81) Finding as to custom how far examinable in second appeal—Miram rights in Chingleput—Swatantram—Thunduvaram. See **CIV. PRO. CODE (1908)**, No. 184, 23 M.L.T. 44 (F.B.)

(82) Suit of Small Cause nature—Nature of suit if to be considered with reference to date of filing suit or of date of filing second appeal. See **CIV. PRO. CODE (1909)**, No. 196, 23 M.L.T. 255.

(83) Costs awarded arbitrarily without judicial discretion—Second appeal maintainable. See **COSTS**, No. 7, 97 P.W.R. 1918

(84) Dismissal of suit for possession and mesne profits—Pecuniary award by appellate court—Remand for enquiry as to mesne profits—Appeal from order of remand in second appeal and must bear *ad valorem* Court fee. See **COURT FEES ACT (1870)**, No. 1, 3 Pat. L.J. 99.

(84 a) Appellate Court, Finding of, based on finding of Court of first instance, Acceptance of in See **CUSTOMS (PUNJAB—ALIENATION)**, No. 9a, 156 P.L.R. 1917

(84 b) Map, and obitias showing allotments on partition—Document Improper exclusion of, by appellate Court—Effect of Remand. See **EVIDENCE**, No. 4a, 47 Ind. Cas. 159.

(85) Inferences drawn from matters not in evidence before Court—Error of law—Second appeal See **EVIDENCE ACT**, No. 16, 20 Bom. L.R. 351

(86) Objection to admissibility of documents in. See **EVIDENCE ACT**, No. 6, 3 Pat. L.J. 806.

(87) Finding of fact by lower appellate Court, Interference with, in—Status of person as tenant held in—Tenancy, Area of Mistake as to, if matter of law See **FINDING OF FACT**, 46 Ind. Cas. 351

(88) Decree in suit for recovery of consideration agreed upon for fishing in tank—If second appeal lies in such suit See **FISHERY** No. 2, 14 N.L.R. 85.

(89) Suit by attaching creditor whose attachment has been raised at the instance of alienees for setting aside alienation as fraudulent—Plea that the suit must be representative if can be taken for the first time in. See **LIMITATION ACT (1908)**, No. 115, 7 L.W. 280.

(40) A point of law requiring investigation into facts—Whether can be raised for the first time in second appeal. See **MAHOMEDAN LAW (GWT)**, No. 3, 48 Ind. Cas. 857.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(41) Patent legal point if may be raised for first time in second appeal. See **MORTGAGE (CONDITIONAL SALE)**, No. 4, 27 P.L.R. 1918.

(42) Suit for recovery from transferee of occupancy holding of registration fee—Second appeal if lies under Orissa Tenancy Act, 1913. See **OCCUPANCY TENURE**, No. 8, 8 Pat. L.J. 851.

(43) Decree for maintenance against three persons—One of them made liable—Liability of the other two in the event of the former's default—Suit to recover the amount paid by the former—Amount below Rs. 500—Suit cognizable by Small Cause Court. See **PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887)**, No. 19, 16 A.L.J. 44.

(44) Relief not claimed in the lower Courts, Grant of, for first time in See **REGISTRATION ACT (1908)**, No. 33, 167 P.L.R. 1917.

(45) Rent, Suit for—Amount less than Rs. 100 Second appeal, if lies C.P. Tenancy Act (1908), S. 81 (b), Conditions necessary to bring a case under. See **RENT, SUIT FOR**, No. 2, 47 Ind. Cas. 540.

(46) *Res judicata*, Plea of, if can be raised even in See **RES JUDICATA**, No. 22, 47 Ind. Cas. 685

(47) Plea of *res judicata* depending on finding of fact—Plea not challenged in lower appellate Court—Plea not maintainable in second appeal See **RES JUDICATA**, No. 44, 132 P.W.R. 1918

(48) Pecuniary jurisdiction Objection to, based on valuation of suit, if can be raised for the first time in See **VALUATION OF SUIT**, No. 4, 46 Ind. Cas. 892

—3.—To Privy Council

(1) *Civ. Pro. Code (Act V of 1908) S. 110—Privy Council leaves to appeal—Cross appeals to the High Court—No substantial question of law*

In a suit, the Court of first instance decreed it in part and dismissed it in part. There were cross appeals to the High Court on behalf of the plaintiffs and the defendants. The High Court decreed the defendants' appeal reversing the judgment and decrees of the Court below. In the plaintiffs' appeal the High Court affirmed the first Court's decrees. The plaintiffs applied for leave to appeal against the judgment of the High Court reversing the first Court's decrees and the application was granted. On an application for leave to appeal against the portion of the judgment affirming the first Court's decrees, held that that could not be granted, inasmuch as there was no substantial question of law **Chiranjil Lal v Behari Lal**, 16 A.L.J. 864.

RICHARDS, C.J. and TUDBALL, J

(2) *Civ. Pro. Code (Act V of 1908), S. 110, O. XLV, r. 5—Leave to appeal—Privy*

Appeal—(Continued).**—3.—To Privy Council—(Continued).**

Council—Value of subject-matter—Value determined once for assessing pleader's fees—Valuation cannot be re-opened.

In a suit to recover possession of certain property and to restrain the defendant from obstructing the plaintiff in his possession, the trial Court raised an issue "what is the value of the claim for the purpose of assessing the pleader's fees," and found that the value was Rs. 4,000. The unsuccessful party appealed first to the District Court and then to the High Court, without raising any objection to the valuation. Finally, he applied for leave to appeal to the Privy Council and contended that under O. XLV, r. 5 of the Civ. Pro. Code, he was entitled to an order remitting the case to the lower Court for enquiry as to the amount or value of the subject-matter:

Held, overruling the contention, that the applicant could not be heard to say that there was a dispute upon the point which would justify an order of remand. **Anant Narayan Deshpande v. Ramchandra Gangadhar Deshpande**, 20 Bom. L.R. 418=42 B. 609=46 Ind. Cas. 4.

BATCHELOR, A.C.J. and HEATON, J.

Reference :—33 B. 669, R.

(3) **Appealable value—Contract—Breach alleged by both parties—Plaintiff's plea that counter claim not admissible overruled—Point not raised in plaintiff's appeal against decree in defendant's favour, if may be taken by plaintiff in the Privy Council on defendant's appeal against decree in plaintiff's favour in appeal Court.**

Where plaintiff and defendant each alleged breach of contract by the other party, making claims and counter-claims on that basis and the plaintiff's contention that the defendant's counter-claim was not admissible under the Code of Civil Procedure being overruled, decree was passed in defendant's favour, but the plaintiff did not re-open the question in the appeal Court which reversed the first Court's decree and made a partial decree in favour of the plaintiff:

Held, on defendant's appeal to the Privy Council, that the question of the admissibility of the counter-claim must be taken to have been decided between the parties in accordance with the contention of the defendant and the plaintiff could not be permitted to raise it for showing that defendant's claim on appeal could not come up to Rs. 10,000 in value. **Pléree Leslie and Co. v. N. Girelah Chettiar**, 22 C.W. N. 323=46 Ind. Cas. 576 (P.C.).

VISCOUNT HALDANE, LORD BUCKMASTER, LORD PARKER OF WADDINGTON, LORD PARMOOR, and SIR WALTER PHILLIMORE, BART.

(4) **Civ. Pro. Code (Act V of 1908), S. 109—Decree of final order within the meaning of the section—Leave to appeal to Privy Council.**

Appeal—(Continued).**—3.—To Privy Council—(Continued).**

Where the High Court in appeal remanded a case and directed that defendants, who had been sued in their individual capacity should be sued as executors as well and that one of the defendants should be sued as residuary legatee and heir, and on such amendment of the suit being made, the questions between the parties should be adjudicated upon:

Held, per **Sanderson, C.J.**—That this was not a final order within the meaning of S. 109, Civ. Pro. Code.

Per **Woodroffe, J.**—That this was neither a final decree nor order within the meaning of the section. **Kumar Birendra Nath Roy v. Kumar Nripendra Nath Roy**, 22 C.W.N. 640=46 Ind. Cas. 681.

SANDERSON, C.J. and WOODROFFE, J.

Reference :—18 O.L.J. 124, R.

(5) **Leave to, Application for, by disqualified person, Rejection of—Fresh application after removal of disqualification—First application if revived—Limitation if saved on ground of disqualification—Limitation Act (1908), S. 5—Court, Inherent power of—Civ. Pro. Code (Act V of 1908), S. 151.**

Where a person whose estate was under the superintendence of the Court of Wards applied for leave to appeal to His Majesty in Council and his application was rejected on the ground of his disqualification and he again, after the release of his estate from the Court of Ward's superintendence, applied for leave to appeal, which application was made two years after the date of the decree to be appealed from.

Held, (1) that the first application was not revived by the second application; even if it was revived as it stood, the revival could not in any way benefit the applicant, for the old application which was sought to be revived being an application by a person disqualified to make it, would, after revival also, remain an application by a disqualified person;

(2) that provisions of S. 5 of the Limitation Act could not be utilised on behalf of the applicant as no sufficient cause had been shown; and

(3) that the Court would not be justified in utilising the provisions of S. 151 of the Civ. Pro. Code for the purpose of reviving his previous application and permitting the applicant to appeal to His Majesty in Council.

Civ. Pro. Code, S. 151, can only be utilised to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. **Narendra Bahadur Singh v. Oudh Commercial Bank**, 46 Ind. Cas. 69=5 O.L.J. 153.

STUART and KANHAIYA LAL, A.J.CS.

(6) **Appeal in forma pauperis to Privy Council—Permission if will be given by High Court.**

The High Court will not give permission to appeal in forma pauperis to His Majesty in

Appeal—(Continued).**—3.—To Privy Council—(Continued).**

Council. *Amba v. Shrinivasa Kamthi*, 35 M.L.J. 268—24 M.L.T. 207—8 L.W. 460—47 Ind. Cas. 646.

OLDFIELD and PHILLIPS, JJ.

References:—17 C.L.J. 381; 8 Pat. L.J. 179, F.; 4 M.I.A. 114, R.

- (7) *Civ. Pro. Code* (1908), S. 109, cl. (a)—*Final judgment, meaning of—Order of remand by High Court—When final claim as regards two sets of properties—Judgment final as regards one only—If leave can be granted.*

When the High Court reversed and remanded the suit to the lower Court for further trial on the merits, it would not amount to a final judgment within S. 109, cl. (a), to enable leave being granted to appeal to Privy Council (a).

Where every issue of fact has been found by the appellate Court, and the remand is directed solely with a view to give the consequential reliefs dependent upon the conclusions of the appellate Court, the judgment would be final, but it need not be final though the remand is not on a preliminary point (b).

It is wrong to grant leave when the judgment is final only regarding one set of properties in dispute, but not about the other. *Mangayya v. Venkataramanumurthi*, (1918) M.W.N. 844.

AYLING and SESHAGIRI Aiyar, JJ.

References:—(a) 13 M. 349; 38 M. 509 and 38 A. 150 (F.B.), F. (b), 17 A. 112 (P.C.), R.

- (8) *Fact, question of—Findings of fact, interference with, on appeal.*

An appellant, who asks the Board to upset a carefully considered finding on a question of fact arrived at by Judges fully conversant with habits and practices of the country, takes a heavy burden on himself.

Their Lordships of the Privy Council refused to displace a carefully reasoned judgment of the Judicial Commissioner's Court on a question of fact, which commended itself to their view of the case, merely in order to restore a judgment of the Subordinate Judge, which did not rest on the favour with which he regarded the witnesses but on a speculation of his own as to probabilities. *Jurawan Lal v. Baldeo Singh*, 21 O.C. 104 (P.C.).

VISCOUNT HALDANE, LORD SUMNER, SIR JOHN EDGE and MR. AMER ALI.

- (9) *Leave to appeal to His Majesty—S. 109, Civ. Pro. Code—Final order—Remand order for trial on merits—Limitation—Value of subject-matter, Consideration of.*

A plea of limitation was taken as one of the main defences in a case. The trial Court accepted this plea and dismissed the suit. The Court of the Judicial Commissioner sitting in appeal reversed the decision of the lower Court on this point and remanded the case for trial on merits.

Held, that the order of remand was a final order within the meaning of S. 109 of the Code of Civil Procedure.

Appeal—(Continued).**—3.—To Privy Council—(Continued).**

Held, further, that, having regard to the nature of the questions involved in the appeal and the value of the subject-matter of the suit, leave to appeal to His Majesty in Privy Council should not be refused. *Hyder Mehdi v. Badshah Khanam*, 21 O.C. 386.

KANHAIYA LAL and DANIELS, A.J.Cs.

References.—15 B. 155; 17 A. 112; 29 A. 184; 35 C. 618; 10 C.L.J. 386; 40 C. 635, R.; 38 A. 391; 38 A. 150; 10 O.C. 205; 11 O.C. 169; 19 O.C. 36; 18 C.L.J. 124, Dist.

- (10) *Civ. Pro. Code* (1908), S. 110—*Certificate of fitness of case for appeal to the Privy Council—Amount or value of subject-matter of suit.*

The widow of the Raja of Dumraon, entitled to a life interest in the estate, executed an *ekranama* in favour of the plaintiff, her manager, granting him a pension of Rs. 500 per month from the date of his retirement. The widow died in 1907. The plaintiff retired in March, 1908, and was paid his pension until September, 1911, when the defendant obtained possession of the Raj. In August, 1912, the plaintiff instituted the present suit claiming the sum of Rs. 5,445 made up of pension and interest thereon from September 1911 to July 1912, and further interest until realisation. He did not, however, make any claim for a declaration that the plaintiff was entitled to future pension or to a charge on the property for such pension, although he made a general claim for any other relief to which he might be entitled, without specifying its nature. The suit was decreed for Rs. 5,445 with interest at 6 per cent. per annum until realisation and the decree directed execution only against certain property of the widow in the hands of the defendant, who disputed the allegation that any such property came into his hands, that the widow ever had any separate property and who refused to pay the decretal amount, although his application to stay execution pending his appeal to the Privy Council had been once rejected by the High Court. In an application by the defendant for a certificate under S. 110, Civ. Pro. Code, 1908, *held* that, as the subject-matter of the suit was only the specific and ascertained sum of Rs. 5,445 due on account of arrears of pension and interest thereon, the plaintiff having made no claim for future arrears of pension, the case was not governed by the first part of S. 110, Civ. Pro. Code. *Held*, also, that the second part of S. 110, Civ. Pro. Code, did not apply, as the decree did not involve either directly or indirectly a claim or question to or respecting property of the value of Rs. 10,000 as suits for subsequent arrears of pension were in *gremio futuri*, and as such arrears would not become the plaintiff's property till he obtained a decree therefor from Court or till the defendant admitted liability for the same. *Held*, further, that the decree did not involve indirectly the question whether property worth more than Rs. 10,000 was liable to attachment in execution.

*Appeal—(Continued).***—3.—To Privy Council—(Continued).**

of the decree because there was no finding by any Court whether the defendant had in his hands any property of which attachment could be made in execution of the decree. *Maharaja Kesho Prashad Singh v. Shiva Saran Lal*, 3 Pat. L.J. 817—44 Ind. Cas. 476.

MILLER, C.J. and MULLICK, J.

References:—24 A. 174 (P.C.); 39 M. 843, R.; 33 C. 1986; 14 C.W.N. 872, D.

- (11) *Civ. Pro. Code* (1908), Ss. 109 (a), 110, 47—*Suit decreed by Privy Council without reference to results of partition proceeding terminating before Privy Council decision—Prayer for execution against shares allotted in partition proceedings—Objection that separate suit necessary overruled by High Court and direction to executing Court to execute decree on shares allotted in partition—High Court's decision of final order from which appeal lay to Privy Council.*

A suit to set aside a revenue sale of an *ijmal* share in a *mahal* and to recover possession and mesne profits was eventually decreed in the plaintiff's favour. But no mention was made before the Privy Council of the result of certain partition proceedings which, commencing before the institution of the suit, terminated a little before this decision of the Privy Council. The decree of the Privy Council did not, therefore, purport to give the plaintiff possession of the shares and interests, allotted to him in the partition proceedings but only of the original shares in the parent estate. Execution was prayed for, not, however, against the shares specified in the suit plaint, but against the substituted shares and interests allotted under the partition. The High Court decided that the plaintiff in the suit was entitled to possession, of the estates allotted in the partition proceedings when the same had been ascertained by the first Court in the execution proceedings and, remanding the case ordered the first Court to hold the necessary enquiries and to execute the Privy Council decree with reference to the shares allotted in the partition proceedings. In an application for leave to appeal to the Privy Council against this decision of the High Court the respondent (plaintiff) contended that the judgment of the High Court sought to be appealed from was not a decree, or final order within the meaning of S. 109 (a), *Civ. Pro. Code*, but was merely interlocutory and one directing procedure. *Held*, per *Dawson Miller, C.J.*, that the question in dispute related to the execution, discharge or satisfaction of the decree within the meaning of S. 47, *Civ. Pro. Code*, that the decision of the High Court thereon was a decree and that it was a fit case for appeal to the Privy Council although there had been a remand (a).

Per *Chapman, J.*—The decision of the High Court was an interlocutory order directing

*Appeal—(Continued).***—3.—To Privy Council—(Continued).**

procedure and was therefore not a final order (b). *Rai Baiji Nath Goenka Bahadur v. Maharaja Sri Rameshwar Singh*, 3 Pat. L.J. 339—45 Ind. Cas. 191.

MILLER, C.J. and CHAPMAN, J.

References:—(a) 2 Pat. L.J. 496; 15 B. 155; 23 A. 152; 35 C. 618, R. (b) 23 A. 220, *Rd. on.*

- (12) *Civ. Pro. Code* (1908), S. 110—*Net income, after deducting Government and other outgoings to be taken into consideration and not the gross income—Mesne profits up to date of appellate Court's decree if may be added to make up appealable value—Practice of Patna High Court follows in this respect that of Calcutta High Court.*
The right method of calculation under S. 110, *Civ. Pro. Code*, of the value of an appeal to the Privy Council from a decree of reversal is to take into consideration the net income of the property which would appear after deducting the Government revenue and other outgoings and not the total annual income.

Case where the Patna High Court, in accordance with its rule to follow the Calcutta High Court in matters of settled practice, allowed an applicant for leave to appeal to the Privy Council to add to the actual value of the land in suit the amount of mesne profits up to the date of the decree of the appellate Court to make up the requisite value. *Mahabir Prasad Singh v. Anup Narain Singh*, 3 Pat. L.J. 377—46 Ind. Cas. 137.

DAWSON MILLER, C.J. and MULLICK, J.

- (12-a) *Appeals, Consolidation of, for purposes of pecuniary valuation—Civ. Pro. Code* (1908), O. XLV, r. 4—*Consolidation of, in other cases—High Court, Power of, to permit—Civ. Pro. Code* (1908), S. 151.

It is not intended by O. XLV, r. 4, *Civ. Pro. Code* (1908), to limit the powers of the High Court to consolidate appeals to His Majesty in Council only to the purposes mentioned in that rule. Under S. 151, the High Court has an inherent power to permit consolidation on grounds other than those provided in the rule (a).

In the interests of justice and to save unnecessary expense, two appeals which are, although in form two, in substance practically one, ought to be consolidated and tried together. *Ghaudhry Har Prasad Rai v. Brij Kishor Das*, 3 Pat. L.J. 446.

MILLER, C.J. and IMAM, J.

Reference:—(a) 40 C. 955, *Ref. to.*

- (13) *Rent, Enhanced rate, for garden crops, Custom as to, Plea of, negatived and acquiesced in—Not to be taken as a ground of appeal before.* See *MAD. ACT VIII OF 1865 (RENT RECOVERY)*, (1918) M.W.N. 732 (P.C.).

(14) *Application for leave to appeal as pauper to Privy Council—Jurisdiction of High Court to grant such application.* See *FAUPPEL APPEAL*, No. 1, 9 Pat. L.J. 179.

Appeal—(Concluded).**—3.—To Privy Council—(Concluded).**

(15) Order of remand, under Civ. Pro. Code (1908), O. XLI, r. 23—Appeal from, if lies to Privy Council under S. 109—Order of remand, it can be reconsidered in appeal from final decree after remand. See REMAND, No. 8, 46 Ind. Cas. 923.

—4.—Letters Patent.

Appeal, Disposal of, by two Judges of High Court—Review by a single Judge, Validity of—Order of single Judge on review application, Appeal from, if lies under Letters Patent, cl. 15—Jurisdiction, Consent if can confer.

Neither consent of parties nor failure to take objection can give a jurisdiction which is not conferred by law.

A single Judge of a Bench of two Judges of a High Court which heard and disposed of an appeal has no jurisdiction to hear a review application and dispose of it. When such an application is heard and disposed of by a single Judge without jurisdiction an appeal lies under cl. 15 of Letters Patent. *Jagat Chandra Acharyee v. Syama Charan Bhattacharjee*, 44 Ind. Cas. 999 (F.B.).

SANDERSON, C.J., TEUNON and WALMSLEY, JJ.

References :—9 C. 482, *Appr.*; 21 C.W.N. 652, *Dist*

—5.—Revenue Appeals.

Bengal, N.W.P. and Assam Civil Courts Act (XLI of 1887), S. 21, cl. 4, Notification under—Subordinate Judge empowered to hear appeals from Munsif—Revenue appeals, such Notification if confers jurisdiction to hear, also—Agra Tenancy Act (II of 1901), S. 197. See JURISDICTION (OF CIVIL COURTS), No. 3, 46 Ind. Cas. 736.

Appearance.

(1) *Civ. Pro. Code (Act V of 1908), O. XVII, r. 2—Date fixed for appointing Commissioner—Failure of defendant to appear—Procedure.*

Where the parties had agreed that, if a certain preliminary point was found in favour of plaintiff, the case should be referred to a Commissioner on the remaining matters in dispute and when on the date on which the case was posted for appointing a Commissioner accordingly the defendant did not appear, the Court is not justified in setting it down for hearing *ex parte*. The proper procedure is for the Court to appoint the Commissioner after consulting the plaintiff's advocate who was present and to order that the defendant's advocate should be informed of it since the presence of the defendant or his advocate was not absolutely necessary as the Court was only to pass in a formal way the order which had been agreed upon between the parties. *Ko Te Ne v. Mahomed Durbeah*, 49 Ind. Cas. 587.

MAUNG KIN, J.

Appearance—(Concluded).

(2) *Civ. Pro. Code (Act V of 1908), O. X, r. 4—Personal attendance of parties, when to be ordered.*

Held, that parties to suits should not be required to attend the Court under O. X, r. 4 (Act V of 1908), unless questions material to the case which are to be answered have first been put to their pleaders and they have been unable or have refused to answer them. *Sadeahwar Narain v. Qadir Bakhsh*, 21 O.C. 252.

STUART and KANHAIYA LAL, J.Cs.

(3) No personal appearance by plaintiff—Absence of pleader—Presence of plaintiff in Court if amounts to appearance. See CIV. PRO. CODE (1908), No. 259, 3 Pat. L.J. 365.

(4) Pleader with instructions only to ask for time, sitting in Court-room if an. See CIV. PRO. CODE (1908), No. 263 a, 3 Pat. L.J. 481.

(5) Suit against firm—Plaintiff's right to know members thereof—Appearance of partner in person, if enforceable—Effect of partner's appearance. See FIRM, No. 1, 78 P.R. 1918.

(6) Plaintiff, Of, Necessity of, when pleader instructed to appear—Dismissal of suit in presence of pleader, if for default—Review—Civ. Pro. Code (1908), O. III, r. 1, O. IX, r. 9. See REVIEW, No. 5, 46 Ind. Cas. 492.

Appellate Court.

(1) *Decision of—Point arising out of pleadings, if decision can be based on, though neither urged nor covered by any issue—Removal of occupant to another house—Abandonment of house, if amounts to—Escheat.*

An appellate Court has power to base its decision on a point arising out of the parties' pleadings, when there is sufficient evidence on the record to justify the same, even though that point is neither expressly taken nor covered by any of the issues framed in the suit.

The mere removal of a person from one house to another is not in itself sufficient evidence of an abandonment of a kind which would entitle the landlord to claim a right by escheat. *Gauri Shankar v. Abbas Beg*, 46 Ind. Cas. 12 = 5 O.L.J. 165.

KANHAIYA LAL, A.J.C.

(2) *Execution of decrees—Order for sale of immoveable property—Application for stay of such sale—Inherent powers of appellate Court—Civ. Pro. Code (1908), O. XLI, rr. 5 and 6.*

The inherent powers of the appellate Court clearly recognised by O. XLI, r. 5, cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing Court by O. XLI, r. 6, which rule seems to have been clearly intended in order that the executing Court might be compelled to exercise it in emergent cases for the benefit of the judgment-debtor (a).

An application under O. XLI, r. 5, Civ. Pro. Code, can be made to an appellate Court to stay the sale of immoveable property ordered by the

Appellate Court—(Continued).

lower Court (b). **Lakshmanan Chetty v. Palaniappa Chetty**, 34 M.L.J. 470-7 L.W. 612-24 M.L.T. 18-41 M. 813- (1918) M.W.N. 502-45 Ind. Cas. 30.

SADASIYA AIYAR and NAPIER, JJ.

References :—(a) 34 C. 1037; 20 C.L.J. 512, R. (b) 23 M.L.J. 677, *Diss.*; 34 M.L.J. 471 (foot note), R.

(3) Powers of, on appeal. See BEN. ACT XI OF 1859 (LAND REVENUE SALES), No. 5, 23 M.L.T. 117 (P.G.).

(4) Appellate Court reversing decision of primary Court—Appellate judgment to be adequate and satisfactory. See BEN. ACT VIII OF 1895 (TENANCY), No. 59, 43 Ind. Cas. 973.

(5) Statement in judgment appealed from that certain point was not pressed in Court below—Appellate Court to accept such statement. See APPEAL (GENERAL), No. 27, 35 M.L.J. 169.

(6) Appellate Court not entitled to raise new points not raised in original Court and remand the case. See CIV. PRO. CODE (1909), No. 505, 44 Ind. Cas. 416.

(7) Appellate Court cannot vary decree in regard to person not a party to appeal. See CIV. PRO. CODE (1909), No. 519, 44 Ind. Cas. 480.

(8) Powers of the appellate Court to admit additional evidence in appeal. See CIV. PRO. CODE (1909), No. 516, 44 Ind. Cas. 670.

(9) Interferences by appellate Court in the matter of appointing a receiver by the lower Court. See CIV. PRO. CODE (1909), No. 481, 45 Ind. Cas. 224.

(10) Power of, where lower Court refused to record evidence—Remand order, Validity of—Civ. Pro. Code (1909), O. XLI, rr. 23, 27. See CIV. PRO. CODE (1908), No. 510, 45 Ind. Cas. 832.

(11) Presumption as to genuineness of ancient documents—Interference by appellate Court when presumption made. See EVIDENCE ACT, No. 29, 57 P.W.R. 1918.

(12) Debt contracted by Hindu father on credit of family property—Discretion of Court, Reasonable exercise of—Appellate Court, interference by. See HINDU LAW (DEBTS), No. 11, 21 O.C. 267.

(13) Contents of judgment of appellate Court—Requirements of law. See JUDGMENT, No. 1, 20 Bom. L.R. 461.

(14) When objection to jurisdiction of, could be taken—Decision on merits. See JURISDICTION (GENERAL), No. 9, (1916) M.W.N. 661.

(15) Document exhibited by consent in trial Court—Rejection by appellate Court if proper—Procedure. See LANDLORD AND TENANT, No. 54, 35 M.L.J. 11.

Appellate Court—(Concluded).

(16) Failure by appellate Court to make mention of certain document—Effect. See MUHAMMADAN LAW (GIFT), No. 3, 43 Ind. Cas. 857.

(17) Discretion of lower Court on question of costs—Power of appellate Court to interfere with wrong exercise of such discretion. See MINOR, No. 1, 16 A.L.J. 592.

(18) Point of, it may be taken at any time *suo motu* by Court—Duty of appellate Court in this respect. See MINOR, No. 7, 14 P.W. R. 1918.

(19) Defect in attestation of mortgage deed—Provisions of S. 59, Transfer of Property Act imperative—Duty of appellate Court to take notice of defect. See MORTGAGE (GENERAL), No. 16, 9 L.B.R. 159.

(19-a) Person entitled to intervene in original probate proceedings not made party thereto—Power of appellate Court to add such person as party respondent in appeal. See PARTIES TO SUIT, No. 1-c, 3 Pat. L.J. 409.

(20) Decree right when made—Happening of event subsequent to decree—Proper procedure is to request appellate Court to take additional evidence thereon—Failure to comply with provisions of Code for taking it in the absence of objections. See PRE-EMPTION, No. 29, 14 P.W.R. 1918.

(21) Inherent power of, to remand apart from provisions of Civ. Pro. Code. See REMAND, No. 4, 3 Pat. L.J. 253.

(22) Remand by, where case fully dealt with and decided on merits, Legality of—Procedure—Appellate Court to frame issues and refer for trial or take additional evidence or direct it to be taken—Civ. Pro. Code (1909), O. XLI, rr. 23, 25, 28. See REMAND, No. 6, 177 P.W.R. 1918.

(23) Power of, to let in additional evidence to cure inherent defect. See RES JUDICATA, No. 22-d, 47 Ind. Cas. 141.

(24) Assessment of damages by lower Court—Power of, to interfere with such assessment. See TORT, No. 4, 7 L.W. 415.

(25) Court of first instance fully discussing evidence—Appellate Court passing judgment in agreement—Whether discussion of evidence by appellate Court necessary. See TRANSFER OF PROPERTY ACT, No. 34, 44 Ind. Cas. 777.

Appellate Court, Jurisdiction of.

Bengal Tenancy Act (1885), Sch. III, Art. 3—Special rule of limitation under—Written statement, Plea not raised in, as required by Civ. Pro. Code, O. VIII, r. 2—Appellate Court, if can dismiss suit as barred by special limitation even when.

The plaintiffs brought the suit to recover possession of certain lands alleging that they were entitled to the same as permanent tenants. The defendants alleged in their written statements that neither the plaintiffs nor their predecessors-in-title ever had any sort of right

Appellate Court, Jurisdiction of—(Concluded).

or possession over the land in suit within twelve years and that the claim was barred by limitation. No issue was settled as to whether the special rule of limitation mentioned in Art. 3 of Sch. III to the Bengal Tenancy Act applied to the case. The first Court decreed the suit but on appeal the lower appellate Court dismissed the suit on the ground that it was barred by limitation under the provisions of Art. 3, Sch. III of the Bengal Tenancy Act:

Held, that the case of special limitation under the provisions of Art. 3, Sch. III of the Bengal Tenancy Act not having been specially pleaded as required by Civ. Pro. Code (1908), O. VIII. r. 2, and the facts not being apparent on the face of the record, the Judge of the appellate Court had no jurisdiction to go into the matter and enquire whether on certain facts that he had found the suit was barred. **Kedar Nath Mondal v Mohesh Chandra Khan**, 46 Ind. Cas. 787.

FLETCHER and SHAMSUL-HUDA, JJ.

Appellate Court, Powers of.

- (1) *Pre-emption, Suit for—Pre-emption, Right of, Loss of, after original decree in—Effect of—Decree in pre-emption suit, Vendee acquiring fresh right after passing of.*

The right of a plaintiff to enforce pre-emption must exist not only at the time of the sale or foreclosure but also at the time of the institution of a suit to enforce that right. If he loses that right after the sale or foreclosure or at any time after the institution of the suit and before a decree for pre-emption can be passed in his favour, he is put out of Court and no relief can be granted to him. But where he obtains a decree, anything which may subsequently happen cannot affect the title which he may acquire under the decree by complying with its terms, unless what happens has the effect of invalidating the antecedent title which he held on the date of the sale or foreclosure or on the date of the suit and by virtue of which he claimed the pre-emptive right.

In a pre-emption suit the vendee was found to have held certain property to which he had a defeasible right on the date on which the suit was filed, but to which his right had become absolute owing to the failure of the party interested to impugn it with success by the time the claim for pre-emption came up for hearing on appeal. A right so perfected can be referred back to a date anterior to the suit so as to defeat a claim for pre-emption. But a right of defence which did not exist at all on the date of the sale or foreclosure or on the date when the suit for pre-emption was filed, cannot be of any consequence, if it became available for the first time after a decree for pre-emption was passed in favour of the plaintiff in that suit.

A Court of appeal need not go beyond considering whether the right of pre-emption claimed by the plaintiff existed on the date of the sale or foreclosure and retained its enforceable character when the suit for pre-emption was

Appellate Court, Powers of—(Concluded).

filed and till a decree for pre-emption was obtained therein which was the subject of that appeal. **Kheri Singh v. Deo Kunwar**, 46 Ind. Cas. 339=5 O.L.J. 215.

STUART and KANHAIYA LAL, A.J.Cs.

Reference:—25 Ind. Cas. 694=17 O.O. 242, *Expt.*

- (2) *Right of pre-emption, Existence of, on date of decree of Court of first instance—Right of pre-emption, Property qualifying for—Loss of, after passing of decree—Decree if could be reversed in appeal.*

If at the date of the decree of the first Court the pre-emptor plaintiff has a right to pre-empt, then it is not open to an appellate Court to reverse the decree on the ground that since the date the decree was drawn up the plaintiff pre-emptor has lost the property which qualified him for the exercise of the right of pre-emption unless the transaction which has led to the loss of the property can be referred back to an antecedent date so as to show that the plaintiff pre-emptor had never any title to the property the possession of which qualified him for the exercise of the right of pre-emption. **Wall Mahomed Khan v. Nabl Hasan Khan**, 46 Ind. Cas. 359.

LINDSAY, J.C.

Reference:—46 Ind. Cas. 339=5 O.L.J. 215, *F.*

- (3) *Remand of case on second appeal to appellate Court—Power of appellate Court to order further enquiry by original Court. See CIV. PRO. CODE (1908), No. 505-a, 147 P.L.R. 1917.*

- (4) *Bengal Tenancy Act (1885), S. 105—Proceedings under—Measurement, Deduction on, Power to allow, of the appellate Court. See LANDLORD AND TENANT, No. 52-a, 46 Ind. Cas. 544.*

Apportionment of Rent.

- Suit, if lies—Suit for recovery of arrears of rent—Rent, Apportionment of—Joint landlords and tenants—Rights and obligations—Bengal Tenancy Act (VIII of 1885), S. 61.*

The plaintiff and the fourth defendant were, at the date of the institution of a suit for apportionment of rent and for recovery of arrears at the rate settled by the decree, joint landlords of the tenants defendants. It was not possible for the tenants to obtain joint receipts of the co sharers for payment of rent. The tenants, consequently, made deposits in Court, under S. 61 of the Bengal Tenancy Act:

Held, that the plaintiff could not, as a matter of right, claim from the tenants, what he estimated to be his proportionate share of the rent, before the rent was actually apportioned by the decree made in the suit and that the deposit of rent by the tenants under S. 61 of the

Apportionment of Rent—(Concluded).

Bengal Tenancy Act, was a valid one, *Satyesh v. Jillar Rahman*, 27 C.L.J. 488—45 Ind. Cas. 721.

MOOKERJEE and BEACHROFT, JJ.

References:—5 C. 902=6 C.L.R. 421; 27 C. 479=4 C.W.N. 494, R.

Arbitration.

- (1) *Civ. Pro. Code (Act V of 1908), Sch. II, para. 14 (c)*—Reference to arbitration without intervention of Court—Six arbitrators appointed—All the arbitrators not taking part in the proceedings—Award invalid.

Disputes between the plaintiff and defendants were referred to the arbitration of six arbitrators, the decision in the case to be according to the verdict of the majority. The arbitrators met on two different dates, but on neither of those dates was any award drawn up. The arbitrators of the defendants did not agree with those for the plaintiffs and they withdrew from the arbitration. They took away the records of the depositions of witnesses. Thereupon on a third date the arbitrators for the plaintiffs recorded the evidence afresh, and took fresh proceedings in the absence of the defendants and their arbitrators and gave an award:

Held, that all the arbitrators not having taken part in the fresh proceedings on the third date, the award so passed by the arbitrators was invalid on the face of it under para. 14 (c), Sch. II to the Civ. Pro. Code. *Kali Charan Pande v. Gupta Nath Mitra*, 16 A.L.J. 307=45 Ind. Cas. 34.

TUDBALL and ABDUL RAOOF, JJ.

- (2) *Civ. Pro. Code (1908), Sch. II, para. 1*—References to arbitration—"All the parties interested," not joining in the reference—Award, validity of—Objection to the validity of the award taken by a party who joined in the reference as to be given effect to—Objection at the appellate stage if can be entertained—Decree upon the award based upon the invalid reference—Appeal.

In a suit brought by the plaintiffs against several defendants, an application was made by the plaintiffs and the defendants who appeared, to refer the matter in dispute to arbitration and a decree was passed by the Court against all the defendants in conformity with the award submitted by the arbitrator. Upon an appeal having been preferred by the plaintiffs against the decree:

Held that, all the defendants being persons interested in the suit and not having joined in the reference to arbitration the arbitration was wholly invalid (a).

Held further, that the Court could not refuse to entertain the objection as regards the invalidity of the award merely because it was taken by the plaintiffs and not by the defendants who had not joined in the application for reference to arbitration, or because it was neither taken

Arbitration—(Continued).

in the Court of first instance nor taken specifically in the grounds of appeal to the High Court (b).

Held also, that having regard to the fact that the objection related to the jurisdiction of the Court to make the reference, and that the reference was altogether invalid, an appeal lay against the decree based upon the award and the decree of the lower Court upon the award based upon the invalid reference was liable to be set aside. *Girija Nath Roy Choudhry v. Kanai Lal Mitra*, 27 C.L.J. 339=49 Ind. Cas. 169.

CHATTERJEA and WALMSLEY, JJ.

References:—(a) 9 C.W.N. 879; 25 C.L.J. 339, F.; 11 C.W.N. 1152, Not F.; 29 C. 167, R. (b) 18 I.A. 55=19 A. 300, R.

- (3) *Appeal—Arbitration—Awards—Modification of award—Withdrawal of part of claim—Consent.*

The plaintiff instituted a suit for partition of certain moveable and immoveable properties on establishment of their right thereto. On the joint application of the parties, the suit was referred to arbitration. The arbitrator was to decide the issues in the case. An award was submitted within a given time. This was followed by another award in which it was stated that the moveables mentioned in paragraph 2 of the award filed the day before in which the shares of the parties had been defined by the award had no existence, and the first award was accordingly modified by the second. The arbitrator did not partition the properties nor did he pass any order as regards the claim for partition. All that he did was to fix the shares of the parties respectively in the properties claimed. After these awards had been filed in Court, the defendants raised an objection, *inter alia*, on the ground that all the issues in the case had not been decided. The lower Court was of opinion that the award was valid and directed a decree to be drawn up in accordance therewith. The decree set out both the awards, and the plaintiff was allowed to withdraw his claim with regard to partition and accounts:

Held, on appeal, that the decrees and awards should be set aside and that the case should be tried by the lower Court in accordance with law and that the order relating to the amendment of the plaint and withdrawal of the said claims should be set aside and the suit should be tried upon the plaint as originally framed.

It was not open to one party, after having referred all the matters in dispute to arbitration, to withdraw a portion of the claim without the consent of the other party. *Purna Chandra Halder v. Kunja Behari Halder*, 28 C.L.J. 275.

N. R. CHATTERJEA and WALMSLEY, JJ.

- (4) *Arbitration proceedings provided for in contract—Stay of arbitration pending decision of suit, when party filed suit impeaching contract on equitable grounds.*

Arbitration—(Continued).

In a contract of purchase and sale of goods between plaintiff and defendants, there was the usual clause for referring disputes arising out of the contract to arbitration. Plaintiff repudiated the contract on the ground that the broker in the transaction did not disclose that he was a partner of the defendants' firm. Defendants maintained that plaintiff was still bound to take delivery of goods and on plaintiff's refusal referred the dispute to arbitrators mentioned in the contract. The plaintiff filed a suit for a declaration that the contract was not binding on him and obtained an order from Court restraining defendants from proceeding with the arbitration :

Held—That, as this was a case where the plaintiff was impeaching the contract on the ground of fraud, the Court below was right in staying the arbitration proceedings until the suit impeaching the contract was decided (*a*). *Gajananand Maskara v. Shaik Taleb Jalaluddin*, 22 C.W.N. 536=46 Ind. Cas. 173.

SANDERSON, C.J. and WOODROFFE, J.

References :—(*a*) (1895)* *Kitts v. Moore*, 1 Q. B. 253 (260), *Rel. upon*; *M'Harg v. Universal Stock Exchange*, 11 T.L.R. 409, *Comm.*

(5) *Award—Non-appearance of plaintiff before arbitrator—Default—Arbitrator, power of, as Civil Court, if can deal under O. IX, r. 8, Civ. Pro. Code (Act V of 1908)—Sch. II, cls. 14 and 16—Application under O. IX, r. 9—Award leaving matters referred to arbitration undetermined—S. 115—Jurisdiction of High Court—Remission of award to arbitrator by High Court in revisional jurisdiction—Procedure.*

A suit was referred to arbitration by a Court on the application of the parties. The terms of the reference provided that the arbitrator should determine the case after hearing the evidence and if one of the parties failed to appear before him, he should have power to decide the case *ex parte*. On the date fixed for trial, the defendant appeared with his witnesses, but the plaintiff did not appear. The arbitrator did not take the evidence on behalf of the defendant, but made an award by dismissing the suit for default. The award was filed in Court. Thereupon, plaintiff applied to the Munsif for the setting aside of the award on the ground that he could not appear before the arbitrator for illness, but the application was rejected and the Munsif passed judgment according to the award. In the course of his order, however, the Munsif expressed an opinion that the ground alleged might be a good ground under O. IX, r. 9, Civ. Pro. Code. Plaintiff thereafter applied to the Munsif under O. IX, r. 9, Civ. Pro. Code, and then the Munsif set aside the award of the arbitrator and restored the suit to his file. The defendant moved the High Court against that order :

Held—That the arbitrator had no power to deal with the matter under the provisions of O. IX, r. 9 of the Civ. Pro. Code, and that he ought to have heard the evidence on behalf of the defendant; that the award made by the

Arbitration—(Continued).

arbitrator should be held to have left undetermined the matters referred to him for arbitration, and that, under the provisions of cl. 14 of the Second Schedule of the Code of Civil Procedure, the Munsif ought to have remitted the award or the matters referred to arbitration for the reconsideration of the arbitrator, that the application under O. IX, r. 9, Civ. Pro. Code, made to the Munsif was incompetent and the Munsif was obviously wrong in setting aside the award of the arbitrator and restoring the suit to his file.

Held, further, that the proper order to make in this case was that, the order of the Munsif being set aside, the High Court in the exercise of its revisional jurisdiction under S. 115, Civ. Pro. Code, should remit the award in the matter referred to arbitration for reconsideration by the same arbitrator on the ground that the award had left undetermined the matters referred to arbitration. *Gopal Chandra Das v. Khettra Mohan Bhunjia*, 22 C.W.N. 933=46 Ind. Cas. 195.

FLETCHER and SMITHER, JJ.

(6) *Costs, Question of, Power of arbitrators to decide—Order of reference in general terms—Civ. Pro. Code (1908), Sch. II, para 1.*

After issues were framed but before any evidence was recorded the parties applied to the Court to refer their dispute to arbitrators and the order of reference merely described the matter in difference as entered in the copy of the plaint and the copy of the defendant's written statement. An award was filed which in effect granted the plaintiff the injunction claimed and ordered that the defendants should pay the plaintiff the costs incurred by him. On an objection that the petition of reference did not authorize the arbitrators to decide the question of costs :

Held, that, having regard to the facts that the plaint included a prayer for costs and that the arbitrators were directed to deal with all questions raised by the plaint and the written statement for the defence, the arbitrators had sufficient authority to deal with the question of costs.

When a reference to arbitration in a suit is a general one of the whole case, the power of dealing with costs rests with the arbitrators. *Dharm v. Dildar Khan*, 46 Ind. Cas. 182.

DRAKE-BROCKMAN, J.C.

Reference :—91 P.R. 1888, *Rel. on*.

(6-p) *Reference to private, of subject-matter of lis without authority of Court, Validity of—Such agreement to refer or award thereon, if amount to adjustment—Civ. Pro. Code (Act V of 1908), O. XXIII, r. 3, Sch. II, para 16.*

Once a suit has been instituted, the parties are not competent, to refer the subject-matter of the *lis* to private arbitration without the authority of the Court, and so as to bind the Court and obtain its assistance in enforcing the resulting award.

Arbitration—(Continued).

Neither an agreement to refer, without the intervention of the Court, the subject-matter of a pending suit, nor a disputed award made thereon, also without the intervention of the Court, can be brought within the purview of r. 8 of O. XXIII of the Civ. Pro. Code. *Puhpl Bai v. Anusya Bai*, 46 Ind. Cas. 902.

STANYON, A.J.C.

- (7) *Reference to, without Court's intervention—Oral award, if binds parties as written award—Award if should necessarily be followed by execution of documents to be enforceable—Award not made a decree of Court if effective to confer title—Nature of award discussed.*

In an oral submission to arbitration, without the intervention of the Court, by certain members of a family of their claim to various properties, an oral award was given by the arbitrators by which, besides other arrangements, a hypothecation bond, less than Rs. 100 in value originally executed to and standing in the name of her father-in-law, was given to the plaintiff. No application was made to make the award a decree of Court. In a suit on the bond, held that by virtue of the award of the arbitrators the plaintiff acquired title to sue upon the hypothecation bond, and without the execution of any conveyance following such award (a).

An oral award is as binding upon the parties as a written award (b).

Per *Seshagiri Aiyar, J.*—In India an award made on a voluntary reference to arbitration without the intervention of a Court, has the attributes of a judgment, though such award be not made a rule of the Court. The mode of transfer by an award not being dealt with by the Transfer of Property Act, the conditions as to writing and registration prescribed by the Act have no application (c).

Per *Napier, J. (contra)*.—Even if an award on a voluntary submission is equivalent to a judgment for some purposes in the sense that it may have the same effect as a judgment has in barring suits, it is not a judgment in any real meaning of the word, far less it is a decree (d). *Amlr Bi Bi v. Aroklam*, 34 M.L.J. 184 = 45 Ind. Cas. 813.

SESHAGIRI AIYAR and NAPIER, JJ.

References.—(a) 23 A. 285; 26 A. 497; 33 B. 401; 18 C. 414; 37 C. 63; 19 M. 290; 20 M. 490; 23 M. 593; *Hunter v. Rice*, 15 East's Term Reports, 102, R.; *Johnson v. Wilson*, 25 Eng. Rep. 1156, D. (b) 1 M.H.C.R. 178; 26 B. 132; S.A. No. 837 of 1916 (Madras), R. (c) 25 C. 410; 34 M. 72; 13 M.L.J. 363, 500; 28 M.L.J. 685, R. (d) *Owen v. Mord*, 100 Eng. Rep. 946; *In re Bankruptcy Notice*, (1907) 1 K. B. 479, R.

(8) *Award—Arbitrator's power to remit or review award—Award a good defence in civil suit. Amar Nath v. Ishar Singh*, 99 P.R. 1917 = 173 P.W.R. 1917 = 43 Ind. Cas. 350. See Final Part 1917, Col. 161.

- (9) *Specification by name of arbitrators—Death of two of them before application*

Arbitration—(Continued).

made for filing agreement in Court—Effect on agreement to refer—Agreement if can be filed in Court—Reference, Order of, if can be made—Civ. Pro. Code (1908), Sch. II, paras 17 and 19.

Five arbitrators were specified by name in an agreement to refer a dispute to arbitration and two of them died before an application to file the agreement in Court was made. Held that the actual agreement to refer became incapable of performance on such death, that it was a sufficient reason for refusing to file the agreement in Court and that the Court had no jurisdiction under cl. 2 of para 17, Sch. II, Civ. Pro. Code, to make a reference to the arbitrators. Held also that para 19 only comes into operation when an order of reference has been made under para 17. *Mohun Lal v. Damodar Das*, 71 P. R. 1918 = 44 Ind. Cas. 866.

SCOTT-SMITH and LE-ROSSIGNOL, JJ.

References.—42 Ind. Cas. 911; 12 B.L.R. App. 13, Appr.; 8 A. 940; 17 M. 498; 33 A. 743, Dist.

- (10) *Civ. Pro. Code (Act V of 1908), S. 104 (f), Scope of, Sch. II, paras 1, 15, 17, 20—Order refusing to file award on private reference, Nature of—Application to file award on private arbitration—Subsequent reference to new arbitrator through Court—Application to file second award—Order setting aside award, whether decree—Appeal—Revision.*

Cl. (f) of S. 104, Civ. Pro. Code, refers to cases where a matter has been referred to arbitration without the intervention of the Court.

There is an inherent difference between orders refusing to file an award on a matter referred to arbitration without the intervention of the Court and those referred to under paragraph 1 of the Second Schedule of the Civ. Pro. Code. In the former case, if the Court refuses to file an award, its order amounts to a formal adjudication on the matter in controversy and conclusively determines the rights of the parties. In the case of orders setting aside an award under paragraph 15 of the Second Schedule, the order is only of an interlocutory nature and is in no way a conclusive adjudication of the matter in dispute.

A dispute between members of a firm was privately referred by them to arbitration. An award being given, an application was made for filing it. Objections were raised and an issue as to the misconduct of the arbitrators was framed. Meanwhile the parties agreed to refer the whole matter in dispute to a new arbitrator and made an application to the Court to that effect. The new arbitrator was then appointed and gave his award. Objections were made to this second award and the Court, finding that one of the parties had not signed the application of reference to the arbitrator and that the first award had not been superseded set aside the second award. An appeal to the District Judge was dismissed as incompetent and a second appeal was filed in the Chief Court.

Arbitration—(Continued).

Held, (1) that inasmuch as the application for the filing of the first award was numbered and registered as a suit between the parties, a suit was pending at the time the second reference was made and the order of the first Court was not, therefore, an order referred to in S. 104, Civ. Pro. Code;

(2) that the order in question setting aside the award did not amount to a decree and was not appealable as such;

(3) that the order of the lower appellate Court disposed of a question of law and, even if wrong, was not open to revision as no material irregularity had been committed. **Behari Lal v. Khan Chand**, 154 P.W.R. 1918=47 Ind. Cas. 171.

WILBERFORCE, J.

References:—117 P.R. 1916=157 P.W.R. 1916=34 Ind. Cas. 192; 66 P.R. 1915=146 P.W.R. 1915=31 Ind. Cas. 480, R. and D.

(11) *Without intervention of Court—Award by majority of arbitrators illegal—Contemporaneous oral agreement about bindingness of majority award if admissible—Civ. Pro. Code, 1908, Sch. II, paras 17 and 20—Evidence Act (I of 1872), S. 92, proviso 2.*

In the absence of anything in an agreement of reference to arbitration out of Court, providing that a majority award should be valid, the award, if not made by all the arbitrators unanimously, is invalid, and S. 92, proviso 2, of the Evidence Act, will not render admissible a contemporaneous oral agreement validating such majority award (a).

A Court becomes *functus officio* under para 17, Sch. II, Civ. Pro. Code, 1908, as soon as it decides to file the award or refuses to file it (b). **Gur Baksh Singh v. Chutta Singh**, 47 Ind. Cas. 960.

KANHAIYA LAL, A.J.C.

References:—(a) 17 Ind. Cas. 320; 16 O.C. 94, R. (b) 27 A. 526; A.W.N. (1905) 86; 2 A.L.J. 416, R.

(11-a) *Private reference to—Costs in award—Absence of written notice to defendant—Validity of award.* See **AWARD**, No. 2, 97 O.L.J. 104.

(12) *Reference to, of all matters in dispute, withdrawal of portion of claim after, Validity of.* See **AWARD**, No. 5, 46 Ind. Cas. 477.

(13) *Erroneous view of law taken by arbitrators—Award if vitiated thereby.* See **AWARD**, No. 6, 34 M.L.J. 323.

(14) *Conditions for validity of final award—Limitation if exists for remitting award for reconsideration.* See **AWARD**, No. 8, 24 M.L.T. 102.

(15) *Award made decree of Court—Management of temple of villagers—Scheme whether can be altered by majority of villagers without intervention of Court—New points not raised in pleadings if can be considered by Court.* See **AWARD**, No. 10, (1918) M.W.N. 595.

Arbitration—(Concluded).

(16) *Award not partitioning agricultural land but merely settling shares of parties, Filing of.* See **AWARD**, No. 12, 79 P.L.R. 1918.

(17) *Application to file award made before delivery of award—Order directing award to be filed—Appeal.* See **AWARD**, No. 13, 90 P.W.R. 1918.

(18) *Persons interested to make an application for an order for reference to arbitration—Difference between old and new Civ. Pro. Codes.* See **CIV. PRO. CODE** (1908), No. 7, 45 Ind. Cas. 321.

(19) *Suit referred to arbitration—Decree for amount awarded by arbitration—Decree of Court.* See **CIV. PRO. CODE** (1908), No. 463, 45 Ind. Cas. 429.

(20) *Reference to arbitration out of Court—Minor plaintiff represented by mother and guardian applying to Court for decree in terms of award—Decree passed without reference to O. XXXII, r. 7, Civ. Pro. Code, Validity of.* See **GUARDIAN AND MINOR**, No. 1, 20 Bom. L.R. 970.

(31) *Award signed by parties as well as arbitrators, if requires registration.* See **REGISTRATION ACT**, No. 18, 139 P.W.R. 1918.

(22) *Suit for restitution of conjugal rights—Entire suit, if can be referred to arbitration.* See **RESTITUTION OF CONJUGAL RIGHTS**, No. 1, 78 P.L.R. 1918.

(23) *Agreement to refer to—Immediate institution of suit by one party—Suit if barred.* See **SPECIFIC RELIEF ACT** (I OF 1877), No. 9, 22 C.W.N. 362.

Arbitration Act (IX of 1899).

S. 19—*Umpire with bias in favour of one party—Provision for appointment of—Stay of suit if will be granted—Order directing stay for limited period, if proper.*

A Court will not grant an order staying a suit under S. 19 of the Arbitration Act, where it finds that the reference to arbitration provides for the appointment of an umpire who has a bias in favour of one of the parties to it, though it will generally be slow to interfere with a reference to arbitration.

An order for stay under S. 19 of the Arbitration Act for a limited period, as for two months, is not one contemplated by the section. **Goverdhandas Yashudas Ratanchand v. Ramchand Manjimal**, 47 Ind. Cas. 783=12 S. L.R. 41.

PRATT, J.C. and FAWCETT, A.J.C.

Arbitrator.

(1) *Appointment of—Effect—Procedure if arbitrator neglects to act.* See **ACT IX OF 1899 (ARBITRATION)**, No. 1, 44 Ind. Cas. 360.

(2) *Calcutta Improvement Act (V of 1911) and Calcutta Improvement (Appeals) Act (XVIII of 1911)—Tribunal constituted under, if mere body of, or Court under S. 195, Crim. Pro. Code.* See **SANCTION TO PROSECUTE**, No. 1, 45 O. 585.

Arrest.

Application for execution of decree—Judgment-debtor outside jurisdiction of Court issuing warrant of arrest—Warrant if may be issued—Date for return to be fixed.

The fact that a judgment-debtor, at the time of the making of an application for the execution of a decree, does not reside within the territorial jurisdiction of the Court is not necessarily a sufficient reason for refusing to issue a warrant for his arrest though it must be executed only within such jurisdiction. A time must be fixed for the return of the warrant by the Court issuing it. *Krishna Prasad v. Biddya Nanda*, 3 Pat. L.J. 95=44 Ind. Cas. 296.

ROE and JWALA PRASAD, JJ.

Assam Land and Revenue Regulation (I of 1886).

S. 97—Partition under, Imperfect, when can be obtained under—Co-sharers, Consent of, if necessary—Manner in which partition to be carried out, Questions as to, to be raised before Revenue authority. See *PARTITION*, No. 2-b, 46 Ind. Cas. 967.

Assessment.

Of salt works by Municipal Board—Principles of rating. See *ADEN SETTLEMENT*, No. 1, 20 Bom. L.R. 639.

Assignment.

(1) *Agreement providing for appropriation of portion of amounts realised under decrees—Whether equitable assignment.*

Where an agreement provides that as soon as the amounts of the decrees are realized the plaintiff should appropriate some part out of the amounts, the agreement creates an equitable assignment of the decrees in favour of plaintiff giving him a charge on the fund for the amount due to him. *K N. Rama Aiyar v. G. Parthasarathy Chetty*, 43 Ind. Cas. 385 (F.B.).

ABDUR RAHIM, SESHAGIRI AIYAR and PHILLIPS, JJ.

References:—Rodick v. Gandell, (1852) 1 De. G.M. & G. 763; *Riccard v. Prichard*, (1855) 1 K. & G. 277, R.; *William Brant's Sons & Co. v. Dunlop Rubber Co.*, (1905) A.C. 454, R.; 6 M. 294; 16 M. 429; 36 A. 507, R.; *Tailby v. Official Receiver*, (1888) 13 A.C. 523, R.

(2) *Future property, Of, Validity—Transfer of Property Act (1882), S. 6—Construction of section.* See *CONTRACT*, No. 8, 47 Ind. Cas. 563.

(3) *Deed of, by nephew, if necessary in case of suit by sons after father's death on a mortgage bond executed in favour of father as manager of a joint Hindu family consisting of father, sons and nephew.* See *MORTGAGE SUIT*, No. 2, 47 Ind. Cas. 649.

Assignment of Debt.

(1) *Suit by assignee—Objection of want of consideration by adverse party—Validity.* See *CONTRACT ACT*, No. 10, 43 Ind. Cas. 74.

(2) *Before obtaining succession certificate—Assignee if should obtain certificate in his own name before suing to recover debt.* See

Assignment of Debt—(Concluded).

SUCCESSION CERTIFICATE ACT, No. 4, 35 M.L.J. 666.

(3) *Transfer of a right to profits of a village, an, not transfer of a mere right to sue—Transfer of Property Act (1882), S. 6 (e).* See *TRANSFER OF PROPERTY ACT*, No. 4-a, 47 Ind. Cas. 634.

Assignment of Decrees.

(1) *Transfer of mortgage-decree to one of the mortgagors.—Transfer of minor's share without leave of Court, if void—Assignment of mortgage-decree, if can execute—Appropriation.*

A transfer of a minor's interest by a certificated guardian without the leave of the District Judge, is voidable at the instance of any other person, that is, in addition to the minor, affected by the transfer.

A judgment debtor assignee of a mortgage-decree can execute it, by putting up the mortgaged property to sale (a). *Jagabanda Pal Chowdhury v. Haladhar Pal Chowdhury*, 27 C.L.J. 110.

BEACHOROFF and WALMSLEY, JJ.

Reference:—(a) 14 C.L.J. 639, F.

(2) *Decree, assignment of, if may be questioned as benami in execution proceeding—Decree assigned to judgment-debtor's pleaders—Effect—Pleader trustee, bound to reconvey on terms—Proper procedure, Institution of suit.*

The assignment of a decree to the pleader of the judgment-debtor does not extinguish the judgment-debt and release the judgment-debtor from liability. The pleader holds the decree on trust for his client and is bound, if called upon by the latter, to assign the decree to him, but no Court will decree such an assignment except upon equitable terms.

A question that the assignee of a decree is *benamidar* for somebody else cannot be gone into in execution proceeding. When the judgment-debtor alleged that the assignee was a *benamidar* for their pleader:—

Held:—That it was not practicable in execution proceedings to go behind the decree and alter the liability of the parties, after investigation of the sum which would be equitably payable by the judgment-debtor to the assignee of the decree to entitle him to obtain a reconveyance thereof. This should be the subject of investigation in a suit, the execution proceedings being stayed to enable the judgment-debtor to institute such a suit. *Nagendrabala Dassi v. Debendra Nath Mahish*, 22 C.W.N. 491=44 Ind. Cas. 13.

MOOKERJEE and WALMSLEY, JJ.

References:—Hobday v. Peters, 38 Beav. 349; *MacLeod v. Jones*, 32 W.R. (Eng.) 660; *Cartier v. Palmer*, 54 R.R. 145; 10 W.R. 469; 13 W.R. 209; 15 M. 389; 23 C. 805; 2 N.W.P. 46, R.

(3) *Assignment pendente lite—If carries with it the right to execute decree in appeal—Hindu joint trading family—Power of attorney by two members—If terminated by death of one of them.*

Assignment of Decree—(Concluded).

What is really transferred when a decree is assigned is not the decree itself but the interest of the decree-holder in the decree as may be finally determined.

Held, therefore, that an assignee of a decree *pendente lite* is entitled to execute the decree passed in appeal therefrom (a).

A power-of-attorney executed by two members of a Hindu joint trading family is not terminated by the death of one of them when the interest of the deceased member passes to the surviving member (b). *M. Ponnusami Pillai v. Chidambaram Chettiar*, (1918) M.W. N. 194=23 M.L.T. 218=7 L.W. 566=35 M.L.J. 294=44 Ind. Cas. 849.

SPENCER and KUMARASWAMI SASTRI, JJ.

References:—(a) 19 M. 306; 23 A. 395, F. (b) 21 C.W.N. 620, F.

(4) Benami assignment—Assignee if entitled to execute decree—Questions in application for execution by assignee. See CIV. PRO. CODE (1908), No. 307, 7 L.W. 201.

(5) Restitution, Claim for—Assignment after appellate decree—Assignee if entitled to benefits of S. 144, Civ. Pro. Code (1908). See RESTITUTION, No. 4, 46 Ind. Cas. 465.

Assignment of Lease.

Repudiation of lessor's title by original lessee if gives rise to forfeiture against assignee. See LEASE, No. 5, 20 Bom. L.R. 830.

Attachment.

(1) *Object of—Consent to, Effect of—Estoppel of objection to sale—Right, title and interest of judgment-debtor, Order directing sale of, Validity of, when right, title and interest in issue—Appeal if lies from such order.*

The primary object of an attachment of property is that pending the sale the right of the judgment-debtor therein shall be maintained intact for the benefit of any possible purchaser.

Consent to attachment means only that the owner of the property attached accepts the limitation put upon his right to alienate the property pending the attachment.

The respondent held an *ex parte* money decree against the appellant. The appellant had applied for a re-hearing of the case and consented pending the re-hearing to an attachment of an occupancy holding. On the case being again decreed against the appellant, the respondent applied to have the decree executed by sale of the attached holding. The appellant objected on the ground that he had no saleable interest in the holding. The Munsif held that there was no evidence as to the transferability of the holding and directed that the right, title and interest of the judgment-debtor would be sold. On appeal, the District Judge found to the effect that the appellant having consented to the attachment was estopped from objecting to the sale.

Held: (1) that an appeal lies against the Munsif's order;

(2) that it was idle for the Court of the Munsif to put up to sale the right, title and

Attachment—(Continued).

interest of the judgment-debtor when the whole issue before him was whether the judgment-debtor had any right, title or interest in the holding at all;

(3) that consent to attachment cannot amount to estoppel of the objection to the sale. *Bochal Mahton v. Iari Jaji*, 47 Ind. Cas. 29.

ROE and JWALA PRASAD, JJ.

(1-a) *Decree for sale of mortgaged property, Execution sale of, Attachment if necessary for—Civ. Pro. Code (1908), O. XXI, r. 14, Applicability of, to an application for such a sale.*

Where a decree passed is one for sale on a mortgage, a preliminary attachment is not necessary, in case of an application for sale of the mortgaged property and to such an application O. XXI, r. 14, Civ. Pro. Code, does not apply. *Iqbal Narain v. Jankaran*, 47 Ind. Cas. 639.

DANIELS, A.J.C.

(1-b) *Civ. Pro. Code (V of 1908), S. 64—Same person holding two decrees against another—Properties attached and sold in execution of the first decree—Sale set aside under O. XXI, r. 89, Civ. Pro. Code—First decree satisfied out of deposit—Subsequent private sale by judgment-debtor—Decree-holder, if entitled to have second decree also realised from the same properties—Separate attachment under second decree, if necessary—Attachment, if can defeat private alienation.*

A, a decree-holder, held two decrees against the same judgment-debtor. He attached certain properties belonging to the judgment-debtor under his first decree and brought them to sale, but the sale was set aside under O. XXI, r. 89, Civ. Pro. Code, and the first decree was satisfied by the deposit except for some small interest which had accrued in the meanwhile. In an attempt by A to have his other decree also satisfied out of the same properties which had after the setting aside of the sale been privately sold to the plaintiff.

Held, (1) that he was not entitled to do so,

(2) that the attachment under the first decree could not be made use of for the execution of the second, as there had been no sale under the first,

(3) that if A wanted to execute his second decree also against the same properties he must separately attach them under the second decree, and

(4) that the private alienation by the judgment-debtor to the plaintiff would be good against any such subsequent attachment. *Gotatal Vighnesawardu v. Tadanki Yenkata Suryanarayana Murthi*, 7 L.W. 573=45 Ind. Cas. 782.

WALLIS, C.J. and KUMARASWAMI SASTRI, J.

References:—44 O. 662=5 L.W. 711 (P.C.); 7 L.W. 298 (F.B.), F.

Attachment—(Continued).

- (2) *Attachment order after judgment-debtor's appearance and showing cause against—If conclusive.*

Where an order of attachment is made, after the judgment-debtor had been given an opportunity to appear and show cause against the order, it is conclusive. If the order is intended to be attacked on the ground that certain pleas were not taken originally, the propriety of the order can be questioned by a subsequent petition. Otherwise, the decision at any particular stage of execution proceedings would be deprived of finality. **Madlidi Dorayya v. Satti Veerayya**, (1913) M.W.N. 143 = 35 M.L.J. 312 = 44 Ind. Cas. 4.

OLDFIELD and BAKEWELL, JJ.

Reference:—8 C. 51, F.

- (3) *Aliyasantana Law—Mulgani tenant's right to improvements, if can be attached and sold.*

The right to improvements of a mulgani tenant in South Canara, cannot be attached and sold in Court auction, as it is an inchoate right ascertainable only at the time of eviction. **Anantha Bhatta v. Manimamale Anantha Bhatta**, (1918) M.W.N. 287.

PHILLIPS and KUMARASWAMISASTRI, JJ.

Reference:—21 M. 138, R.

- (4) *Wasika allowance — Arrears of wasika accruing due in the lifetime of the wasikadar, nature of—Attachment of wasika arrears—Civ. Pro. Code, Ss. 60, 25 and O. XXI, r. 43.*

Arrears of wasika allowance, which accrued due in the lifetime of the wasikadar and were after his death paid to the heirs, are not liable to attachment for satisfying the debts of the deceased in the hands of such heirs. **Mohammad Taqi v. Sakina Begum**, 21 O.C. 349.

DANIELS, A.J.C.

References:—10 B.H.C. 400; 5 M.H.C. 371; 26 M. 69; 12 O.C. 323, R.

- (5) *Execution sale set aside for default not attributable to decree holder—Attachment effected prior to cancellation of sale, if revives for fresh execution—Civ. Pro. Code (1908), O. XXI, r. 57.*

Held, that once an attachment is properly and legally obtained and the property attached is put up to sale in execution and the sale is afterwards set aside, then the antecedent attachment revives and by reason of its revival supports, without the necessity of a fresh attachment, a second application for leave to issue execution, unless the ground upon which the sale is set aside is default on the part of the decree-holder. **Malhalbarat Dutta v. Surja Kanta De**, 3 Pat. L.J. 310 = 45 Ind. Cas. 589.

CHAPMAN and ATKINSON, JJ.

References:—W.R. Gap. 26; 20 W.R. 20; 21 W.R. 435; 34 I.A. 490, F; 13 C.L.J. 240, Dist.; 35 Ind. Cas. 230, R.

- (6) *Application by holder of attached decree to enter satisfaction—Judgment-debtor not*

Attachment—(Concluded).

made party, but attaching creditors brought on record by Court—Adjustment of decrees after attachment, if effective as against attaching creditors. See **ADJUSTMENT OF DECREES**, No. 2, (1918) M.W.N. 874.

- (7) *Attachment during pendency of arbitration proceedings—Delivery of award before sale under attachment—Rights of purchaser and rights under award, competition between. See AWARD, No. 7, 35 M.L.J. 441.*

(8) *Grant expressed to be for maintenance of taluka with the lands in lieu of pension as jagir—Gift to heirs after grantee's death—Grant of land if free from attachment. See MAINTENANCE GRANT, No. 1, (1918) M.W.N. 384 (P.C.).*

- (9) *Of simple mortgage-debt—Procedure for such attachment. See MORTGAGE (GENERAL), No. 15 a, 21 O.C. 400.*

(10) *Of property before insolvency adjudication—Judgment-debtor subsequently adjudicated insolvent—Receiver of Court can avoid attachment. See PROVINCIAL INSOLVENCY ACT (III OF 1907), No. 23, 16 A.L.J. 32.*

- (11) *Right to attach half salary of insolvent—Civ. Pro. Code (1908), S. 60. See PROVINCIAL INSOLVENCY ACT (III OF 1907), No. 8, 16 A.L.J. 107.*

Attachment before Judgment.

- (1) *Dismissal of suit—No order made withdrawing attachment before judgment—Attachment if continues if not expressly withdrawn at time of dismissal—Civ. Pro. Code (1908), O. XXXVIII, r. 9, S. 115—Revision.*

An attachment before judgment comes to an end when the suit is dismissed and does not revive when an appeal is lodged. That part of the rule, O. XXXVIII, r. 9, Civ. Pro. Code, requiring the Court to remove the attachment when the suit in which it is made is dismissed is not intended to be more than directory. But a Court should, in order to avoid all possible doubt and difficulty, when dismissing a suit at the same time make the order directing the attachment to be withdrawn; though even if the order is not made on the dismissal of the suit the attachment before judgment falls to the ground.

If a certain property is not under attachment, the Court has no jurisdiction to direct it to be sold without being first attached; but if it does so direct, the case is one which falls under S. 115, Civ. Pro. Code, 1908. **Abdul Rahman v. Amin Sharif**, 45 O. 760 = 22 C.W.N. 927 = 44 Ind. Cas. 229.

RICHARDSON and BEACHCROFT, JJ.

References:—13 C.L.J. 243; 10 A. 506, R.

- (2) *Civ. Pro. Code, Act V of 1908, O. XXI, r. 57, O. XXXVIII, rr. 5 to 11—Application for attachment before judgment—Attachment actually effected after judgment—If falls within O. XXXVIII—Subsequent execution application dismissed—If attachment ceases.*

Attachment before Judgment—(Concluded).

An attachment applied for before judgment, but actually effected after decrees, has still the force of an attachment before judgment under O. XXXVIII and the provisions of O. XXXVIII do not lay down imperatively that the attachment should be actually effected before judgment.

O. XXI, r. 57, does not apply to attachments before judgment under O. XXXVIII and the dismissal of the subsequent execution application will not put an end to the attachment. **Rudravaram Venkatasubblah v. Peria Lutchanna**, (1918) M.W.N. 606=25 M.L.J. 387=24 M.L.T. 346=8 L.W. 369.

PHILLIPS and KUMARASWAMI SASTRI, JJ.

References:—33 C. 639, *Not F.*; 3 L.W. 336; 41 M. 151; 22 Ind. Cas. 351; 26 Ind. Cas. 81, R.

(3) *Small Causes Court, Jurisdiction of, to attach immovable property before judgment—Civ. Pro. Code, 1908, if allows it.*

There is no provision in the Civ. Pro. Code of 1908 precluding a Court of Small Causes from attaching immovable properties before judgment. **Kanchedi v. Kanchedi**, 14 N.L.R. 1=43 Ind. Cas. 123.

DRAKE-BROCKMAN, J.C.

References:—6 M.H.C.R. 92, *Not F.*; 34 M. 25; 38 C. 448, R.

(4) *Necessary evidence*, See CIV. PRO. CODE (1908), No. 458, 44 Ind. Cas. 240.

(5) *Claim to property subject of—Applicability of O. XXI, r. 63, to such claims*. See CLAIM TO ATTACHED PROPERTY, No. 1, 8 L.W. 197.

(6) *Order raising, if bar to subsequent suit for declaration that property is liable to attachment under decrees in prior suit*. See LIMITATION ACT (1908), No. 116-b, 41 M. 23.

Attestation.

(1) *Mortgage-deed, Two executants to a—Attestation in respect of one, Sufficiency of—Admission of execution, Question of attestation if arises in case of—Evidence Act (I of 1874), S. 70.*

When there are two executants of a mortgage deed, attestation may be according to law in respect of one of them and not in respect of the other.

When execution is admitted and due attestation not denied, the question of attestation does not arise or if it arises the maxim *omnia presumuntur rite esse acta* comes in, unless there is evidence that the attestation was not according to law. **Dhanna Lal v. Shambhu**, 47 Ind. Cas. 9.

BATTEN, A.J.C.

Reference:—42 Ind. Cas. 299=13 N.L.R. 121, F.

(2) *Attesting witness to mortgage-deed called but not examined—Admissibility of document*. See EVIDENCE ACT (I OF 1872), No. 21, 16 A. L.J. 121.

(3) *Of document, essence of—Mortgage-deed—Scribe, if and when an attester—Deposition*

Attestation—(Concluded).

of scribe, if proves deed. See EVIDENCE ACT (I OF 1872), No. 22, 7 L.W. 241.

(4) *Acknowledgment by mortgagor of his signature to deed if sufficient for purposes of attestation—Witnesses to see actual execution by mortgagor before attesting deed*. See MORTGAGE (GENERAL), No. 16, 9 L.B.R. 159.

(5) *Mortgage-deed executed by pardanashin—Signature appended behind pardah and behind witnesses—Attestation by witnesses on subsequent acknowledgment of her signature by her son—Mortgage if valid*. See MORTGAGE (GENERAL), No. 10, 34 M.L.J. 545 (P.C.).

(6) *Of document before its execution if a proper—Nature of—Requirements of law as to, if complied with by admission of executant—Attestation if deals only with proof or validity of document*. See MORTGAGE (GENERAL), No. 13, (1918) M.W.N. 863.

Auction-purchaser.

* (1) *Civ. Pro. Code (1908), O. XXI, r. 93—Auction sale under old Code—No saleable interest possessed by judgment-debtor in property sold—Right to refund of purchase-money if enforceable by suit or by petition—Civ. Pro. Code (1882), Ss. 313, 315—Repealing statute, Rules of interpreting—General Clauses Act (1897), S. 6 (c) and (e). **Thirumalaisami Naidu v. Subramanian Chettiar**, 40 M. 1009=45 Ind. Cas. 109. See Final Part, 1917, Col. 166.*

(2) *Civ. Pro. Code (Act V of 1908), S. 60 (c), O. XXI, r. 92—Execution of decrees—Sale in execution—House of an agriculturist—Exemption from liability to sale—Issue raised in a separate suit by judgment-debtor that house not saleable—Estoppel.*

In execution of a money decree passed against the defendant a house was sold and it was purchased by the plaintiff. The defendant raised no objection to the sale, which was duly confirmed. The plaintiff, having obtained formal possession, brought a suit against the defendant for recovery of actual possession. The suit was resisted on the ground that the defendant was an agriculturist and consequently the house was exempted from liability to sale under S. 60 (c) of the Code of Civil Procedure: Held that defendant having allowed the auction sale to take place without objection and that the sale having been confirmed, it became conclusive as between the parties, and, the purchaser acquired a vested interest in the property sold and the defendant was precluded from questioning the validity of the sale and the title of the purchaser. **Lala Ram v. Thakur Prasad**, 16 A.L.J. 691=40 A. 680=47 Ind. Cas. 947.

BANERJI and RYVES, JJ.

References:—29 A. 612; 28 B. 125; 34 C. 199, F.; S.A. No. 327 of 1910 (Allahabad), *Not F.*

(3) *Execution sale, Purchaser at, Mortgage prior to attachment, If bound by.*

A person who purchases, in execution of a decree, property subject to mortgage executed prior to attachment cannot acquire larger rights

Auction-purchaser—(Continued).

than those which his judgment-debtor possess, on the date of sale. Such a purchaser is bound by the mortgage and the mere fact that he had no notice of the mortgage or that the mortgages did not have his lien notified at the time of sale is immaterial. *Bhalron Prasad v. Sheo Darshan*, 45 Ind. Cas. 877=5 O.L.J. 114.

KANHAIYA LAL, A.J.C.

- (4) *Execution sale, Setting aside of—Purchase-money, withdrawal of, by—Subsequent confirmation of sale—Duty of auction-purchaser to refund purchase-money—Person not party to purchase, Liability of, determination of—Jurisdiction—Civ. Pro. Code (1908), S. 151.*

When an auction sale was set aside, the auction-purchaser was allowed to take out the purchase-money deposited by him in Court and when subsequently the High Court confirmed the sale after reversing the order setting it aside:

Held, that the auction-purchaser was bound by the order of confirmation and must therefore refund the purchase-money taken out by him from the Court.

It does not seem to be in accordance with justice, equity and good conscience that, in a summary miscellaneous proceeding for refund of money taken out by an auction-purchaser, the Court should enter into an adjudication between the auction-purchaser and a person who is strictly no party at all to the proceedings. *Dalip Narain Singh v. Baljnath Goenka*, 46 Ind. Cas. 276.

MULLICK and THORNHILL, JJ.

- (4-a) *Rent decree. In execution of—Subsequent purchaser in execution of mortgage decree—Former if can oust latter—Even when no notice under Bengal Tenancy Act (VIII of 1885), S. 167—Position of latter.*

A purchaser of a holding under a mortgage decree cannot oust a prior purchaser under a rent decree even though there had been no notice under S. 167, Bengal Tenancy Act. He might be regarded as a second mortgagee with a right to redeem the latter. *Surat Lal v. Murlidhar*, 46 Ind. Cas. 921.

ROE and COUTTS, JJ.

- (5) *Civ. Pro. Code (1908), S. 36 and O. XXI, r. 53—Court-sale subsequently set aside—Purchaser, order for refund to—Order, execution of—Decree for maintenance charged on immovable property, attachment of—Separate decree.*

A purchaser at a Court-sale which had been subsequently set aside, obtaining an order for refund of the purchase-money, can execute the order as if it were a decree. Where such purchaser in executing the order attaches a decree for maintenance charged on immovable property, his proper course is to apply for execution of the maintenance decree, purchase the mortgage interest and bring a separate suit under O. XXXIV, r. 4, for sale. Alternatively, he

Auction-purchaser—(Continued).

may as representative of the maintenance decree-holder under O. XXI, r. 53 (3), attach and bring to sale the property of the defendants in the maintenance suit (a). *Yenkataraman-murthi v. Sundara Ramlah*, 28 M.L.T. 355=47 Ind. Cas. 630.

SPENCER and BAKEWELL, JJ.

Reference:—(a) 22 M.L.T. 386, F.

- (5-a) *When can impugn validity of his own purchase—No saleable interest in judgment-debtor—Suit for damages, when a proper remedy.*

An auction-purchaser cannot attack his own purchase except on the ground that the judgment-debtor had no saleable interest.

If he has bought a property, the title as to which is defective, and if he has been misled on account of any fraud or omission on the part of the decree-holder, it will be open to him to seek his remedy against the decree-holder by a suit for such damages as the law allows. *Khetro Mohon Datta v. Sheikh Dilwar*, 3 Pat. L.J. 516=46 Ind. Cas. 674.

MULLICK and THORNHILL, JJ.

- (6) *Acknowledgment of debt by judgment-debtor after attachment—Effect of acknowledgment. See ACKNOWLEDGMENT OF DEBT, No. 1, 22 C.W.N. 278.*

(7) *Sale of mortgaged properties by decree in mortgage suit—Appeal by purchaser of one such property at revenue sale—Exemption of purchaser from liability under mortgage—Exemption if enures for benefit of other defendants-mortgagors. See APPEAL (GENERAL), No. 30, 3 Pat. L.J. 166.*

(8) *Auction-purchaser entitled to benefit of his purchase if rules of Code not strictly complied with—Deposit of money by judgment-debtor not made within time and not made with application to set aside sale—Appeal by auction-purchaser from order setting aside sale—Appellate order confirming sale—Judgment-debtor if can apply in revision. See CIV. PRO. CODE (1908), No. 344, 16 A.L.J. 433.*

(9) *Execution of decree—Purchaser at auction—Transfer of property by auction-purchaser—Vendee deprived of possession—Refund of money to his vendee by auction-purchaser—Suit by auction-purchaser for refund of money paid by him—Sale not set aside—Suit not maintainable. See CIV. PRO. CODE (1908), No. 357, 16 A.L.J. 511.*

(10) *If representative of judgment-debtor. See CIV. PRO. CODE (1908), No. 61, 30 Bom. L.R. 495.*

(11) *Default of, to pay balance of purchase-money—Expiry of date of payment in meanwhile—Principles of liability of defaulting purchaser—Notice. See CIV. PRO. CODE (1908), No. 340, 7 L.W. 159.*

(12) *Obstructed in execution—Order for possession passed in his favour—Default of, to obtain possession—Subsequent suit by, for possession—Estoppel. See ESTOPPEL, No. 5, 23 M.L.T. 233.*

Auction-purchaser—(Concluded).

(13) Execution of decree against ghatwal—Auction sale—Negotiations for resumption between ghatwal, Zemindar and Government—Transferable right granted after auction-sale—Property that passed at auction-sale. See GHATWALI TENURE, No. 1, 28 C.L.J. 283.

(13-a) Execution sale of minor's property, when minor not properly represented—Suit by minor for recovery of property—Auction-purchaser not being a party to suit, if any avail—Minor if can be compelled to reimburse purchase-money of. See MINOR, No. 5-b, 113 P.R. 1918.

(14) Title of, if questionable, by parties to execution sale, after sale becomes absolute. See MORTGAGE (GENERAL), No. 15-a, 21 O.C. 400.

(15) Charge, if interest in land—Purchase of charge in Court-auction—Auction-purchasers if get any rights thereunder. See MORTGAGE (REDEMPTION), No. 14, 9 L.B.R. 169.

(16) Mortgage decree for sale—Sale in execution of money decree against same property—Subsequent sale under mortgage decree—Purchaser under money decree if entitled to possession against purchaser in mortgage sale. See MORTGAGE (SALE), No. 5, 42 Ind. Cas. 624.

(17) Malabar otti mortgagee if can enforce pre-emption against purchaser in compulsory sale. See PRE-EMPTION, No. 15, 34 M.L.J. 412.

(18) In execution sale—If representative of decree-holder. See RESTITUTION, No. 1, 41 M. 467.

(19) Delivery of possession to plaintiff in his suit for possession—Appeal by defendant—Purchase and possession of property in sale in execution of mortgage decree against plaintiff—Right of defendant after succeeding in appeal to recover possession from auction-purchaser—Auction-purchaser if representative of plaintiff. See RESTITUTION, No. 3, 27 C.L.J. 489.

Auction Sale.

(1) *Fraud in publishing or conducting sale—Application to set aside rejected—Appeal—No second appeal—Civ. Pro. Code (Act V of 1908), O. XXI, r. 90, S 104, O. XLIII, r. 1. Sheo Prasad Singh v. Musammat Premna Kuar, 15 A.L.J. 920—40 A. 122—43 Ind. Cas. 522. See Final Part, 1917, Col. 167.*

(2) Decree-holder purchasing property in auction sale—He is bound to obtain possession in execution proceedings—He cannot maintain separate suit for possession. See CIV. PRO. CODE (1908), No. 82, 44 Ind. Cas. 563.

(3) Held by Court—Bid of one person, if can be used by another—Bidder's consent, Effect of. See COURT AUCTION, No. 1, 21 O.C. 212.

(4) Suit to set aside alienation by widow—Plaintiff to prove doing by widow of act necessarily resulting in transfer—Defence of mortgage suit abandoned by widow after slight

Auction Sale—(Concluded).

contest—Execution sale by Court if amounts to private alienation—Auction or Court-sale when may be considered as private sale. See LIMITATION ACT (1908), No. 167, 35 M.L.J. 364.

(5) Purchase at auction sale—Profits to accrue from date of sale. See RIGHT OF SUIT, No. 1, 45 Ind. Cas. 248.

(6) Acquisition by grove holder of superior proprietary rights through inheritance—Auction sale of superior proprietary rights to third person—Auction sale whether affects also rights of grove holder in grove. See VENDOR AND PURCHASER, No. 9, 21 O.C. 263.

Award.

(1) *Application for enforcement of—Presence of all arbitrators, if necessary. Abu Hamid v. Golam Sarwar, 25 C.L.J. 396—22 O.W.N. 301. See Final Part, 1917, Col. 167.*

(2) *Private reference to arbitration—Costs, award of—Written notice.*

An absence of written notice to one of the defendants does not necessarily invalidate an arbitration proceeding (a).

Where an order for costs was made in an award made on private references to arbitration, which could be expunged and the remainder of the award would thereby remain unaffected:

Held, that the award could be enforced to that extent.

Quare:—Whether the principle, that when a suit has been referred to arbitrators, they have authority to deal with the costs of reference and the award, can be extended to private references to arbitration? *Mohendra Nath Das v. Mohlal Kolay, 27 C.L.J. 104—43 Ind. Cas. 770.*

MOOKERJEE and BEACHROFT, JJ.

References:—(a) *Oswald v. Earl Grey, (1855) 24 L.J.Q.B. 69.* (b) 1 B.L.R.O.C. 144, R.; 21 C.L.J. 248, *Dist.*

(3) *Failure to sign the award by one arbitrator—Validity.*

The fact that an arbitration award was not signed by one of the arbitrators, is not a sufficient ground for setting aside the award. *Manphool v. Sahl Ram, 43 Ind. Cas. 154.*

WALSH, J.

References:—18 M. 22; 37 A. 456, *F.*; 28 A. 408, *Diss.*

(4) *Arbitration—Fixing of date for filing award—Award made before that date—Filing of award beyond that date—Court, Competency of, to receive—Civ. Pro. Code (Act V of 1908), Sch. II, para 3.*

When a case is referred to arbitration it is the duty of the Court to appoint a date within which the arbitrators are to make their award.

Where in a case referred to arbitration the award was filed after the date fixed by the Court after extensions from time to time, but was found to have been before the date fixed for filing it:

Award—(Continued).

Held, that the award was one which it was competent to the Court to receive. **Mohan Lal v. Baz Khan**, 46 Ind. Cas. 824.

LINDSAY, J.C.

- (b) *Arbitration, Reference to, of all matters in dispute, withdrawal of portion of claim after, Validity of—Two successive awards one modifying other—Decree setting forth both, if valid.*

One of the parties to a suit ought not, after having referred all the matters in dispute to arbitration, to be allowed to withdraw a portion of the claim without the consent of the other party.

A suit for partition of certain moveable and immoveable properties having been referred to arbitration, in which all the issues in the case were to be decided, an arbitrator made two successive awards, the second modifying the first. The Court, being of opinion that the award was valid, directed a decree to be drawn up, which decree set out both the awards and the plaintiff was allowed to withdraw his claim with regard to matters not decided by the awards.

Held, that the procedure adopted in this case was one which should not be allowed and that the decrees and the awards should be set aside and the case tried by the Court below in accordance with law. **Purna Chandra Halder v. Kunja Behari Halder**, 46 Ind. Cas. 477.

CHATTERJEE and WALMSLEY, JJ.

- (b-a) *Arbitration, Agreement to refer to, of a non-compoundable criminal case—Contract Act (1872), S. 23—Public policy, such agreement if against—Award of arbitrators, Enforceability, of.*

The plaintiff having instituted a criminal case against the defendants, making various charges, principal one being cheating, a non-compoundable case, the Magistrate referred the case to a gentleman for enquiry with the suggestion that perhaps he would be able to effect a settlement between the parties. An akharinama having been drawn by which the parties agreed to refer their difference to arbitrators, the Magistrate dismissed the complaint. The result of the arbitrator's meeting was an award in favour of the plaintiff and in an application to have it filed:

Held, that as the agreement to refer to arbitration was entered into in order to stifle a criminal prosecution, it was in essence a bargain and hence against public policy and that the award was invalid and therefore not enforceable. **Thandamoyee Das v. Goonamani Das**, 47 Ind. Cas. 506.

WALMSLEY and PANTON, JJ.

- (6) *Grounds on which it may be set aside—Illegality patent on face of award—Award based on erroneous view of law—Civ. Pro. Code (1909), S. 14 (c), Sch. II, Scope of—Suit for partition—Defence of blindness.*

In a suit by a Hindu for a share by partition in the family properties, the defence was that he was born blind and hence not entitled to any

Award—(Continued).

share under the Hindu Law. The parties, after the settlement of the issues, referred all questions of fact and law to arbitrators, who decided that the plaintiff was entitled to a life interest in a fourth share in the properties, subject to its becoming an absolute interest in case the plaintiff married. On objection being taken to the award that it was illegal on its face as it proceeded on the ground that the plaintiff though not born blind was not entitled to his full rights in the family: *held* that where an arbitrator has applied his mind honestly and has arrived at a decision to the best of his ability, the fact that a Judge might take a different view was not a ground for holding that the award was illegal on its face and so invalid under S. 14 (c) of Sch. II, Civ. Pro. Code (a).

S. 14 (c) of the second Schedule to the Civ. Pro. Code should be confined to cases like those where the arbitrator perversely and manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound. **Madepalli Venkatawami v. Madepalli Suranna**, 34 M.L.J. 323=24 M.L.T. 60=8 L.W. 202=46 Ind. Cas. 644=(1918) M.W.N. 483=41 M. 1022.

KESHAGIRI AIYER and NAPIER, JJ.

References:—(a) *King and Duveen, In re*, (1913) 2 K.B. 32; 18 C. 414 (P.C.); 29 C. 167 (P.C.); *Adams v. Great North of Scotland Ry. Co.*, (1891) A.C. 31; 19 O.W.N. 476, *Rel. on*; *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railway Co. of London, Ltd.*, L.R. (1912) A.C. 673, *Expl.*; *Landaner v. Asser*, (1905) 2 F.B. 194, *Not F.*; *Hodgkinson v. Fernie*, (1857) 3 C.B. N.S. 189, *doubled*.

- (7) *Attachment of property subject to arbitration during pendency of such arbitration—Delivery of award before sale—Rights of purchaser subject to rights created by award—Civ. Pro. Code, S. 64.*

S. 64 of the Civ. Pro. Code affects only private transfers made during the subsistence of an attachment.

Where during the pendency of certain arbitration proceedings, properties in dispute therein were attached but before the Court sale, the award was made:

Held that the purchaser took the property only subject to the rights created by the award. **Karl Viswanathan Chettiar v. Ramaswami Athithanar**, 35 M.L.J. 441=8 L.W. 532=24 M.L.T. 477.

SPENCER and KRISHNAN, JJ.

- (8) *Civ. Pro. Code, Sch. II, Ss. 12, 14 (3)—Limitation Act, Art. 158—Arbitration—Award by two out of three arbitrators—Third arbitrator not taken into consideration—Illegality.*

For the final award to be valid, it is essential that all the arbitrators should be present at all the meetings including the last, that witnesses should be examined in the presence of all, and that all should consult together as to the form that their award should take (a).

Award—(Continued).

Art. 168 of the Limitation Act has no application to proceedings under S. 12 or S. 14 of Sch. II of the Civ. Pro. Code, and there is no period fixed for making application to remit an award for reconsideration of the arbitrators owing to some illegality of the award apparent on the face of it (b). *Appayya v. Venkatasami*, 24 M.L.T. 102=6 L.W. 171=(1918) M.W.N. 477=47 Ind. Cas. 597.

SPENCER, J.

References:—(a) 7 A. 523; 12 M. 113; 25 C.L.J. 396, F. (b) 24 M.L.J. 483; 33 C. 499, F.

(9) *Civ. Pro. Code (Act XIV of 1884), S. 375—Award filed by parties—Accepted by Court—If requires registration—Registration Act, Ss. 17, 49.*

Under the Code of 1892, the parties to a suit filed an award which was apparently accepted by the Court, but there was no evidence that the award had been embodied in a decree as the records had been destroyed.

Held, that the award having been acted upon by the Court does not require registration (a). *Ramminni Yaradiah Naidu v. Ramminni Thippiah Naidu*, (1918) M.W.N. 134=3 L.W. 379=43 Ind. Cas. 697.

WALLIS, C.J. and OLDFIELD, J.

References:—(a) 20 A. 171 (P.C.), F.; 36 M. 46, D.

(10) *Arbitration—Award made decree of Court—Management of temple of villagers—If scheme can be altered by majority of villagers without intervention of Court—Pleadings—New point if can be raised—Consent decree.*

Where a dispute regarding the management of a private temple was referred to arbitration, and the award passed in pursuance thereof was embodied as a decree of Court, a majority of villagers cannot, sometime later and without the aid of the Court, set aside the provisions of the award as regards the management (a).

A consent decree cannot be set aside by the consent of parties without the aid of the Court (b).

The proper course to have the scheme modified in such a case is to bring a suit for the same.

The Court should not go into a question not raised in the pleadings.

Sadasiva Aiyar, J.—When a temple is alleged to belong to a fluctuating body of persons like a caste and not to the public, it should be strictly proved. *Yegnarama Dikshitar v. Gopala Pattar*, (1918) M.W.N. 595=8 L.W. 357=17 Ind. Cas. 548 (F.B.).

WALLIS, C.J., SADASIVA AIYAR and SPENCER, J.J.

References:—(a) 29 M. 283, F. (b) 10 P.D. 161, F.

(11) *Construction of—Alienation—Condition restricting alienation, whether binding upon*

Award—(Continued).

person not expressly mentioned—Personal covenant—Restraint on alienation.

Held, that a term in an award, which restricts the alienability of property for an indefinite period, ought not to be held binding upon a person or a class of persons not expressly mentioned as being bound by it.

The question of partition of ancestral property between two brothers R and L, having been referred to arbitration, the arbitrator gave his award by which a *haveli* valued at Rs. 5,000 was to go to R, and a shop also valued at Rs. 5,000 was to go to L. The award further provided that, if L wished to sell the shop owing to pressing necessity, he must sell it to R or R's descendants at the fixed price of Rs. 5,000 and that he should not be competent to sell it to any one else; R and L having both died, the sons and widow of L sold the shop to defendant No. 1, who had knowledge of the award and the conditions laid down by it. Thereupon, the sons of R instituted the present suit, praying that, as the vendors had no right to sell the shop contrary to the terms of the award and as the alienation was void as against them, they might be granted a decree for possession of the shop on payment of Rs. 5,000.

Held: (1) that the restriction contained in the award was personal and peculiar to L and, being in derogation of an owner's ordinary legal rights, could not rightly or equitably be construed as by implication to extend to the heirs of L who were not, therefore, bound by it;

(2) that the sale was consequently valid and the plaintiffs could not challenge it. *Diwan Chand v. Hakim Rai*, 37 P.L.R. 1918=39 P.R. 1918=28 P.W.R. 1918=43 Ind. Cas. 674.

RATTIGAN, C.J. and SHAH DIN, J.

(12) *Civ. Pro. Code (Act V of 1908), Sch. II, para 20—Arbitration—Dispute about partition of agricultural joint property—Private reference to arbitration—Award settling shares of parties—Application to file award in Court, whether maintainable.*

Held, that an award, which does not partition agricultural land but merely settles the shares of the parties, may be filed in Court. Where, therefore, a dispute relating to the partition of joint property, including agricultural land, was privately referred to arbitration, and one of the parties applied under para. 20 of the Second Schedule of the Civ. Pro. Code, for the filing of the award in Court:—*Held*, that, inasmuch as the award did not actually partition the agricultural land, there could be no objection to the filing of the award. *Govind Lal v. Muni Lal*, 79 P.L.R. 1918=81 P.W.R. 1918=45 Ind. Cas. 166.

SCOTT-SMITH, J.

References:—63 P.R. 1893; 117 P.R. 1916=107 P.W.R. 1916; 70 P.L.R. 1917; 34 Ind. Cas. 192, F.

(13) *Decree—Appeal—Civ. Pro. Code (Act V of 1908), Sch. II, paras. 17, 20, 21, scope and applicability of—Application to file award made before delivery of award—*

Award—(Continued).

Order, whether appealable—Material irregularity in proceedings of arbitrators—Revision.

Held, that para. 20 of Sch. II of the Civ. Pro. Code, prescribes the procedure to be followed in respect of an application for filing an award, which has already been made without the intervention of the Court and does not apply to a case where, up to the date of filing of the application, the arbitrators have not made their award.

Where, therefore, the parties to a dispute entered into an agreement to refer it to arbitration and after the commencement of proceedings by the arbitrators but before the delivery of any award, the plaintiff made an application under paras. 17, 20 and 21 of the Second Schedule to the Civ. Pro. Code, whereupon the Court made an order directing the award to be filed in Court.

Held, that the order was not one under paras. 20 and 21 and was not, therefore, appealable. *Allah Din v. Mt. Badshah Begam*, 90 W.R. 1916=45 Ind. Cas. 647.

SCOTT-SMITH, J.

Reference:—C.A. 2036 of 1917, F.

(14) *Arbitration—Finality of award—Grounds on which it can be questioned—Corruption or illegality—Appointment of Court as arbitrator how far affects principle of finality of.* *Maung Kala v. Maung Malk*, U.B.R. (1917), 4th Qr., 36=44 Ind. Cas. 622. See Final Part, 1917, Col. 169.

(14-a) *Arbitration—Judgment in terms of—Appeal if lies from.* See APPEAL (GENERAL), No. 23 d, 46 Ind. Cas. 785.

(15) *Submission of claim to arbitration—Award given—Claim merged in award—Suit to recover Rs. 45 directed to be paid to plaintiff by award—Suit is one cognizable by Small Causes Court—Suit not one for specific performance of contract—Second appeal if lies in such suit.* See APPEAL (SECOND APPEAL), No. 26, U.B.R. (1918), 3rd Q., 109.

(16) *Reference to arbitration—All parties not joining therein—Validity of award.* See ARBITRATION, No. 2, 27 O.L.J. 339.

(17) *Omission of plaintiff to appear before arbitrators—Dismissal of suit by arbitrator—Decree on award—Remedy of plaintiff—Award to be treated as not having determined matters referred—Remission of award for reconsideration, proper remedy.* See ARBITRATION, No. 5, 22 C.W.N. 933.

(17-a) *Arbitration, Reference to private, of subject-matter of its without authority of Court, Validity of—Award on such reference if amounts to adjustment under Civ. Pro. Code (1908), O. XXIII, r. 2.* See ARBITRATION, No. 6 a, 46 Ind. Cas. 202.

(18) *Arbitration without reference to Court—Oral award—Award not followed by any document not made a rule of Court—Award if a judgment.* See ARBITRATION, No. 7, 34 M.L.J. 184.

Award—(Concluded).

(19) *Orders refusing to file award on matter referred to arbitration without intervention of Court and those referred to under para. 1 of Sch. II of Civ. Pro. Code, difference between—Application to file award on private arbitration—Subsequent reference to new arbitrator through Court—Application to file second award—Order setting aside award, whether decree—Appeal.* See ARBITRATION, No. 10, 154 P.W.R. 1918.

(20) *Made without any representative on behalf of minor, validity of.* See CIV. PRO. CODE (1908), No. 548, 23 M.L.T. 89.

(21) *During pendency of attachment—Purchase in execution sale thereunder made long after award—Award not private transfer—Purchase in execution sale subject to decree on award.* See LIS PENDENS, No. 2, 35 M.L.J. 411.

(22) *Maintenance, Decree for, in terms of—Charge on immoveable property created by award—Decree if capable of execution personally without bringing charged property to sale.* See MAHOMEDAN LAW (MAINTENANCE), No. 1, 46 Ind. Cas. 169.

(23) *Part of, partitioning immoveable property, Suit to enforce a—Court of Small Causes, Cognizability by, of.* See PROVINCIAL SMALL CAUSE COURTS ACT, No. 13-a, 22 C.W.N. 66.

(24) *Signed by parties as well as arbitrators—Such award if requires registration.* See REGISTRATION ACT (1909), No. 18, 139 P.W.R. 1918.

Award Decree.

Reversioners if bound by award or compromise decree against widow. See HINDU LAW (WIDOW), No. 7, 20 Bom. L.R. 947.

Ballment.

Delivery of goods for being ferried across river to ferry licensee—Loss of goods by sinking of boat while under mooring—Liability of ferry licensee if that of carrier or bailee. See COMMON CARRIER, No. 3, U.B.R. (1918), 4th Qr. 120.

Ballor and Bailee.

(1) *Shipping—Delivery to be taken at wharf—Consignee's delay to take delivery—Position of ship owner—Bailee.* See CONTRACT ACT, No. 71, 8 L.W. 4 (F.C.).

(2) *Goods delivered to G.I.P. Ry. for delivery at station of E.I. Ry.—Risk note—Loss of goods—Conditions of liability of Railway.* See RAILWAYS ACT, No. 6, 14 N.L.R. 122.

Bank.

Official Liquidator of, not agent of bank but officer of Crown. See ALIEN ENEMY, 47 Ind. Cas. 121.

Banker and Customer.

Banker—Draft drawn against shipping documents, under c. i. t. contract—Draft sent to a Bank for collection—Presentment of draft for payment—Drawee paying the draft and receiving documents—Policy of insurance

Banker and Customer—(Concluded):

not among documents — Banker remitting the money to his principal the same day— Cable advice to the principal of the payment — Drawee subsequently discovering mistake in the documents of the omission of the policy — Drawee calling upon the Bank to stop payment — Refusal of the Bank to do so — Liability of the Bank to refund the money— *Contract Act (IX of 1872), S. 72—Section governed by estoppel— Principal and agent. Solomon Jacob v. The National Bank of India, Ltd., 19 Bom. L.R. 789=42 B. 16. See Final Part, 1917, Col. 171.*

Benamidar.

(1) Auction-purchaser, for judgment-debtor — Execution sale set aside under S. 173, Bengal Tenancy Act (1885)—No appeal—Civ. Pro. Code (1908), S. 47, Benamidar, inapplicable to. See APPEAL (GENERAL), No. 23-c, 46 Ind. Cas. 748.

(2) Possession, Suit for, of immoveable property—It can maintain. See POSSESSION, No. 5, 45 Ind. Cas. 794.

Benami Transaction.

(1) *Ejectment—Benamidar—Fictitious suit—Fictitious sale—Court, if can enforce unreal title. Surendra Nath Ghose v. Kalligopal Mojumdar, 26 C.L.J. 333=22 C.W.N. 367=42 Ind. Cas. 431=45 C. 920. See Final Part, 1917, Col. 174.*

(2) *Benamidar, decree against—Sale of property held in benami in execution of decree, if binds beneficiary—Symbolical possession delivered, if binds beneficiary.*

Although a decree against a benamidar may bind the beneficiary, symbolical possession delivered in execution thereof is of no avail except against the actual party to the suit or the proceeding in execution, and the beneficiary who was no party to either is not affected by it.

Quere.—Whether when a money-decree has been obtained against the benamidar, the beneficiary is necessarily bound by the sale of the property held in benami in execution of the decree. *Satish Chandra Sarkar v. Brojogopal Dutta, 22 C.W.N. 807=46 Ind. Cas. 104.*

RICHARDSON and BEACHCROFT, JJ.

References:—19 C.L.J. 34; 8 C.L.J. 305; 6 C.L.J. 472, R.

(3) *Benami transfer to effect fraud—Fraud carried out—Transferor's suit for possession under the transfer—Plea of benami character of transaction—Sustainability. Yodiana Kamayya v. Gudisa Mamayya, 32 M.L.J. 484=43 Ind. Cas. 352. See Final Part, 1917, Col. 352.*

(4) *Mortgage executed benami with fraudulent intention—Fraud not carried out—Suit on mortgage by real mortgagee—Maintainability. Rajagopalachar v. Sundara Chetty, 33 M.L.J. 696=45 Ind. Cas. 332. See Final Part, 1917, Col. 175.*

Benami Transaction—(Continued).

(5) *Promissory note—Promisor—Promisee—Benamidar, Right of suit of.*

Where two persons executed a promissory note to the plaintiff benami for one of themselves (the promisors), and the plaintiff brought a suit to recover the amount:

Held that the promisee of a note, of which he is in part the promisor, cannot maintain suit, and, therefore, the plaintiff, who is his benamidar, also cannot maintain the suit.

A benamidar cannot be in a better position than the real party. *Raman Chetty v. Panupathi Iyer, 24 M.L.T. 502.*

AYLING and SESHAGIRI Aiyar, JJ.

(6) *Test for determining nature of transaction—Estoppel—Transfer by ostensible owner—Transferor, duty of—Legal owner in possession—Constructive notice—Transfer of Property Act, S. 41.*

Held, that:—

1. The source of the purchase-money is a very important factor in determining the question whether a transaction is not benami. Actual possession or receipt of rent of the property is another criterion.

2. Where the real owner has all along remained in possession and enjoyment of the property, that circumstance is constructive notice of the benami nature of the transaction.

3. A person invoking the plea of estoppel must clearly plead precise facts which led him to believe that his transferor was the real owner and must show the precise nature of the enquiries he relied on.

In a suit for a declaration that plaintiff was the sole proprietor of the property in dispute and that defendant No. 3 had no right to mortgage $\frac{1}{3}$ share thereof to defendants Nos. 1 and 2, it appeared that although the house was purchased in the names of defendant No. 3 and his brother, the purchase-money was paid by their father, the plaintiff, who was also either in possession or in receipt of rent from the tenants and whose name was entered in the Municipal Committee's registers with respect to the payment of the house-tax:

Held, (1) that the real owner of the property was the father and that the sons were merely benamidars;

(2) that all the external *indicia* of ownership being in favour of the father they ought to have put the mortgagees upon an enquiry which, if prosecuted, would have revealed the facts that the mortgagor was not entitled to deal with the property;

(3) that in view of the above findings, the mortgagees were not entitled to avail themselves of the plea of estoppel. *Ram Sarup v. Maya Shankar, 46 P.R. 1918=45 P.L.R. 1918=33 P.W.R. 1918=43 Ind. Cas. 556.*

SHADI LAL, J.

Reference:—18 W.R. 166=11 B.L.R. 46=I.A. Sup. Vol. 40=3 Sar. P.C.J. 656 (P.C.), F.

7) *Purchase by father of property in son's name—Presumption of advancement if*

Benami Transaction—(Continued).

arises—Indicia of benami transactions—Sale by son to another, if valid—Estoppel of father.

The purchase by a father, whether a Hindu or Mahomedan, in the name of one of his sons, gives rise only to the presumption that it is a *benami* purchase and not that it is an advancement in favour of that son.

Facts, held conclusively to indicate *benami* nature of transactions pointed out.

Where it is shown that the son's vendee had knowledge of facts, *viz.* doubtful title of the son, anticipation of some dispute, doubt as to son's age and capacity to contract, which ought to have put him upon an inquiry as to the son's title, and that the vendee had also direct notice, in the shape of a warning from the Sub-Registrar before whom the son and the vendee appeared for registration of their sale-deed, of the father's claim to the house, the father is not estopped from denying his son's title to the house and no equities arise in favour of the son's vendee, as he entered into the transaction with his eyes open. *Gulam Dastgir v Teja Singh*, 73 P.R. 1918=159 P.W.R. 1918=17 Ind. Cas. 367.

SCOTT-SMITH and SHADI LAL, JJ.

References:—6 M.I.A. 53; 13 M.I.A. 283; 13 W.R. 1 (P.C.) 22 C. 909, R.

(7-a) Purchase by Government servant of property in another's name—Disobedience of Government orders, if confers title to property acquired—Possession of benami purchaser for more than 12 years, confers title by adverse possession.

Where the real purchaser of property is a Government servant, who purchases it *benami* because of certain Government orders prohibiting Government servants from acquiring landed property in the district where they are employed, the real purchaser acquires no title under the *benami* deeds of purchase.

But if such a *benami* purchaser, or his heirs holds proprietary possession of the property against the original sellers or owners or ostensible purchasers for more than 12 years from the date of the purchase, he acquires a good title to the property by prescription. A title void in its inception becomes a good title by virtue of more than twelve years' adverse possession. *Sajjad Mirza v. Nanhi Khauam*, 47 Ind. Cas. 694.

LINDSAY, J. C.

(8) *Benamidar's right of action in general. See CIV. PROC. CODE (1908), No. 307, 7 L.W. 301.*

(9) *Benamidar allowed to pose as ostensible owner and to alienate property—Real owner whether can deny title of benamidar. See ESTOPPEL, No. 8, 126 P.W.R. 1915.*

(10) *Nature of suits by benamidar. See MORTGAGE (GENERAL), No. 11, (1918) M.W. N. 107*

(11) *Money supplied by father—Purchase in son's name benami. See PLEADINGS, No. 9, 196 P.W.R. 1918.*

Benami Transaction—(Concluded).

(12) *Property alleged, to be held in benami for insolvent if may be recovered without suit. See PROVINCIAL INSOLVENCY ACT (III OF 1907), Nos. 10, 14, 15 and 27, 22 C.W.N. 700, 702, 704, 709.*

Benefit Society.

Organization to place capital at disposal of members in turn on payment of monthly subscriptions—Right of subscriber to claim refund of part subscription. See SUBSCRIPTION, No. 1, 77 P.R. 1918.

Bengal Allaylon and Dillaylon.

See BEN. REG. XI OF 1825.

Bengal Cess Act

See BEN. ACT IX OF 1850.

Bengal Civil Courts

See BEN. ACT XII OF 1887.

Bengal Land Redemption and Foreclosure.

See BEN. REG. XVII OF 1806.

Bengal Land Registration Act (VII of 1876).

Enquiry under, if judicial proceeding. See JUDICIAL PROCEEDING 47 Ind. Cas. 710.

Bengal Land Revenue Assessment.

See BEN. REG. I OF 1901.

Bengal Land Revenue Sales

See BEN. ACT XI OF 1859.

Bengal Municipal Act

See BEN. ACT III OF 1884.

Bengal Patel.

See BEN. REG. VIII OF 1819.

Bengal Patni Taluks.

See BEN. REG. VIII OF 1819.

Bengal Tenancy Act.

See BEN. ACT VII OF 1859.

See BEN. ACT VIII OF 1855.

Bequests.

(1) *Perpetuities, Rule against, if subject to charitable bequest—English rule as to bequests, Applicability of, to India—Succession Act (X of 1865), Ss. 101, 105—Bequest to one church and on breach of condition to another—Remoteness—Validity of bequest.*

S. 101 of the Succession Act applies to all bequests, whether they are of a charitable nature or not.

The question as to the validity of a bequest on ground of remoteness, does not depend upon what did in fact happen but upon whether under the terms of the will the bequest might be delayed beyond the time specified in S. 101 of the Succession Act.

The positive language of the Succession Act as contained in the provisions of S. 101 is sufficient to preclude the application of the English Law.

A bequest of certain properties to a church subject to certain conditions was made by a

Bequests—(Concluded).

testator with the provision that the properties shall be made over to another church, in case the conditions should ever be broken or in any way infringed.

Held, that the gift over to the other church was invalid on ground of remoteness. **J. H. Jones v. Administrator-General of Bengal**, 47 Ind. Cas. 383.

SANDERSON, C.J. and WOODROFFE, J.

(2) See **HINDU LAW—WILL**.

Berar Inam Rules.

Rule 14 (2)—Temporary alienation by way of lease—Sanction of Commissioner if required for such alienation. See **SERVICE GRANTS**, No. 1, 14 N.L.R. 12.

Berar Land Revenue Code.

(1) Ss. 4 (5), 86, 87, 205—Pre-emption, Rights of, under S. 205—Recognized division of a Survey number, Occupant of, as defined in S. 4 (5)—Sub-division by agreement of parties, Right how affected in case of—Record of Rights, Officer in charge of, if authorized to recognize division of Survey number—Division of Survey number and distinct Survey number, Difference between, under S. 66 (2)—“Survey number” in S. 67, Meaning of. See **PRE-EMPTION**, No. 11-a, 42 Ind. Cas. 147.

(2) S. 78 (2)—*Anti-izara tenant—Burden of proof—Presumption.*

In a suit for ejectment where a tenant pleads that he is an *anti-izara* tenant, it is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitle him to do so. He has to prove that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between landlord and tenant for its duration is forthcoming. If he fails to do so, the presumption under S. 78 (2), Berar Land Revenue Code, will not be made in his favour. **Abdullah Khan v. Abhlman**, 44 Ind. Cas. 531.

KOTWAL, A J.C.

(3) Ss. 78 and 79—*Effect of notice under the sections—Appeal against unfavourable opinion of Court by party in whose favour decree was passed, not allowed—Res judicata.*

No appeal lies from a decree, merely on the ground that certain observations made in the judgment of the Court were unfavourable to the person in whose favour the decree was passed. The opinion of the Court was upheld in appeal, but the decision of the appellate Court on such matters cannot operate as *res judicata*.

Where a Jaghirdar issued notice under S. 78 of the Berar Land Revenue Code, and allowed the tenant in the occupation of the land for more than one year, he cannot be supposed to have waived the notice inasmuch as no rent was accepted nor was possession of the transferee

Berar Land Revenue Code—(Concluded).

from the tenant in any manner recognized by the Jagirdar. So, the tenant or his transferee is not entitled to a fresh notice under S. 79 of the Code.

A notice under S. 79 unconditionally determines the tenancy, but, if a tenant is silent to a notice under S. 78 (3), he can only be evicted for not paying the enhanced rent, after the rent had been determined to be just and reasonable by a competent Court. **Narayan v. Syed Bahadur**, 44 Ind. Cas. 723.

MITTRA, A.J.C.

Reference :—5 N.L.R. 100, R.

(4) Ss. 78 (3), 79, 223—“*Antiquity*” meaning of—*Tenancy commencing after 1867—Ejectment of tenants who are not ante-izara tenants.*

For the application of S. 78 (2), it is necessary that, by reason of the antiquity of the tenancy, no satisfactory evidence is forthcoming as to its commencement. The word “antiquity” is not to be understood in its commonly accepted meaning of absolute antiquity, but as antiquity in reference to the possibility of getting evidence. Where it can be stated definitely that the tenancy did not commence till after 1867, evidence of the commencement of the tenancy cannot be said to have been lost by reason of its antiquity. The result is that S. 78 (2) practically becomes inapplicable to *izara* villages as all cultivators who held land prior to the *izara* have been recognized as *ante-izara* tenants entitled to the protection given by S. 223 of the Code.

Where the tenants are not *ante-izara* tenants nor tenants protected by S. 78 (3) of the Berar Code they must be held to be annual tenants, for the Code does not recognize any other class of tenants. **Parashram v. Bapu**, 42 Ind. Cas. 631—14 N.L.R. 111.

MITTRA, OFFG, A J.C.

References :—18 B. 221; 11 Ind. Cas. 698, F.

(5) S. 79 (2)—Tenancy for one year only if covered by. See **LANDLORD AND TENANT**, No. 67, 14 N.L.R. 129.

(6) S. 79. See Nos. 3 and 4, *supra*.

(7) S. 86. See No. 1, *supra*.

(8) S. 87. See No. 1, *supra*.

(9) S. 205. See No. 1, *supra*.

(10) S. 223. See No. 4, *supra*.

Berar Municipal Law (1886).

(1) Ss. 42, 44—Civil Court, Jurisdiction of, to question illegality of tax duly notified—Sovereigning purposes, Taxation for. See **JURISDICTION (OF CIVIL COURTS)**, No. 4, 46 Ind. Cas. 682.

(2) S. 44. See No. 1, *supra*.

Berar Patels and Patwaris Law (1900).

S. 9—Lands purchased out of emoluments of Patwaris—Self-acquired property.

Property purchased with the savings of the emoluments of Patwari, become the self-acquired property of the Patwari, and a partition of such property cannot be claimed. *Shivram Ambadas v. Shridhar Shivram*, 43 Ind. Cas. 187.

MITTRA, A.J.C.

Bhagdari and Narvadhari Act.

See BOM. ACT V OF 1862.

Bharatpur State.

Claim by, against Secretary of State for India to site of house in Sakitra, near Gobardhan—Death of residents of house. See *ESCHBAT*, No. 1, 16 A.L.J. 553.

Bhumak.

If village or private servant. See *SERVICE TENURE*, No. 1, 14 N.L.R. 152.

Bihar and Orissa Tenancy.

See BEN. ACT II OF 1913.

Bill of Exchange.

Instrument ordering firm to pay certain sum to certain person or bearer a—Stamp duty on—One anna under Stamp Act (II of 1899), Sch. I, Art. 13.

An instrument ordering payment of a certain sum by a firm to a certain person or bearer is a bill of exchange payable on demand and is chargeable with a duty of one anna under Art. 13 of Sch. I of the Stamp Act. *In re Raeburn and Co.*, 47 Ind. Cas. 561.

THOMPSON, F.C.

Bill of Lading.

Claim for compensation for damage done to goods—English law—Right of common carriers to limit liability by express terms provided in the Bill of Lading. See *COMMON CARRIERS*, No. 2, 45 Ind. Cas. 168.

Birt.

Birtdar's right to deduct dahiya from rental—Under proprietary right in land. See *LANDLORD AND TENANT*, No. 70, 21 O.C. 244.

Board of Revenue.

(1) The Boards of Revenue are the agents of the Executive Government of the Presidency. *Ramalinga Reddi v. Kottaliya*, 22 M.L.T. 17 = 6 L.W. 246 = 33 M.L.J. 60 = (1917) M.W.N. 558 = 41 Ind. Cas. 486 = 41 M. 26. See *Final Part*, 1917, Col. 178.

(2) Dispute between rival claimants to come on record as deceased plaintiff's legal representative—Summary rejection by Revenue Court of claim of one such claimant without enquiry—Legality of order of rejection—High Court, and not Revenue Board, to interfere in revision against order. See *REVISION*, No. 18, 35 M.L.J. 632.

Bombay Civil Courts Regulation.

See BOM. REG. IV OF 1837.

Bombay District Municipal Act.

See BOM. ACT III OF 1901.

Bombay Hereditary Office.

See BOM. ACT III OF 1874.

Bombay Revenue Jurisdiction.

See BOM. ACT X OF 1876.

Breach of Contract.

Compensation for, Suit for—Suit by shareholder for dividend is a—Limitation Act (1908), Art. 116. See *COMPANIES ACT* (1882), No. 1, 8 L.W. 354.

Breach of Promise.

(1) *Contract—Breach of promise of marriage—Damages for the breach—Suit not maintainable under Mahomedan law.* *Abdul Razak v. Mahomed Hussein*, 19 Bom. L.R. 164 = 42 B. 499. See *Final Part*, 1917, Col. 179.

(2) *Burmese Buddhists—Marriage arranged between parents of parties to be married—No consent to or offer of, marriage proved on son's part—Breach of promise of marriage, Damages for, if can be claimed against parents of son.* See *BUDDHIST LAW (MARRIAGE)*, No. 4, U.B.R. (1918), 3rd Qr. 106.

Breach of Promise of Marriage.

Burmese youth under age of eighteen, if can make valid promise of marriage—Liability of such youth for damages for breach of such promise. See *BUDDHIST LAW (MARRIAGE)*, No. 3, U.B.R. (1918), 1st Qr., 75.

Breach of Trust.

Lease of temple lands in perpetuity, if necessarily a. See *LANDLORD AND TENANT*, No. 53, 7 L.W. 194.

Buddhist Law.

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—DIVORCE.
- 4.—GIFT.
- 5.—INHERITANCE.
- 6.—MARRIAGE.

—1.—General.

Buddhist Ecclesiastical Law, Question of, Decision of—Vinaya—Atthagatha—Dhammathats.

Questions of the Buddhist Ecclesiastical Law which come before the Civil Courts must be determined not merely by the canonical text of the Vinaya, i.e., the Palidaw, but the Atthagatha and other commentaries must also be considered and the provisions of the Dhammathats should also be taken into account as throwing valuable light on the established custom of the country. *U. Ambatha v. U. Thu Dathana*, 45 Ind. Cas. 938.

TWOMEY, C.J. and MAUNG KIN, J.

Buddhist Law—(Continued).**—2.—Adoption.**

- (1) *Letters of Administration, Application for, by sister of deceased Burmese Buddhist woman—Objection by natural half niece of deceased alleging her own adoption by deceased—Fact of deceased being woman divorced from her husband if deprives her of right of adoption—Probate and Administration Act, 1881, S. 23.*

An application for letters of administration by the full sister of a deceased Burmese Buddhist woman, divorced from her husband, was opposed by another woman, the natural half-niece of the deceased, on the ground that she was the adopted daughter of the deceased.

Held that the question of adoption was relevant to the application and required consideration, as, if the alleged adoption be proved, the full sister would not be an heir and not entitled to any share in the estate and, therefore, would not be a person entitled to the letters of administration, under S. 23, Probate and Administration Act (2).

Held, also, that the same reason that enables a single woman, a spinster or a widow to adopt applies also to the power of adoption by a woman who is divorced from her husband and has divided the joint property with him.

Semle:—Though a married woman living with her husband cannot adopt without his consent, yet, an adoption being to a great extent a matter of intention, there would be a good adoption without any formal declaration, if the intention to adopt continued after the divorce and full effect was then given to that intention (b). *Aung Ma Khaling v. Mi Ah Bon*, 9 L.B.R. 163=11 Bur. L.T. 65=45 Ind. Cas. 737.

TWOMEY, C.J. and ORMOND, J.

References:—(a) 5 L.B.R. 78, *Expl.* (b) 14 Bur. L.R. 9, R.

(2) *Kittima son—Proof of adoption—Publicity of relationship—Separation and inheritance—Forfeiture of inheritance. Maung Thwe v. Maung Ton Pe*, 22 M.L.T. 411=22 O.W.N. 97=(1918) M.W.N. 9=27 O.L.J. 68=20 Bom. L.R. 69=45 C. 1 (P.G.). See Final Part, 1917, Col. 181.

—3.—Divorce.

- (1) *Burmese husband, Second marriage of, without chief wife's consent—Chief wife if entitled to divorce.*

The chief wife of a Burmese Buddhist may object to her husband taking a second wife and may claim a divorce if he does so; her right is, however, subject to certain exceptions found in ss. 219, 232, 265=267 and 311 of the Digest. The husband is allowed to take a second wife when the first wife is barren or has borne only female children or is suffering from certain diseases. When the chief wife decides to claim the right of divorce the division of property should, in the absence of any contract to the contrary, be made as if the divorce were

Buddhist Law—(Continued).**—3.—Divorce—(Concluded).**

one by mutual consent. *Maung Hme v. Ma Sein*, 45 Ind. Cas. 953=9 L.B.R. 191.

TWOMEY, C.J., KIN and RIGG, JJ.

References:—L.B.R. (1872=1892) 103; 3 Ind. Cas. 715=5 L.B.R. 87, *Diss. from*.

- (2) *Divorce—Cruelty, single act of, if sufficient.*

Under Burmese Buddhist Law a divorce on the terms of a divorce by mutual agreement may be allowed to a wife on proof of a single act of cruelty on the part of the husband. *Ma Sein Phaw v. Mg Ba On*, 46 Ind. Cas. 144.

PRATT, J.

(3) *Judicial separation—Crim. Pro. Code (1898), S. 488, Order under, same effect as order for—Issue during continuance of order—Onus of proof as to access—Legitimacy, Presumption as to—Evidence Act (1872), S. 112. See CRIM. PRO. CODE (1898), No. 12, 46 Ind. Cas. 620.*

—3.—Gift.

Burmese religious gift—Registration, if necessary—Transfer of Property Act (IV of 1882), S. 123.

Burmese Buddhist religious gifts are not excepted from the operation of S. 123 of the Transfer of Property Act. Therefore, a gift or dedication of a Kyaung not effected by a registered instrument is void. *Uzayanta v. U. Naga*, 45 Ind. Cas. 926=9 L.B.R. 258.

ORMOND, J.

—5.—Inheritance.

- (1) *Circumstances which exclude person from inheritance.*

According to Buddhist law, mere non-attendance on a deceased during his or her illness does not exclude those who would ordinarily inherit from his or her. The law requires that, on the part of the person sought to be excluded, there was conduct such as constitutes an intention on his part to destroy the natural tie between him and the deceased. *Maung Nge v. Maung Zin Ba*, 44 Ind. Cas. 239.

MAUNG KIN, J.

References:—U.B.R. (1892=1896), Vol. II, 184; 4 L.B.R. 291, F.

- (2) *Marriage of second wife by person whose first wife died, leaving her surviving children by her first husband—Right of such surviving children to property acquired by their deceased mother and their step-father—Right of such surviving children also to jointly acquired property of their deceased step-father and his second wife—Step-father's second wife and her children by him living—Limitation Act, 1908, Art. 123.*

The issue of a Burmese woman, M.K. by her first husband, sued the widow Z, and children of M.K.'s second husband and their step-father A, who after M.K.'s death married Z, as second

Buddhist Law—(Continued).**—5.—Inheritance—(Continued).**

wife for a share of the jointly acquired property of their step-father A's marriage with M.K. and also the property acquired by A and Z, during their marriage. M.K.'s first husband died about 25 years before the suit. M.K. had no issue by her subsequent marriage with A, and M.K. herself died 10 years before the suit. A also died two years before the suit leaving him surviving the said Z, his widow and the children by her. Neither M.K. nor A appeared to have brought any property to their marriage. **Held** that the suit must be dismissed; because, firstly, as regards the property acquired by A and his second wife Z, it is only when the surviving step-father dies leaving no natural issue and no widow surviving him that the children of the step-father A's deceased first wife (M.K.) by her former husband are entitled to their step-father A's property under the Digest, ss. 294 and 295, and secondly as regards the plaintiff's right to the property of their deceased mother M.K. after the death of their step-father A, ss. 216 and 222 of the Digest, under which they could sue for such property within 12 years of A's death relate only to the mother M.K.'s *thinhi* property if any. **See** *Pe v. Ma Shwe Zin*, 9 L.B.R. 173=47 Ind. Cas. 139.

TWOMEY, C.J. and ORMOND, J.

- (3) *Pongyi, Right of, after ordination to inherit from lay relatives—Land given to pongyi outright as religious gift—Right of pongyi's lay relatives to inherit such land after pongyi's death.*

A *pongyi* after his ordination cannot inherit from his lay relative. On the death of a *pongyi*, his lay relatives cannot inherit from him land which had been given to him outright as a religious gift. The Full Bench expressly stated that the above opinion of theirs did not relate to (i) cases in which the land is not given outright, the intention being to make a gift of the produce only for the donee's lifetime and (ii) to those in which *pongis* acquire land otherwise than by religious gift. **See** *Shwe Ton v. Tan Sin*, 9 L.B.R. 220 (F.B.).

TWOMEY, C.J., ORMOND, MAUNG KIN, RIGGS and PRATT, JJ.

References:—2 U.B.R. (1897—1901) 62; 2 U.B.R. (1897—1901) 54; 2 U.B.R. (1892—1896) 78, 897; 1 U.B.R. (1910—1913) 183; L.B.R. (1893—1900) 614, 8 L.B.R. 145, R.

- (4) *Pongyi or rahan—Right of such person after ordination to inherit to lay relatives—Divesting of property at ordination.*

A *pongyi* or *rahan* cannot, after his ordination, inherit any property from his lay relatives, as his severance from his family on ordination is so very complete that all ties of relationship are thereby annulled; nor can he, where he had already acquired the status of heir before his ordination, claim to be such after the ordination, as it is also undoubted that Burmese Buddhist priests divest themselves of all worldly

Buddhist Law—(Continued).**—5.—Inheritance—(Concluded).**

possessions at the time of ordination. **See** *Maung Pwe v. U. Ingya*, U.B.R. (1918), 2nd Qr., 91=47 Ind. Cas. 681.

HEALD, J.C.

References:—2 Chan Toon's Leading Cases, 285; 2 U.B.R. (1914—1916) 61; *Shwe Ton v. Tun Lin*, (Civ. Ref. No. 1 of 1916 of L.B. Chief Court; Unrep.), F.; 2 U.B.R. (1897—1901) 54, *Not F.*

—6.—Marriage.

- (1) *Burmese Buddhist Law—Seduction—No promise of marriage—No right to compensation—Burma Laws Act, S. 13.*

Where there is no promise of marriage seduction, even in cases where it results in pregnancy, does not afford a cause of action for damages to the person seduced.

A mere act of seduction, without any promise of marriage, cannot be considered to be a question regarding marriage within the meaning of S. 13 of the Burma Laws Act. **See** *Ma Ngwe Yi v. Maung Hla Maung*, 42 Ind. Cas. 539.

MAUNG KIN, J.

References:—L.B.R. (1872—1892) 235; U. B. R. (1897—1901), Vol. II, 499, F.

- (2) *Burmese minor girl, Marriage of—Consent of father, necessity of.*

To validate the marriage of a minor Burmese Buddhist girl, her father's express consent is necessary. **See** *Maung Ba Han v. Ma Tin*, 45 Ind. Cas. 831.

TWOMEY, C.J. and ORMOND, J.

- (3) *Burmese minor youth, if can make valid promise of marriage—Damages for breach of promise of marriage if claimable against such minor.*

There being nothing in the Burmese Buddhist Law to prevent a youth from contracting a valid marriage without his parents' consent at any time after he is physically competent for marriage, he can certainly make a valid promise of marriage, for breach of which he will be personally liable to pay compensation, even though he was under the age of eighteen when he made the promise of marriage. **See** *Maung Nyeln v. Ma Myin*, U.B.R. (1918), 1st Qr., 75=46 Ind. Cas. 421.

HEALD, J.C.

References:—1 U.B.R. (1907—1909), Contract, 5; U.B.R. (1897—1901), Vol. II, 197, R.

- (4) *Betrothal of marriage between Burmese Buddhist—Consent of parties to be married essential—Breach of promise of marriage—Damages, if claimable against parents.*

A Burmese Buddhist, whether male or female, adult or minor, cannot be legally married without his or her consent, or against his or her will. Whether there is a betrothal or not the consent of the parties is, therefore, necessary to a valid marriage, and where such consent is essential, its presence must be an implied

Buddhist Law—(Concluded).**—6.—Marriage—(Concluded).**

condition of any contract of betrothal or other promise made on behalf of the parties by their parents or guardians.

In a suit for damages for the breach of a promise, made by certain Burmese Buddhist parents, to give their son in marriage to the plaintiff, where neither in the pleadings nor in the evidence was there any allegation that the son ever made, or was a party to, any promise to the plaintiff, *held*, that the defendant parents could not be made liable in damages for the breach of their promise. As far as the claim was based on contract, it was clearly one which could have no legal effect: and so far as it was based on the Dhammathats, there was no text obliging parents to compensate a woman who had suffered at the hands of their son in expectation of their marriage. **Maung Po Thaw v. Maung Tha Hlaing**, U.B.R. (1918), 3rd Qr., 106 = 49 Ind. Cas. 59.

SAUNDERS, J.C.

References:—8 L.E.R. 347, R.; 21 E. 23, Dist.

Burden of Proof.**(1) Fraudulent decree—Suspicious circumstances about fraud.**

In a suit for declaration that a decree in a certain rent suit was fraudulent, the plaintiff is to prove that the rent decree was fraudulent and collusive. If that fact is not proved, the plaintiff fails, and, if in the absence of direct proof, the circumstances, which are established, are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition (a). **Amjad Ali Hazl v. Ismail**, 27 O.L.J. 137 = 44 Ind. Cas. 504.

SANDERSON, C.J. and MOOKERJEE, J.

Reference:—(a) **Walsh v. London and S. W. Ry. Co.**, L.R. 12 A.C. 41 (45), P.

(2) Bengal Tenancy Act (VIII of 1885), S. 52—Enhancement of rent on account of excess area—What the landlord has to prove—Shifting of onus—Second appeal—Case decided on surmise and conjecture—Difference between inference and speculation.

In a suit for enhancement of rent on the ground that the tenants are in possession of land proved by measurement to be in excess of the area for which rent has been previously paid, the burden of proving an increase in the area for which rent has been previously paid is on the landlord, who may discharge the burden in two ways, viz.:

(1) By proving that the tenant is in possession of excess land outside the boundaries of land originally settled with him, for instance, land obtained by encroachment or alluvial increment.

(2) By proving that at the original settlement of the land the rent was fixed at a rate per bigha or other unit of measurement or at

Burden of Proof—(Continued).

differential rates according to the quality of the land and so forth, and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such agreement.

Proof by the landlord of the existence of excess area shifts the burden of proof from the landlord to the tenant.

It is open to the High Court in second appeal to see whether the lower appellate Court has, as alleged, decided the case not on evidence but on surmise and conjecture. **Dhrupad Chandra Koley v. Hari Nath Singh Roy**, 22 O.W.N. 826 = 27 O.L.J. 563 = 45 Ind. Cas. 660.

RICHARDSON and WALMSLEY, JJ.

References:—20 C. 579; 5 C.L.J. 538; 6 C.W.N. 318; 16 C.L.J. 182; 15 C.W.N. 921; 19 O.L.J. 451, R.

(3) Suit on mortgage—Plea of payment—Onus, nature of—Evidence Act (I of 1872), S. 114—Shifting of onus—Trial Judge's estimate of testimony, value of, in doubtful cases.

In a suit to enforce a mortgage bond, in which the defence sought to prove that the debt had been discharged by payments endorsed on the bond, the trial Court, on a review of the evidence, held that the endorsements were fictitious and decided in favour of the plaintiff; but the High Court on appeal was of opinion that the plaintiff had failed to discharge the burden which rested on him to prove his case and dismissed the suit.

Held, by the Judicial Committee, that though the initial burden of proof rests on the appellant in such a case as this, both on general grounds and by reason of the provisions of S. 114 of the Evidence Act, this burden is one which shifts easily as the evidence is developed, and their Lordships did not attach much importance in this case to the question on whom the initial onus lay.

That the evidence in this litigation, taken as a whole, was of such a character and so full of doubtful statements that it could only be weighed adequately by the Judge who had seen the witnesses, and the balance of probabilities in this case also being in their Lordships' opinion on the side of the conclusion reached by the trial Judge, the judgment of the High Court was reversed and that of the trial Judge was restored. **Kundal Lal v. Musammat Begam-un-nisa**, 22 O.W.N. 937 = 8 L.W. 283 = 47 Ind. Cas. 837 (P.C.).

VISCOUNT HALDANE, SIR JOHN EDGE and MR. AMBER ALI.

(4) Illegal seizure of cattle—Suit for damages for the same.

Seizure of cattle is an instance of self-help in abatement of nuisance which the law allows. But the party taking the law into his own hands must justify his act, just as under the Penal Code the burden of proof lies on the

Burden of Proof—(Continued).

party relying on the right of private defence. **Madho Rao v. Abdul Gafur**, 44 Ind. Cas. 241.

MITRA, A. J. C.

Reference:—44 Ind. Cas. 237, F.

(5) Party pleading exception.

It is well settled that a party pleading an exception must prove the exception. **Dharam Deo Singh v. Ram Prasad Sah**, 44 Ind. Cas. 470—4 Pat. L.W. 152.

ROE and JWALA PRASAD, JJ.

(5-a) Question of—Court of appeal, Importance in a, of.

The question of the burden of proof is not of any very great importance in a Court of appeal where evidence has been given upon both sides in the original Court. **Sah Deo Narain Deo v. Kusum Kumari**, 46 Ind. Cas. 929.

CHAPMAN and ATKINSON, JJ.

(6) Foreign judgment—Decree transferred to British Court for execution—Civ. Pro. Code (1908), S. 41 and O. XXI, r. 93—Claim to attached property dismissed—Suit by unsuccessful claimant—Claimant's allegation that he had separated before suit in foreign judgment—Foreign judgment if vitiated by wrong view of law—Judgment opposed to "natural justice," meaning of.

A decree of the Cochin Court against the plaintiff's elder brother, described as the manager of the joint family, was, under S. 44, Civ. Pro. Code, transferred to the British Court for execution. The plaintiff, on the attachment of the property of the joint family, preferred a claim to such properties, alleging that, before suit, the defendant in the Cochin suit had become divided from the plaintiff, but the claim was rejected. In a suit by the claimant to establish his right, held that the burden of proof was on the plaintiff to establish the partition alleged by him.

There is no warrant for the proposition that a wrong view as to onus would have the effect of rendering a foreign judgment one not given on the merits (a). A mere incorrect view on a point of Hindu Law by a foreign Court would not give jurisdiction to our Courts to say that the judgment is opposed to natural justice and would not be sufficient to vacate a foreign judgment (b). The term "natural justice" used in reference to foreign judgments refers to the form of procedure than to the merits of the particular case (c). **R. S. Rama Shenoi v. M. A. Hallanga**, 34 M.L.J. 295—41 M. 205—45 Ind. Cas. 703.

SESHAGIRI AIYAR and BAKEWELL, JJ.

References:—(a) 40 M. 112, Dist. (b) *Liverpool Marine Credit Co. v. Hunter*, (1868) L.R. 3 Ch. A. 479, F. (c) *Crawley v. Isaacs*, (1867) 16 L.T. (N.S.) 529, R.

(7) Attachment by decree-holder of decree in favour of judgment-debtor—Application by judgment-debtor to enter up satisfaction of decree in his favour—Application opposed by attaching decree-holder—Burden of**Burden of Proof—(Continued).**

proving non-satisfaction of decree lies on attaching decree holder—Duty of Court seized of application to enter up satisfaction of decree to enquire into bona fides of satisfaction—Permission to withdraw without inquiry a failure to exercise jurisdiction given by Civ. Pro. Code, O. XXI, r. 2—Material irregularity—Civ. Pro. Code, S. 115—Injustice in exercise of jurisdiction is ground for revision.

Where a decree-holder, attaching a decree of his judgment-debtor, opposes the latter's application for entering up satisfaction of the decree, it is the duty of the attaching decree-holder to adduce evidence to show that the decree was not satisfied; the burden of proving that the certificate of satisfaction was collusive and fraudulent being upon the attaching decree-holder, the judgment-debtor need not prove the bona fides of the certificate.

When once a Court is seized of an application to enter up satisfaction, it is bound to make an enquiry and see whether the decree has been satisfied and the Court will not be justified under the circumstances in allowing the application to be withdrawn (a). In such a case, there is an irregularity, which will warrant the interference of the High Court under S. 115, Civ. Pro. Code. Wherever there is injustice done in the exercise of jurisdiction the High Court should interfere. **Somu Pather v. Rengaswami Reddai**, 35 M.L.J. 253.

SESHAGIRI AIYAR, J.

References:—(a) 21 C.L.J. 632, F.; 29 M.L.J. 219, R.

(8) Suit for specific performance of unregistered written contract of sale—Subsequent sale to another vendee by registered deed by registered sale—Plea of purchase for value without notice and in good faith—Onus of proving want of notice on which party—Specific Relief Act, S. 27 (b)—Registration Act, S. 50 (1).

S. 50 (1) has no application to a case where, in a suit for specific performance of an unregistered written contract for sale against the vendor and a subsequent vendee under a registered deed of sale, the latter pleads that he is a bona fide purchaser for value without notice and in good faith within S. 27 (b) of the Specific Relief Act, the provisions of which govern the case. In spite of his sale-deed being registered, the onus lies on the subsequent vendee to show that he had no notice of the prior contract in favour of the plaintiff. **Gangaprasad v. Kushal Chand**, 14 N.L.R. 27—43 Ind. Cas. 940.

BATTEN, J.C.

References:—13 O.P.L.R. 172 and 38 A. 184, F.

(9) Ala and adna maliks—Right to share of produce—Declaratory suit to establish right as adna maliks.

Plaintiffs sued for a declaration that they were the adna proprietors and in possession of the land in suit and that the defendants were

Burden of Proof—(Continued).

merely *ala* proprietors entitled to receive *malikana* dues at 25 per cent. of the land revenue.

It appeared that the land in dispute had been entered in the successive settlement records as the property of the defendants, whose names were written across both the columns relating to *ala* and *adna* malik.

Held, (1) that the *onus* was on the plaintiffs to establish their claim to inferior proprietorship and to prove that the defendants were merely superior proprietors entitled to recover only 25 per cent. on the land revenue;

(2) that the mere fact that tenants had been located by the village officers was no adequate ground for depriving the defendants of their right of ownership, when the entries with regard to that matter had all along been in their favour;

(3) that the plaintiffs having failed to discharge the *onus* that lay on them, the defendants were entitled to the ownership both *ala* and *adna* of the land in suit. *Ahmad Yar v. Muhammad Khan*, 63 P.W.R. 1918=44 Ind. Cas. 534.

SCOTT-SMITH and SHADI LAL, JJ.

- (10) *Limitation Act* (IX of 1908), Sch. I, Art. 164—*Ex parte decree, application to set aside—Applicant's want of knowledge of decree—Revision—High Court, interference by.*

Held, that, in an application to set aside an *ex parte* decree, the burden of proving want of knowledge of the decree within 30 days of the application is on the applicant.

Where, therefore, an application to set aside an *ex parte* decree was dismissed as time-barred, the first Court holding that the defendant had not proved his want of knowledge of the decree within 30 days of the application, but was allowed in appeal by the District Judge, who considered that it was for the plaintiff to show that the defendant had knowledge of the decree:

Held, that, (1) as the defendant had failed to prove that he had not obtained his knowledge of the decree within 30 days of the application, his application must be dismissed;

(2) that the District Judge had misunderstood and misapplied the law and had thereby committed a material irregularity in the exercise of his jurisdiction; and

(3) that, as the misunderstanding of the law by the District Judge had resulted in a totally erroneous decision, there were sufficient grounds for interference in revision. *The Firm of Sugru Mal-Harcharan Das v. The Firm of Sham Lal Gokal Chand*, 146 P.W.R. 1918=46 Ind. Cas. 777.

WILBERFORCE, J.

- (11) Suit for damages for illegally impounding cattle. See ACT I OF 1871 (CATTLE TRESPASS), No. 1, 44 Ind. Cas. 237.

- (12) Non-Hindu—Adoption of Hindu Law. See C. P. ACT XX OF 1875 (LAWS), No. 1, 44 Ind. Cas. 435.

Burden of Proof—(Continued).

- (13) Question of *onus* of proof on a point of custom—Question if a question of fact or question of law. See PUN. ACT III OF 1914 (COURTS), No. 1, 7 P.R. 1918.

- (14) Suit for possession. See ADVERSE POSSESSION, No. 2, 40 Ind. Cas. 420.

- (15) Succession to occupancy holding. See APPEAL (SECOND APPEAL), No. 19, 33 P.L.R. 1918.

- (16) Tenant claiming right to remain in land against the wishes of landlord—Burden of proof, on whom lies. See BERAR LAND REVENUE CODE, No. 2, 44 Ind. Cas. 531.

- (17) Where custom set up. See CUSTOM, No. 1, 16 A.L.J. 17 (P.G.).

- (17-a) Adoption of daughter's son—Arroras of Lahore—Custom as to—*Onus* in case of. See CUSTOMS (PUNJAB—ADOPTION), No. 1, 106 P.R. 1918.

- (18) Alienation by male proprietor—*Onus* of proving property to be ancestral. See CUSTOMS (PUNJAB—ALIENATION), No. 3, 35 P.L.R. 1918.

- (19) Person claiming as posthumous son—Burden of proving legitimacy. See CUSTOMS (PUNJAB—SUCCESSION), No. 9, 42 P.W.R. 1918.

- (20) Person basing title on oral will—Proof of precise words, *onus* of, lies heavily on him. See CUSTOMS (PUNJAB—SUCCESSION), No. 10, 85 P.W.R. 1918.

- (21) Ejectment suit—Burden on plaintiff to prove title—Proof of possession within twelve years—Effect. See EJECTMENT, No. 1, 20 Bom. L.R. 346.

- (21-a) Bengal Tenancy Act (1885), S. 88—Ejectment, Suit for—Filing of suit, allegation as to, by agent of plaintiff a lady without her authority—Burden in case of. See EJECTMENT, No. 4-b, 47 Ind. Cas. 575.

- (22) Estoppel, In plea of—Evidence Act (1872), S. 115. See ESTOPPEL, No. 4, 46 Ind. Cas. 474.

- (23) Adjustment of—Question of law. See EVIDENCE ACT, No. 54, 43 Ind. Cas. 478.

- (24) Purchase and possession of holding by landlord in execution of decree for arrears of rent against tenant—Fraudulent suppression of processes necessary to be served on judgment-debtor—Omission of service of notice under Civ. Pro. Code, 1908, O. XXI, r. 22, vitiates sale—Burden of proving knowledge of fraudulent suppression of facts and processes lies on party guilty of fraud—Remedy of person aggrieved by fraudulent suppression of processes if lies under S. 47, Civ. Pro. Code, 1908. See EXECUTION SALE, No. 1, 27 C.L.J. 528.

- (24-a) Hindu joint family, Debt by karta of—Legal necessity, *Onus* as to. See HINDU LAW (DEBTS), No. 2-a, 43 Ind. Cas. 193=3 Pat. L.W. 181.

Burden of Proof—(Continued).

(25) Debt by father—Immoral nature—Son's share when not liable. See HINDU LAW (DEBTS), No. 4, 45 Ind. Cas. 206.

(26) Mortgage of family ancestral property by father for cash advance and old bond debts—Liability of son's share for cash advance and other debts—Antecedent debt—Son if bound to prove mortgagee's knowledge of immoral purpose. See HINDU LAW (DEBTS), No. 8, 14 N.L.R. 41.

(26-a) Hindu son, Duty of, to pay just debts of his father—Debts tainted with immorality, Onus as to—Onus when and how shifted. See HINDU LAW (DEBTS), No. 13-b, 120 P.W.R. 1917.

(27) Money advanced on mortgage by one member of family—Presumption as to its origin from joint funds—Allegation as to advance being self-acquisition, onus of proving. See HINDU LAW (JOINT FAMILY), No. 1, 40 Ind. Cas. 463.

(27-a) Reunion of members of a Joint Hindu family after separation, In case of. See HINDU LAW (JOINT FAMILY), No. 4, 46 Ind. Cas. 529.

(27-b) Hindu widow, Compromise by, Release of part of estate under, Allegation as to transaction being collusive, Onus in case of. See HINDU LAW (WIDOW), No. 11-d, 47 Ind. Cas. 697.

(28) Possession, Suit for—Allegation of dispossession—Burden of proving prior legal possession—Limitation. See LIMITATION ACT (1908), No. 186, 41 Ind. Cas. 722.

(29) Agricultural lease during pendency of mortgage suit—Lease if valid—Burden of proving that lease did not affect rights of mortgagee. See LIS PENDENS, No. 3, 14 N.L.R. 133.

(30) Pardanashin lady, Gift by—Onus in case of, on persons seeking to claim under it. See MORTGAGE (GENERAL), No. 7, 45 Ind. Cas. 691.

(31) Mortgage admitted—Subsistence or irredeemability of mortgage remaining to be considered—Contending mortgagees bound to prove. See MORTGAGE (REDEMPTION), No. 13, 7 L.W. 281.

(31-a) Parties owning land in two villages—Absence of 45 years—Revenue Circular No. 2 of 1903, Issue of—Mutual settlement evidenced by mutation entry—Bindingness of, on parties, although more advantageous to one—Burden of proof as to mistake in mutation. See MUTATION, No. 1, 153 P.L.R. 1917.

(31-b) Bengal Estates Partition Act, 1897, Partition effected after, came into operation—Allegation as to its being under Act of 1876—Onus in case of. See PARTITION, No. 2-c, 43 Ind. Cas. 859.

(32) Application for partition by one recorded co-sharer—Denial of title of applicant by other

Burden of Proof—(Concluded).

co-sharers—Onus of proving want of title in applicant lies on co-sharers so denying title. See PARTITION, No. 5, 6 P.R. 1918 (Rev.).

(33) Suit for possession of land—Allegation of title and dispossession—Denial of both by defendant in possession—Duty of plaintiff to prove title—Duty of plaintiff also to prove twelve years' possession where title based on possession. See POSSESSION, SUIT FOR, No. 3, U.B.R. (1918), 4th Q., 125.

(34) Purchase from insolvent of whole of his assets prior to his insolvency—Validity of, onus of proof of. See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), No. 7, 22 C. W.N. 395.

(34-a) Mortgage, Suit on, after 36 years—No demand or payment made during the interval—Genuineness of mortgage, Onus as to. See PRESUMPTION, No. 1, 46 Ind. Cas. 506.

(36) Principal and agent—Agent's authority, Limits of—Evidence Act, 1872, S. 106. See PRINCIPAL AND AGENT, No. 4, 45 Ind. Cas. 822.

(36) Proceeding questioning bona fides of transfer by insolvent—Transferor bound to prove bona fides of transaction. See PROVINCIAL INSOLVENCY ACT (III OF 1907), No. 27, 22 C.W.N. 709.

(37) Consignor of goods covered by risk-note if entitled to claim damages for loss—Burden of proving how consignment lost. See RAILWAYS ACT (IX OF 1890), No. 1, 22 C.W.N. 622.

(38) Suit for compensation for loss of goods entrusted for carriage and delivery—Risk-note—Conditions of liability—Burden of proof of loss. See RAILWAYS ACT (IX OF 1890), No. 6, 14 N.L.R. 122.

(39) Signatory of document alleging that document does not contain correct statement—Burden of proof lies on him. See REGISTRATION ACT (XVI OF 1909), No. 24, 44 Ind. Cas. 399.

(40) Money lending transactions with expectant heirs—Lender bound to show non-exercise of undue influence on borrower. See UNCONSCIONABLE BARGAIN, No. 1, 16 A.L.J. 905 (P.C.).

(41) Transfer of portions of Jaghir, if sale or grant of tenure—Resumability, Burden of proof as to, on whom lies. See RESUMPTION, No. 2, 45 Ind. Cas. 898.

Burma Laws Act.

See BUR. ACT XIII OF 1898.

Calcutta Improvements Act.

See BEN. ACT V OF 1911.

Calcutta Municipal Act.

See BEN. ACT III OF 1899.

Canal.

Private water course from, Irrigation from, Dispute as to, Government if a necessary party—Canal Department if can confer permanent rights of irrigation without proceeding under S. 20 or 23 of Canal Act (1890) nor can go against decision of Court. See REMAND, No. 5, 177 P.W.R. 1918.

Canal Act (1890).

Canal Department, if can confer permanent right of irrigation from private water course without proceeding under S. 20 or 23 of. See REMAND, No. 5, 177 P.W.R. 1918.

Cancellation of Document.

Suit for—Limitation for, Starting point of—Limitation Act (1908), Sch. I, Art. 91—“Entitled” in, Meaning of—“Entitled” under Specific Relief Act (I of 1877), S. 39.

The word “entitled” in Art. 91 of Sch. I of the Limitation Act must be interpreted as meaning “entitled by law,” i.e., under S. 39 of the Specific Relief Act.

In a suit for cancellation of a document, the period of limitation begins to run from the time when the plaintiff becomes aware of facts which arouse in him a reasonable apprehension that he would suffer serious injury if the document be left outstanding. *Balasundaram Pandiam Pillai v Authimulam Chettiar*, 37 Ind. Cas. 505.

PHILLIPS and KRISHNAN, JJ.

Carriers.

(1) Carrier, meaning of—Liability of continuous carriers. See CONSIGNOR AND CONSIGNEE, No. 1, 34 M.L.J. 553.

(2) Liability of Railway Company for misdelivery of parcel. See RAILWAYS ACT (1890), No. 3, 20 Bom. L.R. 591.

Carriers Act (III of 1865).

(1) Ss. 2 and 6. Ferry licensee carrying goods for hire across a river—Boat carrying goods, while stationary, sunk by steamer—Ferry licensee liable as carrier, not bailee. See COMMON CARRIER, No. 3, U.B.R. (1918), 4th Cr., 120.

(2) S. 6. See No. 1, *supra*.

(3) S. 10—Notice—Manner of service, if can be restricted by the contract—Loss of goods—Knowledge of the carrier if sufficient—Civ. Pro. Code (Act V of 1909), S. 115—Error of law—Revision.

A condition in a bill of lading requiring the service of notice of claim in respect of the contract at the carrier's office at a particular place, is not inconsistent with the provisions of S. 10 of the Carriers Act, and is perfectly legal.

Notice under S. 10 of the Carriers Act must be given, and it is not enough that the carrier had knowledge *aliunde* of the loss (a).

The High Court refused to interfere under S. 115 of the Civ. Pro. Code, although it was of opinion that the lower Court's decision was

Carriers Act (III of 1865)—(Concluded).

erroneous in law (b). *The River Steam Navigation Co., Ltd. v. Messrs. Hazarimal Multani Mal*, 27 O.L.J. 294=41 Ind. Cas. 919.

CHITTY and BRACHCROFT, JJ.

References :—(a) 38 O. 50, F. (b) 11 O. 6; 41 O. 323, R.

Case Law.

(1) *High Courts, Decisions of—Subordinate Courts in Central Provinces not bound by, but by the decisions of the Judicial Commissioner's Court.*

While it is open to the Subordinate Courts in the Central Provinces to assist themselves on questions of law by a study of the rulings of all the High Courts in India published in any authorised series of reports, they are absolutely bound, irrespective of their own opinion and the dissentient opinion of any other High Court, by the decisions on such questions of the Judicial Commissioner's Court, while such decisions are not expressly overruled by the paramount authority, that is, His Majesty in Council. The subordinate Courts have no option to choose between a decision of the Judicial Commissioner's Court published or unpublished in the local or any other law reports, and the decision of any other High Court in India or Burma. *Puhpl Bai v. Ananya Bai*, 46 Ind. Cas. 902.

STANYON, A.J.C.

(2) Established church, meaning of—Roman Catholic Church, if an established Church—Voluntary association, rules of, different from those of the parent body—Parish Church adopting doctrines of Catholic Church, if can set up separate rules of discipline—Custom, question as to, whether one of fact or of law. See ECCLESIASTICAL LAW, No. 1, 8 L.W. 208.

Caste Disabilities Removal Act.

See ACT XXI OF 1850.

Cattle Trespass Act.

See ACT I OF 1871.

Cause of Action.

(1) *Arising subsequent to suit—Court's power to grant decree in exceptional circumstances.* Courts have power, in exceptional circumstances to grant a decree, even in cases where the cause of action arose subsequent to the suit.

Where it was found that the defendant received the money and that the money became payable immediately after suit; but it was contended that the suit was premature because of the terms of an unregistered mortgage-bond between the parties :

Held, that a decree should be passed for the plaintiff; and that he should not be driven to a fresh suit (a). *Subbaraya Chetty v. Nachiar Ammal*, (1918) M.W.N. 199=7 L.W. 403=44 Ind. Cas. 868.

SESHAGIRI AIYAR and KUMARASWAMI SASTRI, JJ.

Reference :—(a) 37 Ind. Cas. 862, F.

Cause of Action—(Concluded).

- (1-a) *Plaint, Plaintiffs' duty to show in, denial of title—Written statement, Pleas in, if can furnish.*

It is for the plaintiff to show in his plaint that there was a denial of his title prior to the institution of the suit and he cannot rely upon the pleas contained in the written statement for the purpose of making out a cause of action. **Amraj Singh v. Sarabsukh Pande**, 46 Ind. Cas. 660.

LINDSAY, J.C.

- (1-b) *Explanation of term—Relation of, to defence set up by defendant.*

The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. **Mohammad Alikhan v. Shujat Alikhan**, 46 Ind. Cas. 913.

DRAKE-BROCKMAN, J.C.

- (2) Cause of action merged in decree in suit thereon—Subsequent remedy is in execution—Execution if barred, no separate suit. See **MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS)**, No. 2, 7 L.W. 143.

- (3) Declaratory suit that defendant not an under-proprietor—Rent Court, Adverse order of, in ejectment proceedings if necessary for accrual of cause of action for. See **DECLARATORY RELIEF**, 46 Ind. Cas. 660.

- (4) Declaration of title with prayer for confirmation of possession and for temporary injunction, Suit for—Defence of possession and title with defendant—Plaint if can be dismissed as disclosing no. See **DECLARATORY SUIT**, No. 4-2, 46 Ind. Cas. 553.

- (5) Insurance policy applied for from one district—Death of life assured in another—Death a part of cause of action—Jurisdiction of Court in place of death. See **JURISDICTION (GENERAL)**, No. 4, 22 C.W.N. 517.

- (6) Meaning of. See **JURISDICTION (GENERAL)**, No. 8, 35 M.L.J. 189.

- (7) Possession and mesne profits, Suits for, Cause of action, if different—Specific Relief Act (1877), S. 9, Possessory suit under—Mesne profits, Subsequent suit for, maintainability of. See **JURISDICTION (OF CIVIL COURTS)**, No. 7, 46 Ind. Cas. 886.

- (8) Suit for declaration of proprietary title correcting entry in revenue record—Cause of action accrued when plaintiff prayed for entry in his favour and defendant denied his title. See **LIMITATION ACT (1908)**, No. 163, 72 P.L.R. 1918.

Caveat.

- Will—Immediate reversioner not contesting—Next reversioner, if can enter caveat and contest the suit.*

A died testate leaving B his widow. Caveats were entered by the immediate reversioner C and by the mother of the widow of the testator, as well as by D and E who would be reversioners if C were to die before the widow. B by settling with the executor made it impossible for him successfully to challenge the will:

Held, that D and E had sufficient interest to entitle them to enter caveat and contest the suit (a). **Satindra Mohan Tagore v. Sarala Sundarl Debi**, 27 C.L.J. 320=45 Ind. Cas. 59.

SANDERSON, C.J. and WOODROFFE, J.

Reference:—(a) 10 O.L.J. 263, R.

Central Provinces Court of Wards Act.

See C.P. ACT XXIV OF 1899.

Central Provinces Courts Act.

See C.P. ACT II OF 1904.

Central Provinces Land Revenue Act.

See C.P. ACT XVIII OF 1881.

Central Provinces Tenancy Act.

See C.P. ACT IX of 1883.

See C.P. ACT XI of 1898.

Certificate of Sale.

- Particulars in, Correction of, with reference to boundaries given in plaint, Validity of—Accretion to land purchased at execution sale, Declaration of title, Suit for—Accretion before execution sale, Finding as to, Effect of.*

No correction can be made in the particulars given in a sale certificate by the boundaries given in the plaint in suit.

In a suit for a declaration of title to some lands, on the ground of accretion to the *ryoti jamai* lands purchased at an execution sale, it was held, that the plaintiff was not entitled to a decree, as it was found that the lands had re-formed many years before the purchase. **Krishna Gopal Bowmlk v. Hem Chandra Balragi**, 46 Ind. Cas. 908.

CHITTY and SMITHER, JJ.

Certified Copies.

- (1) O. obitias and map relating to partition—Admissibility in evidence. See **EVIDENCE ACT**, No. 11, 23 C.W.N. 48.

- (2) Presumption as to due execution in respect of—Where original cannot be produced—Evidence Act, 1872, S. 90. See **EVIDENCE ACT**, No. 28, 46 Ind. Cas. 344.

- (3) Application for, before recess—Arrangement for delivery during recess—Whether party bound to pay printing charges during recess—Vacation period, if can be deducted. See **LIMITATION ACT (1908)**, No. 8, (1918) M.W.N. 886.

Certified Purchaser.

Persons claiming under a Civ. Pro. Code, 1882, S. 317, Applicability of, to. See **CIV. PRO. CODE (1882)**, No. 4, 46 Ind. Cas. 216.

Cess Act.

See BEN. ACT IX OF 1880.

Champerty.

(1) Agreement of the nature of speculation and purchasing litigation—Whether enforceable. See CONTRACT ACT, No. 10, 43 Ind. Cas. 74.

(2) Financing litigation with agreement to share in property on success, transaction if a loss—Transaction champertous. See CONTRACT, No. 8, 47 Ind. Cas. 563.

Charge.

(1) Loan charged on property—Default by lender to pay full amount, Lien in respect of money actually advanced—Charge on moveable and immovable property, Document creating, Non-Registration of, Charge how affected by, See CONTRACT, No. 8, 47 Ind. Cas. 563.

(2) Encroachment in good faith by defendant upon lands of plaintiff believing them to be his own—Improvements made in good faith by defendant—Liability of owner to pay value of improvements—Defendant entitled to charge on land for value of such improvements. See CONTRACT ACT, No. 47, 40 Ind. Cas. 464.

(3) Cash allowance in perpetuity of one-tenth of assumed rental and awarded by Settlement officer—Nature of allowance—Nankar or dast-want. See DAHYAK, No. 1, 31 O.C. 327.

(4) Property of three co-sharers purchased in execution of decree against two of them—Redemption of existing mortgage on entire property by such purchaser—Determination of mortgage and creation of charge on third share of co sharer in favour of purchaser—Limitation. See LIMITATION ACT (1908), No. 196, 22 C.W.N. 637.

(5) Settlement of property partly for religious purposes and mainly for private purposes—Settlement for religious and charitable purposes a valid charge on property. See MAHOMEDAN LAW (WAQF), No. 6, 37 Ind. Cas. 901=22 C.W.N. 568.

(6) Charge, if an interest in land—Purchase of charge in Court auction—Auction-purchasers if get any rights thereunder. See MORTGAGE (REDEMPTION), No. 14, 9 L.B.R. 169.

(7) Annuity, Payment of, from the share of the estate whether a charge on the property—Intention chief ingredient—Creation of charge in equity. See PARDANASHIN LADY, 22 C.W.N. 226.

(8) Mortgagee paying arrear of revenue to prevent sale—Whether payment is, on the property. See TRANSFER OF PROPERTY ACT, No. 55, 43 Ind. Cas. 190.

(9) Distinction between charge and mortgage—Charge created by judgment-debtors on properties outside suit, validity of. See TRANSFER OF PROPERTY ACT, No. 40, 44 Ind. Cas. 734.

(10) Vendor taking promissory note from one of the vendees for part of sale money—Charge on land if claimable by vendor for money due on note. See TRANSFER OF PROPERTY ACT, No. 37, 28 M.L.T. 85.

Charitable Trust.

Scheme for administration of a charitable trust—Competency of Court to amend the scheme from time to time—Amendment of decree during pendency of appeal—When appeal becomes appeal against amended decree.

There is ample authority for the proposition that a Court, which has sanctioned a scheme for the administration of a charitable trust, is competent from time to time to vary the scheme, as the exigencies of the case may require. *Sadupadhya Umeshanand Oja v. Ravanawar Prosad Singh Bahadur of Gidhour*, 43 Ind. Cas. 772.

MOOKERJEE and BEACHCROFT, JJ.

References:—28 M. 319; 30 M. 138, F.; *Attorney General v. Bovill*, (1840) 1 Phillip 762; *Attorney General v. Bishop of Worcester*, (1851) 9 Hare 348; *Mayor of Lyons v. Advocate-General of Bengal*, (1876) 1 A.C. 91; *Re Browns Hospital, Stamford*, (1889) 60 L.T. 288, R.; 24 B. 45; 2 C.L.J. 460; 16 C.L.J. 431; R. A. No. 111 of 1916, *Appr.*

Chinese Customary Law.

Person claiming as adopted son of Chinaman—Suit for possession of adoptive father's estate—Burma Laws Act (XIII of 1898), S 13—Chinese Customary Law—Succession Act, 1865.

The plaintiff claimed, as the adopted son of a deceased Chinaman, for possession of the property of his adoptive father. *Held* that, unless the plaintiff could prove that the deceased Chinaman was a Buddhist, the law governing the deceased's estate would be the Succession Act, which does not recognise adopted sons; but that, if the deceased was a Buddhist, the law to be applied would be the Chinese Customary Law applicable to Chinese Buddhist. *Held*, also, that, in this case, even though it was found that the deceased became a Buddhist and professed Buddhism, in addition to his "Chinese Religion" only after he came to Burma, S. 13, Burma Laws Act did apply to him and that the question of the plaintiff's adoption should be determined in accordance with Chinese Customary Law. *Kyla Wet v. Ma Gyok*, 9 L.B.R. 179=47 Ind. Cas. 148.

TWOMEY, C.J. and ORMOND, J.

References:—4 L.B.R. 124, *Not F.*; 2 L.B.R. 95, F.; 8 L.B.R. 404, R.

Chota Nagpur Encumbered Estates Act.

See BEN. ACT VI OF 1876.

Chota Nagpur Tenancy Act.

See C. P. ACT VI OF 1908.

Chowkidari Chakran Lands

(1) *Chowkidari land—Land transferred to Zamindar—Previous settlement with putnidar—Assessment of rent.*

The effect of a transfer of Chowkidari land is to make the Zamindar hold the property subject to the rights previously created by him in favour of subordinate holders.

Chowkidari Chakran Lands—(Continued).

The rights of the Zamindar and the *putnidar* as between themselves are regulated by the conditions under which the *putni* was created. Where, definite information is not available as to the exact mode in which the *putni* rent was originally settled, the same basis of calculation in making assessment is adopted as between the State and the Zamindar on the one hand and the Zamindar and *putnidar* on the other hand. The assessment is to be made on the basis of the annual value calculated according to the average rates of letting land similar in quality in the neighbourhood. *Radha Charan v. Ranjit Singh*, 27 C.L.J. 532.

MOOKERJEE and BEACHCROFT, JJ.

References:—13 C.L.J. 103; 4 C.W.N. 814; 14 C.W.N. 1019; 14 C.W.N. 935; 34 C. 109, R.

(2) *Putni lease—Clause reserving power to Zamindar to appoint and dismiss chowkidars, effect of.*

A clause in a *putni* lease, which reserves to or confers on the Zamindar the right to appoint and dismiss chowkidars, has not the effect of reserving to the Zamindar and excluding from the *putni* the chowkidars chakran land. *Nafar Chandra Chandra v. Bijoy Chand Mahtap*, 22 C.W.N. 487=14 Ind. Cas. 526.

TEUNON and NEWBOULD, JJ.

References:—7 C.L.J. 593, R.; 5 C.L.J. 28, Appr.

(3) *Tenants inducted by zamindar on land being vacated by chaukidar in possession, if trespasser—Village Chaukidars Act (VI B.C. of 1870), S. 51.*

Certain chakran lands included in a revenue paying estate on being vacated by the chaukidars in possession were appropriated by the zamindar and settled with tenants. The lands were subsequently resumed by Government and transferred to the zamindar under the Village Chaukidars Act. The plaintiff then obtained a permanent under-tenure from the zamindar and sued to eject the tenants as trespassers.

Held.—That the chaukidari chakran lands formed part of the revenue paying estate, and the zamindar had a qualified title therein. Consequently, when the lands were resumed under the Village Chaukidars Act and transferred to the zamindar under its provisions, the estate taken by the zamindar was in confirmation and by way of continuance of his existing estate and the plaintiff was not entitled to contend that the tenants brought on the lands by the zamindar when the chaukidars vacated them were trespassers. *Sib Chandra Banerjee v. Surendra Chandra Mondal*, 22 C.W.N. 997=45 C. 515=27 C.L.J. 560.

MOOKERJEE and WALMSLEY, JJ.

Reference:—21 C.W.N. 609 (P.C.), R.

(4) *Suit for possession by patnidar—Limitation applicable—Limitation Act, Arts. 142 and 144—Amendment of plaint by addition of new lands—Institution of suit.*

Chowkidari Chakran Lands—(Continued).

Where a plaint for possession of certain plots of land was subsequently amended by the addition of certain other plots of land. *Held*, that was not a case of amendment properly so called, but a case of an addition of entirely new lands and, therefore, as regards such new lands, the suit must be deemed to have been filed on the date when the claim in respect thereof was made by the application for amendment and not on the date when the application was granted by the Court.

In a suit to recover possession by the *patnidar* of chowkidari chakran lands, the article applicable is Art. 144 of the Limitation Act. *Manindra Chandra Nandi Bahadur v. Rangalal Mondal*, 41 Ind. Cas. 728.

WOODROFFE and CUMING, JJ.

(5) *Title of Zamindar—Revenue sale of the Zamindari—Whether purchaser acquires chowkidari chakran lands transferred to the Zamindar under the Chowkidari Act. Brajendra Lal Das v. Deb Narain Tewari*, 41 Ind. Cas. 894=45 C. 765=27 C.L.J. 491. See Final Part, 1917, Col. 193.

(6) *Included in the putni, resumed by Government—Rights of putnidar. Kondkar Mehdi Hossein v. Umesh Chandra Mukherjee*, 41 Ind. Cas. 964=45 C. 685=27 C.L.J. 494. See Final Part, 1917, Col. 193.

(6-a) *Resumption of, by Government—Order of Government for settlement with person within the ambit of whose estate land is situated—Settlement by Collector in contravention of such order—Settlement Person entitled to—Limitation.*

The Collector having made a settlement of resumed Chaukidari Chakran lands with an outsider, other than the person within the ambit of whose estate it was situated, in disregard of the order of the Government, the order of the Collector was held wholly *ultra vires* and nugatory and the mere fact that the Collector committed an error did not entitle the person with whom the settlement by Collector was made to get rid of the rights of the person entitled to the settlement under the Government order, by dealing with it as if it had been rightly resumed and settled. There could not be any question of limitation in this case as against the person entitled to the settlement. *Aghore Nath Banerjee v. Kalyanaswari Das*, 46 Ind. Cas. 883.

FLETCHER and SHAMSUL HUDA, JJ.

(7) *Conclusive evidence regarding nature of services required from service tenure holder—Chaukidari Chakran Act, S. 1, if applies to such cases. See BEN. ACT VI OF 1870 (VILLAGE CHAUKIDARI), No. 2, 29 C.L.J. 251.*

(8) *Legal effect of resumption and subsequent transference of, to Zamindars—Title acquired by Zamindar. See BEN. ACT VI OF 1870 (VILLAGE CHAUKIDARI), No. 3, 22 C.W.N. 660.*

Chowkidari Chakran Lands—(Concluded).

(9) Possession by 'Patnidar of, through services rendered—Resumption of land—Discontinuance of possession—Possession, Suit by patnidar for, Limitation for—Limitation Act (1908), Sch. I, Art. 142, See LIMITATION, No. 8, 46 Ind. Cas. 895.

(10) Patnidars, Right of, on resumption and transfer by Government of such lands to zamindar—Limitation for patnidar's suit for possession. See LIMITATION ACT (1908), No. 155, 16 A.L.J. 964 (P.O.).

Christian Marriage Act (XV of 1872).

(1) Ss. 4, 5—Scope of, as compared with scope of Divorce Act (1869)—Provisions of, if precluded from consideration by S. 4 of Divorce Act—Solemnised, meaning of, in S. 5—Fraud, Nature of, requisite for avoiding a marriage. See HIGH COURT, JURISDICTION OF, No. 1, 47 Ind. Cas. 544.

(2) S. 5. See No. 1, *supra*.

Chur Land.

(1) Lease for term of years of chur land—Rent payable for such land as is capable of cultivation—Law governing parties—Lessee not ryot holding under custom of utbandi—Lessee a non-occupancy raiyat. See BEN. ACT VIII OF 1885 (TENANCY), No. 90, 42 Ind. Cas. 546.

(2) Chuza forming in non-navigable river flowing through or by side of permanently settled estates, if resumable and assessable with Government revenue. See ALLUVION AND DILUVION, No. 1, 22 C.W.N. 872.

City Municipality Act, Madras.

See MAD. ACT III OF 1904.

City of Bombay Municipal Act.

See BOM. ACT III OF 1888.

Civil Court.

Meaning of. See U.P. ACT III OF 1901 (LAND REVENUE), No. 2, 43 Ind. Cas. 473.

Civil Courts Act.

See BEN. ACT XII OF 1887.

See MAD. ACT III OF 1873.

Civ. Pro. Code (1882).

(1) S. 2—"Decree," Order dismissing appeal for default, if—within the meaning of the definition. See EXECUTION OF DECREE, No. 21-c, 47 Ind. Cas. 125.

(2) S. 230—Mortgage decree providing for payment of decretal amount and on default for sale of hypothecated property—Decree for sale of hypothecated property—Decree for payment of money—Limitation Act, Art. 182—Amendment of execution application in second appeal, whether may be allowed—Subsequent execution application against properties not included in previous application—Subsequent application not continuation of previous one.

Civ. Pro. Code (1882)—(Concluded).

* Where a decree provides that defendants should pay the amount claimed and in default the hypothecated property should be sold, held that the decree was one for payment of money.

Where a subsequent application for execution seeks remedy against property other than that which was the subject of previous application, held that the subsequent application is not a continuation of the previous one.

Held, that ordinarily the Court ought not to allow an amendment of execution application in the second appeal, which would prejudice the right of the other party. *Thilagayyan v. Kannusawmi Pillai*, 43 Ind. Cas. 122.

ABDUR RAHIM and KUMARASAWMI SASTRI, JJ.

References:—28 M. 473; 21 M.L.J. 1036; 27 M.L.J. 25, F.; 35 W.R. 830, R.

(3) S. 310-A—Deposit of sale amount by transferee of non-transferable holding—Landlord withdrawing the deposit amount—Whether landlord can question in a subsequent suit, the validity of the transfer.

Where a transferee of a non-transferable holding deposited under S. 310-A, Civ. Pro. Code, 1882, the sale amount with a view to cancellation of sale in execution of decree for arrears of rent, and subsequently the amount of deposit was withdrawn by the landlord and the sale set aside, held that the landlord cannot succeed in a subsequent suit for declaration that the transferees had not acquired a good title by purchase of a non-transferable holding. *Gadadhar Ghosh v. Midnapore Zamindari Co.*, 43 Ind. Cas. 742.

MOOKERJEE and BEACHROFT, JJ.

References:—6 C.L.J. 601; 9 Ind. Cas. 619, F.

(4) S. 317, Scope of—Certified auction-purchaser, Persons claiming under a—If entitled to benefit of provisions of section.

Persons claiming under a certified auction-purchaser are not entitled to the benefit of provisions of S. 317, Civ. Pro. Code, 1882, which apply only to the certified purchaser. *Joy Gobinda Chowdhury v. Debendra Nath Bose*, 46 Ind. Cas. 216.

FLETCHER and SHAMSUL HUDA, JJ.

(5) S. 539—Scheme for administration of a charitable trust—Competency of Court to amend the scheme from time to time. See CHARITABLE TRUST, No. 1, 43 Ind. Cas. 772.

(6) S. 61—Incompetent reference to Court of appeal—Opinion in such reference—*Res judicata*—Whether Court should perpetuate error. See ACCOUNTS, No. 2, 45 Ind. Cas. 201.

Civ. Pro. Code (1908).

(1) Provisions of, apply to proceedings under Lunacy Act (IV of 1912). See ACT IV OF 1912 (LUNACY), 27 C.L.J. 205.

(2) Revision—Scope of S. 115. See BOM. ACT III OF 1901 (DISTRICT MUNICIPAL), No. 2, 44 Ind. Cas. 363.

Civ. Pro. Code (1908)—(Continued).

(3) Code if prohibits attachment before judgment of immovable property by Small Causes Court. See ATTACHMENT BEFORE JUDGMENT, No. 4, 14 N.L.R. 1.

(4) Ss. 2, 47, O. XXI, r. 90, and O. XLIII—Fraud in conducting sale—Order setting aside sale—Order not a decree—Only one appeal allowed—No second appeal—Order not one made under S. 47—Appeal from order, right of, arises only under O. XLIII. See APPEAL (SECOND APPEAL), No. 14, 3 Pat. L.J. 645.

(5) S. 2 (2), O. XVII, rr. 2 and 3—Plaintiff present in Court—Failure to produce evidence—Order of dismissal, if decrees.

Where a plaintiff failed to produce evidence but was present in Court and the suit was dismissed, held that it was a final decision of the suit by the trial Court and the Court's order of dismissal was a decree. *Pramothanath Sahr v. Bashimukhl Debi*, 45 Ind. Cas. 200.

CHITTY and SMITHER, JJ.

Reference:—3 C. 563, R.

(6) S. 2 (2). See No. 72, *infra*.

(7) S. 2 (5) and Sch. II, r. 1—Pleader, his position and power—Persons interested to apply for reference to arbitration.

Pleader is an agent of his client and his power is created entirely by the vakalatnamah given to him by his client.

Under r. 1 of the Second Schedule of the Civ. Pro. Code, 1908, an application for an order for reference to arbitration must be made by all the parties interested and that application must be in writing.

"All the parties interested" means all the parties interested in the litigation. It is a question of fact in each case as to who are the parties interested in the litigation. *Jalpal Tewary v. Tapeswarl Tewary*, 45 Ind. Cas. 321.

JWALA PRASAD, J.

References:—37 A. 456; 33 A. 645; 21 M. 274; 6 N.W.P.H.C.R. 210; 29 A. 429, *Appr.*; 30 A. 32, *Dist.*

(7-a) S. 2 (11)—Legal representative, suit against assets not in the hands of legal representation, effect of. See LEGAL REPRESENTATIVE, No. 1, 10 Ind. Cas. 407.

(8) S. 2 (11). See No. 95, *infra*.

(8-a) S. 2 (12)—Mesne profits—Non-transferable occupancy holding, Purchaser of, Liability of. See LANDLORD AND TENANT, No. 52-b, 46 Ind. Cas. 624.

(9) S. 9—Claim to religious honour consisting of right to receive theertham and prasadam in temple in certain order of precedence—Suit if one of a civil nature. See APPEAL (GENERAL), No. 23, 7 L.W. 614.

(10) S. 10, O. XXI, r. 7—Act XIV of 1889, S. 225—Execution of decrees—Jurisdiction

Civ. Pro. Code (1908)—(Continued).

—Court executing decrees not competent to enquire into validity of decrees.

Held, that a Court executing a decree is not competent to entertain an objection by a judgment-debtor that the decree was a nullity for having been passed contrary to the provisions of S. 10 of the Civ. Pro. Code or the Court passing the decree had no jurisdiction in the matter.

Held, that a decree passed contrary to provisions of S. 10, Civ. Pro. Code, is not a nullity. *Sheopatrai v. Warak Chand*, 42 P.L.R. 1918 = 93 P.W.R. 1918 = 46 Ind. Cas. 419.

SCOTT-SMITH, J.

References:—33 B. 194, *F.*; 15 Ind. Cas. 832 and 28 A. 137, *Dist.*; 32 I.A. 23, R.

(11) S. 11. See RES JUDICATA.

(12) S. 11—Res judicata—Adverse possession against a Hindu widow—Life estate only affected—Reversioner not affected by adverse possession. *Subbi Ganpatibhatta Neelmane v. Ramkrishnabhatta Shankarbhatta*, 19 Bom. L.R. 919 = 42 B. 69 = 43 Ind. Cas. 239, See Final Part, 1917, Col. 202.

(13) S. 11—Res judicata as between co-defendants—Vendor and purchaser—Mortgage by vendee, declaration of validity of, in action by vendor against vendee and his mortgagee—Transfer pending suit—Lis pendens—Transfer of Property Act, S. 52. *Manjeshwara Krishnaya v. Yasudeva Mallaya*, 40 Ind. Cas. 826 = 40 M. 458. See Final Part, 1917, Col. 202.

(14) S. 11—Res judicata—Principle—Refusal to decide issue, effect.

Held, that, where an issue was raised in a suit and the issue was not decided, there can be no res judicata under S. 11, Civ. Pro. Code, 1908. The essential condition of the principle of res judicata is that the issue should be "heard and finally decided" by the Court. The refusal of the Court to determine an issue does not operate as res judicata. *Dhakeswar Prasad Narain Singh v. Pookhar Pandey*, 45 Ind. Cas. 326.

ROE and JWALA PRASAD, JJ.

References:—11 A. 187; 10 C. 856, *Dist.*; *Langmead v. Maple*, (1865) 18 C.B.N.S. 256; 24 C. 618; 7 C. 391; 8 C. 631; 5 C.L.J. 663; 21 A. 505, 34 M.L.J. 12, *Appr.*

(15) S. 11—Previous decision erroneous in law—Whether res judicata for subsequent suit.

In a suit for arrears of rent and interest thereon, the fact that, in a previous litigation it was decided on an issue of law between the parties that the defendants were liable to pay interest on arrears of rent, must be taken to be res judicata between the same parties even though the earlier decision was wrong in law. *Bhagwati Prasad Singh v. Parameshwar Dutt*, 45 Ind. Cas. 352.

LINDSAY, J.C.

References:—10 O.C. 145; 8 O.C. 37, *Appr.*

Civ. Pro. Code (1908)—(Continued).

- (15-a) S. 11—*Res judicata*, Question Court deliberately abstained from deciding, if—Declaratory suit for title by survivorship—Decision on—Declaratory suit that alienations not binding on reversioner if barred by—Limitation Act (IX of 1908), Sch. I, Arts. 98, 99, 120—Declaratory suit that kot kobala and solenama decrees not binding on reversioner—Limitation Act (1908), Article applicable to, Art. 120 and not 93 and 95—Limitation, starting point of.

A matter which a Court deliberately abstains from deciding cannot be *res judicata*.

A suit based on the allegation that the plaintiff took the property by survivorship on the death of a person is essentially different from a suit for a declaration that a certain alienation made and the compromise decree entered into by the widow are not binding on the inheritance when it comes to the hands of the reversioner and a decision in the first suit cannot operate as *res judicata* on the latter.

The Article of the Limitation Act applicable to a suit by a Hindu reversioner for a declaration that a *kot kobala* executed by the last owner and a *solenama* decree made in a suit to enforce the *kot kobala* are not binding on him is Art. 120 and not Arts. 93 and 95 and when the plaintiff is in possession, he is not bound to bring his suit until some act is done on the document which it is sought to declare not binding on the inheritance. *Hara Narain Bera v. Sridhar Pande*, 47 Ind. Cas. 2.

FLETCHER and SHAMSUL HUDA, JJ.

- (16) S. 11—*Res judicata*—Decision on issue which was not necessary for determination of the case. *Kirpa Ram v. Nawab*, 141 P.L.R. 1917=43 Ind. Cas. 754. See Final Part, 1917, Col. 202.

(17) S. 11—Suit for possession and mesne profits—Decree silent regarding future mesne profits—Fresh suit for such profits not barred. See RES JUDICATA, No. 1, 16-A.L.J. 182.

(17-a) S. 11—*Res judicata*—Concurrent jurisdiction of Courts—Necessity of regarding pecuniary limits and subject-matter. See RES JUDICATA, No. 22-c, 47 Ind. Cas. 21.

(17-b) S. 11—*Res judicata*, plea of, a question of law—Second appeal, it can be raised in—Question decided by lower Court, left open and undecided by appellate Court, how far *res judicata*. See RES JUDICATA, No. 22-a, 47 Ind. Cas. 685.

(18) S. 11—Actual adjudication in prior suit if necessary—Implied adjudication, how far *res judicata*—Both parties defendants in prior suits—Conflict of interest *inter se* in prior suit, if necessary to constitute *res judicata*. See RES JUDICATA, No. 23, 8 L.W. 206.

(18-a) S. 11—*Res judicata*—Prior suit, Co-defendants in, question raised *inter se* between—Finding on—Decree in spite of finding, as finding immaterial—No *res judicata* nor estoppel—Evidence Act, S. 115. See RES JUDICATA, No. 23-a, 33 M.L.J. 740.

Civ. Pro. Code (1908)—(Continued).

- (19) S. 11—Decree against widow when binds reversioner. See RES JUDICATA, No. 28, 24 M.L.T. 361 (P.C.).

(20) S. 11. See RES JUDICATA, No. 30, (1918) M.W.N. 175.

(21) S. 11—Applicability of *res judicata* doctrine amongst co-defendants—Guiding principles. See RES JUDICATA, No. 31, (1918) M.W.N. 580.

(22) S. 11. See RES JUDICATA, No. 33, 14 N.L.R. 115.

(23) S. 11—Decision by probate Court in application for grant of letters of administration. Scope of. See RES JUDICATA, No. 37, 49 P.R. 1918.

(24) S. 11—Matter expressly left untouched and undecided—Matter if finally decided. See RES JUDICATA, No. 38, 11 P.L.R. 1918.

(25) S. 11—Suit by widow against daughter-in-law for share of estate—Previous suit by collaterals compromised by widow, effect of. See RES JUDICATA, No. 39, 23 P.L.R. 1918.

(25-a) S. 11—Previous suit between same parties, Question raised but not decided in, it operates as *res judicata*. See RES JUDICATA, No. 37-b, 149 P.L.R. 1917.

(25-b) S. 11—*Res judicata*, Question of, how determined—Decision on point not necessary for decision of suit, whether *res judicata*—Final order of the probate Court as to due execution of will, Effect of—Competency to contest its validity otherwise—Mere omission to appeal by minor's guardian, Effect of—Presumption of jointness—Onus, Question of, when not material—Partition, Effect of—Registration Act (1908), S. 17 (1) (b)—Acknowledgment of partition whether compulsorily registrable—Civ. Pro. Code (1908), O. XIII, r. 4. See RES JUDICATA, No. 40-a, 122 P.W.R. 1917=13 P.R. 1918.

(26) S. 11, Expl. IV—Applicability of the section against pro forma defendants—*Res judicata*.

Where A brings a suit against B, C and D, being equally interested with A in the property, have been made defendants both having refused to join themselves as plaintiffs in the suit, C may not, upon the failure of A, come forward and harass B upon the same cause of action and, on his failure, D, in his turn, may not also come forward to harass B likewise. S. 11, Expl. IV, Civ. Pro. Code, 1908, was designed to meet such a plea, and the bar of *res judicata* applies to them. *Bhageswar Dayal Sahu v. Baneropan Sahu*, 44 Ind. Cas. 546.

SHARFUDDIN and ROE, JJ.

(27) S. 11, Expl. IV—How far applicable to compromise decrees. See FISHERY, No. 2, 14 N.L.R. 35.

(28) S. 11, Expl. IV—Previous suit, in respect of several bits of land—Partial dismissal

Civ. Pro. Code (1908)—(Continued).

—Subsequent suit in regard to lands previously dismissed. See RES JUDICATA, No. 16, 43 Ind. Cas. 221.

(99) S. 11, Expl. IV—*Res judicata*—Prior suit for possession of house on the ground of gift—Subsequent suit for possession of land on the ground of succession—No bar as *res judicata*. See RES JUDICATA, No. 17, 43 Ind. Cas. 395.

(99-a) S. 11, Expl. IV—*Res judicata*—Matter which might and ought to have been made ground of attack—Only if it would affect result of suit. See RES JUDICATA, No. 22-a, 46 Ind. Cas. 929.

(80) Ss. 11, 13, 14—Foreign judgment when *res judicata* in British India. See RES JUDICATA, No. 45, 9 L.B.R. 103.

(31) Ss. 11, 47—First suit for redemption decreed—No execution applied for—Second mortgage to another—Subsequent mortgagee's suit barred. See RES JUDICATA, No. 7, 20 Bom. L.R. 164.

(32) S. 11, O. II, r. 2—Decision of issue not necessary for disposal of suit—Its re-trial. See RES JUDICATA, No. 41, 22 P.W.R. 1918.

(33) S. 11 and O. XXXIII, rr. 1 (a) and 10—*Res judicata*—Payment into Court under preliminary decree—Final decree passed—Subsequent suit for mesne profits between date of payment and date of suit—If barred by *res judicata*—Future mesne profits—Mortgagor if bound to have adjusted in final decree—Redemption suit—Mortgagor when entitled to possession.

A mortgagor can bring a separate suit for mesne profits between the date of his payment under the preliminary decree and the date when he is put in possession of the mortgaged property. He is not bound to have such mesne profits settled and included in the final decree (a).

Under O. XXXIV, r. 1 (a), Civ. Pro. Code, the moment the amount ascertained by the preliminary decree is paid into Court, the mortgagor is entitled to the possession of the property and the retention of possession by the mortgagee thereafter is that of a wrong-doer (b). *Yalappa Tharan v. Subblal Tharan*, 7 L.W. 269=23 M.L.T. 158=(1918), M.W.N. 207=44 Ind. Cas. 251.

SESHAGIRI AIYAR and KUNARASWAMI SASTRI, J.

References:—(a) 11 C.W.N. 1001, F.; 42 Ind. Cas. 280; 31 B. 527, D.; 41 M. 188=6 L.W. 784 (F.B.), R. (b) 14 C.W.N. 1001, F.

(33-a) S. 11, O. XLJ, r. 27—*Res judicata*—Pro note, Suit on—Decision as to genuineness of pro-note—Malicious prosecution, Suit on, if barred by—Cause of action different—Additional evidence—Appellate Court, Power of, to let in. See RES JUDICATA, No. 22-d, 47 Ind. Cas. 141.

(34) S. 11, O. XLJ, r. 33—Suit claiming relief alternately against two defendants—Decree against one—Appeal—No cross-objection against other defendant—Powers of appellate

Civ. Pro. Code (1908)—(Continued).

Court—Appeal allowed—Subsequent suit against other defendant—No bar—Limitation—Suit based on failure of consideration and fraud—Findings in previous suit not conclusive. See RES JUDICATA, No. 12, 42 Ind. Cas. 548.

(95) S. 11. See No. 73, *infra*.

(95-a) S. 12. See No. 544, *infra*.

(96) S. 13. See No. 30, *supra*.

(97) S. 14—Foreign judgment—Want of jurisdiction—Onus of proof

Where a suit is brought on a foreign judgment, every presumption is made in favour of such judgment, and therefore the onus is on the defendants to prove that they had not submitted to the jurisdiction of the foreign Court. *Ramanathan Chetty v. Lakshmana Chetty*, 24 M.L.T. 244.

WALLIS, C.J. and SPENCER, J.

Reference:—5 Q.B.D. 941, R.

(38) S. 14. See No. 30, *supra*.

(39) S. 14 (3). See No. 544, *infra*.

(40) S. 14 (c). See No. 545, *infra*.

(40 a) S. 16—Property, Meaning of. 'Property' as used in S. 16 of the Civ. Pro. Code (1908) means property situate in British India. *Balwand v. Tulsi Bal*, 46 Ind. Cas. 782.

FINDLAY, OFFG. A.J.O.

(40-b) Ss. 16, 20—Joshipan income, Suit for—Immovable property, Suit for, of the nature of—Villages situated outside British India, Suit in respect of—Jurisdiction. See JURISDICTION (OF CIVIL COURTS), No. 6, 46 Ind. Cas. 782.

(41) S. 18. See No. 551, *infra*.

(42) S. 19. See No. 551, *infra*.

(43) S. 20—Jurisdiction of Civil Court—Cause of action—Claim against Mutual Relief Fund.

Held, that the plaintiff's claim for relief against the Punjab Hindu Mutual Family Relief Fund was maintainable at Lyallpur, where a part of the cause of action arose, for the Fund had an agent for procuring members at that place and the member also died there (a). *The Punjab Mutual Hindu Family Relief Fund, Lahore v. Sardar Mal*, 29 P.L.R. 1918=98 P.R. 1918=45 Ind. Cas. 900.

CHEVIS, J.

References:—34 A. 49 and 41 Ind. Cas. 392, R.

(44) S. 20—Jurisdiction—Contract on pukka arbat system. See JURISDICTION (GENERAL), 40 Ind. Cas. 505.

(45) S. 20—Cause of action—Meaning. See JURISDICTION (GENERAL), No. 8, 35 M.L.J. 189.

(46) S. 20 (c)—Contract made and registered at Jagadhri—Contract to be performed at Tehri outside Ambala District—Occurrence of breach of contract also outside Ambala

Civ. Pro. Code (1908)—(Continued).

District—Civ. Pro. Code (1882), S. 17, Expl. 3—Jurisdiction.

A suit claiming Rs. 14,000 as due and payable under a contract made and registered at Jagadhri, where the contract was to be performed at Tehri or in any case outside the jurisdiction of the Ambala Courts, and where the breach or breaches alleged in the plaint occurred also outside the Ambala District was held to be within the jurisdiction of the Senior Subordinate Judge at Ambala, the addition of the words "wholly or in part" in S. 20 (c) of the new Civ. Pro. Code not making any change in the law regarding jurisdiction as it stood under S. 17, Expl. 3 of the old Civ. Pro. Code (a). *Sita Ram v. Rani Chandra*, 26 P. R. 1918=114 P.L.R. 1918=51 P.W.R. 1918=44 Ind. Cas. 869.

BROADWAY, J.

Reference:—(a) 34 A. 49, F.

(47) Ss. 20 and 21—Goods sent in excess returned—Damages—Cause of action—Jurisdiction.

Where plaintiffs sent to defendants some articles in excess of what defendants had ordered and the latter returned them but the goods failed to reach plaintiffs who brought this suit for the price of the same, plaintiffs being residents of Kumbakonam and defendants of Mysore.

Held, the suit relating to the excess goods was one for damages and the Kumbakonam Court had no jurisdiction to try the same.

S. 21, Civ. Pro. Code, does not confer jurisdiction and the fact that one portion of the claim is triable by that Court does not give jurisdiction for the other. *Manjappa v. Rajagopalachariar*, (1918) M.W.N. 378=24 M.L.T. 95=45 Ind. Cas. 779.

ODDFIELD and SADASIVA AIYAR, JJ.

(48) Ss. 20 (c), 21—Suit against insurance company for payment of sum assured on death of policy-holder—Death of holder a part of cause of action—Jurisdiction of Court situated in place of death, though contract was entered into from some other district. See JURISDICTION (GENERAL), No. 4, 22 C.W.N. 517.

(48-a) S. 20. See No. 40-b, *supra*.

(49) S. 21—Objection to jurisdiction before appellate Court, when to be taken. See JURISDICTION (GENERAL), No. 9, (1918) M.W.N. 661.

(50) S. 21. See Nos. 47 and 48, *supra*.

(51) S. 22—Application for transfer by defendant objecting to jurisdiction of Court, Maintainability of—Inconvenience to defendant's witnesses, if valid ground for transfer—Choice of forum by plaintiff, Interference with. See TRANSFER OF CASE, No. 2, 21 O.O. 217.

(52) S. 24—Transfer of a suit of Small Cause Court nature from a Court possessed of such powers to another Court not competent to try it as such—Small Cause Court suit, transfer of,

Civ. Pro. Code (1908)—(Continued).

to another Court. Saljee v. Musst. Tulsha, 20 O.O. 350=48 Ind. Cas. 314. See Final Part, 1917, Col. 209.

(52-a) S. 24—"Court of Small Causes," Meaning of, in—Courts vested with Small Cause Court jurisdiction—Courts constituted under Provincial Small Cause Courts Act (IX of 1907), Ss. 5, 16—Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), S. 25. See SMALL CAUSE COURT, No. 3, 27 C.L.J. 461=44 Ind. Cas. 881.

(53) S. 24 (1) (b)—Notice of review issued by Small Cause Judge—Appointment of Special Small Cause Judge thereafter—Transfer by District Judge of case to special Small Cause Judge—Validity of transfer. See TRANSFER OF CASE, No. 1, (1916) M.W.N. 291.

(54) Ss. 24 (4), 150—Provincial Small Cause Courts Act (IX of 1907), S. 35—Suit pending in Court of Subordinate Judge invested with Small Cause Court powers—Subordinate Judge on privilege leave—Officer not having Small Cause Court powers to the same extent succeeding him—Transfer of suits of certain value pending in Small Cause Court—Jurisdiction—Munsif not having Small Cause Court powers—Appeal.

A Subordinate Judge was invested with the powers of a Small Cause Court Judge up to Rs. 500. A suit was filed in his jurisdiction valued at Rs. 273. The officer in question went on privilege leave and was succeeded by a Munsif as Subordinate Judge. That Munsif had Small Cause Courts powers up to Rs. 250. After this officer had taken charge, the District Judge transferred all suits above Rs. 250 in value pending in the Small Cause Court jurisdiction to another Munsif. The suit was tried and the Munsif decreed the suit for a very small amount. The plaintiff appealed and objection was taken on behalf of the defendants that the suit was a Small Cause Court suit and no appeal lay. The objection being allowed, the plaintiff applied to the High Court for revision of that order:—Held that the suit being of a value exceeding Rs. 250 remained pending on the Small Cause Court side, the presiding officer of the Court by reason of taking leave for a short time did not cease to be invested with the jurisdiction of a Small Cause Court Judge, and the suit was tried as a Small Cause Court suit by the Munsif to whom it had been transferred and consequently no appeal lay. *Chatori Singh v. Ramia*, 16 A.L.J. 548=40 A. 525=46 Ind. Cas. 898.

BANERJI and TUDBALL, JJ.

(55) S. 25. See No. 101, *infra*.

(56) S. 35 (2)—Withdrawal of suit is event which costs can abide and follow. See COSTS, No. 4, 8 L.W. 219.

(57) S. 35 (3). See No. 183, *infra*.

(58) S. 36, O. XXI, r. 53—Court-sale subsequently set aside—Order for refund of money to purchaser—Execution of order as decreed.

Civ. Pro. Code (1908)—(Continued).

See AUCTION-PURCHASER, No. 5, 23 M.L.T.; 355.

(58-a) S. 38. See No. 301-a, *infra*.

(59) S. 39 (1) (c)—Whole property covered by decrees not, but only parts, situate within jurisdiction of Court to which decrees transferred—Such Court if can execute same. See EXECUTION OF DECREE, No. 27, 43 P.R. 1918.

(59-a) Ss. 39, 42—Portion of decrees, Transfer of, to another Court for execution—Validity of—Transfer of decrees—Notice to judgment-debtor. Necessity of. See TRANSFER OF DECREE, 43 Ind. Cas. 186.

(59-b) S. 39. See No. 301-a, *infra*.

(59-c) S. 42. See No. 59-a, *supra*.

(60) S. 44, O. XXI, r. 63—Suit by unsuccessful claimant—Burden of proof. See BURDEN OF PROOF, No. 6, 34 M.L.J. 295.

(61) S. 47—Representative—Auction-purchaser is not a representative of the judgment-debtor.

A purchaser at a Court-sale in execution of a decree by a Civil Court is not a representative of the judgment-debtor, within the meaning of S. 47 of Civ. Pro. Code, 1908. *Narainbhat Ohintamanbhat v. Bandu Krishna Kulkarni*, 20 Bom. L.R. 495=42 B. 411=46 Ind. Cas. 113.

BATCHELOR, AG. C.J. and KEMP, J.

References:—26 A. 447; 24 C. 62, Diss.; 25 B. 631; 8 I.A. 65; 9 B. 285; 13 Bom. L.R. 307; 34 B. 546; 34 M. 417, R.; 19 I.A. 166, *Expl.*

(62) S. 47—Attachment of property of judgment debtor—Claim petition by third party which succeeds—Suit by judgment-debtor for possession of property which succeeds—Sale by judgment-debtor to another person—Reattachment of property by decree-holder—Claim petition by vendee of property—Suit not barred by S. 47.

A attached certain property as property of B, his judgment-debtor. C put in a claim petition and succeeded. Thereupon B sued to set aside the settlement by virtue of which C succeeded in his claim and obtained a decree. Then B sold the property to D. A again attached the property and D put in a claim petition but failed. Then D brought a suit for possession of the property. *Held* (1) that D's suit was not barred by S. 47, Civ. Pro. Code; (2) that A's first attachment was not revived by B's suit. *Champyl Koppan v. Kolasseri Kelappan Nambiyar*, 44 Ind. Cas. 864.

WALLIS, C.J. and SADASIVA AIYAR, J.

Reference:—1 M.W.N. 287, *Appr.*

(63) S. 47—*Madras Proprietary Estates Village Service Act* (II of 1894), S. 17—*Transfer of Property Act*, S. 43—Dismissal of suit against one defendant—"Party to the suit in which the decree was passed"—Mortgage of Service Inam Lands, before notification of enfranchisement, validity of. *Yaddadi Sanamma v. Koduganti Radhabhaji*, 22 M.L.T. 632=(1918) M.W.N.

Civ. Pro. Code (1908)—(Continued).

23=7 L.W. 234=34 M.L.J. 17=43 Ind. Cas. 985=41 M. 418 (F.B.). See Final Part, 1917, Col. 918.

(64) S. 47—Party setting up title adverse to mortgagor and mortgages—Order exonerating him from the suit—If he still remain a party to the suit.

One K filed O. S. No. 288 of 1910 on the file of the District Munsif's Court, Ongole, to recover money due on a mortgage bond executed by P and M. He impleaded M as the 4th defendant who claimed under a sale-deed from T M and set up a title adverse to both the mortgagor and mortgages. The District Munsif delivered judgment exonerating the 4th defendant with costs and passed a mortgage decree against P and N. The property was brought to sale and in execution S purchased the property and when he proceeded to obtain possession M obstructed and the Court passed an order directing delivery of possession to S. M filed the present suit against K, S, P and N for recovery of possession of the property. The lower Court dismissed the suit on the ground that as the plaintiff did not appeal against the order directing delivery of possession, he is precluded from maintaining the suit by reason of S. 47, Civ. Pro. Code.

Held, the plaintiff is a party to the suit O.S. No. 288 of 1910 within the meaning of S. 47, Civ. Pro. Code, though he was exonerated therefrom and therefore the present suit does not lie.

A defendant whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in S. 47 of the Civ. Pro. Code applies, notwithstanding that he had been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff (a). *Mediseti Venkataswamy v. Kunchala Chidambaram*, 23 M.L.T. 206=45 Ind. Cas. 671.

SADASIVA AIYAR and PHILLIPS, JJ.

References:—(a) 21 M.L.T. 121, N.F.; 23 M. 361 (F.B.), F.

(65) S. 47—Order accepting security proffered by decree-holder and delivering possession to him not interlocutory order—Order if appealable. See APPEAL (GENERAL), No. 14, 22 C.W.N. 657.

(66) S. 47—Order amending decree, if one relating to execution of decree. See APPEAL (GENERAL), No. 32, 43 P.R. 1918.

(67) S. 47—Decree against son as representative of father—Execution sale of such property—Suit to recover property. See LIMITATION ACT (1908), No. 29, 40 P.L.R. 1918.

(67-a) S. 47—Execution of decree, Independent title if can be enforced in. See MORTGAGE (SALE), No. 5-a, 47 Ind. Cas. 374.

(68) S. 47—Question concerning auction-purchaser and also parties to suit—Question to

Civ. Pro. Code (1908)—(Continued).

be determined in execution—Separate suit unnecessary. See **MORTGAGE (SALE)**, No. 8, 23 M.L.T. 198 (P.C.).

(68-a) S. 47—Receiver appointed in execution proceeding, Order refusing to discharge—Order under S. 47—Appeal if lies from order. See **RECEIVER**, No. 7, 3 Pat. L.J. 513.

(69) S. 47—Person in possession holding up as shield payments made towards prior mortgages—Suit decreed subject to his lien—Final decree made without mention of lien—Property sold and purchased by mortgagee—Dispossession of person in possession—Maintainability of suit to recover money paid for prior mortgages. See **RES JUDICATA**, No. 5, 16 A.L.J. 685.

(69-a) S. 47—Sale proclamation, Valuation in, Objection to—Order overruling, if appealable under. See **SALE PROCLAMATION**, 47 Ind. Cas. 512.

(70) S. 47—Suit against father and son on mortgage—Son exempted, in decree—Effect of decree same as dismissing suit against son—Simple money decree against father—Execution and subsequent suit against son for balance of money. See **SEPARATE SUIT**, No. 1, 16 A.L.J. 752.

(71) S. 47—Sale of property claimed by person in his personal capacity in decree in suit against him as representative of another—Right of person to set aside sale if exerciseable under S. 47 or by separate suit. See **SEPARATE SUIT**, No. 2, 27 O.L.J. 572.

(72) Ss. 47, 2 (2)—Decree—Question between a party and his representative—Interlocutory order—Appeal. **Khan Mahomed v. Chelaram**, 11 S.L.R. 74=43 Ind. Cas. 165. See **Final Part**, 1917, Col. 214.

(73) Ss. 47, 11—Suit by prior mortgagee—Puisne mortgagee made party, but no mention in decree of such mortgagee's right to redeem—Suit for redemption by puisne mortgagee if barred. See **RES JUDICATA**, No. 32, (1918) M.W.N. 902.

(73-a) Ss. 47, 104, O. XLIII, r. 1 (j)—Execution sale, Application to set aside an, order refusing—Second appeal if lies. See **APPEAL (SECOND APPEAL)**, No. 10-a, 46 Ind. Cas. 539.

(74) Ss. 47, 144—Scope of—'Parties' in S. 144, meaning of—Representatives, meaning of—Assignee, if entitled to benefits of S. 144. See **RESTITUTION**, No. 4, 46 Ind. Cas. 465.

(75) Ss. 47, 144, 151—*Ex parte* decree—Sale of house in execution—Subsequent cancellation of *ex parte* decree—Re-trial ending in plaintiff's favour—Application to set aside sale, Limitation for. See **SETTING ASIDE SALE**, No. 2, 20 Bom. L.R. 925.

(76) Ss. 47, 151, O. XXI, r. 2—Payment out of Court to decree-holders if cognisable by executing Court—Plea of fraud not raised by judgment-debtor if may be raised by his assignee

Civ. Pro. Code (1908)—(Continued).

after long time—Inherent powers of Court to investigate fraud. See **LIS PENDENS**, No. 1, 20 Bom. L.R. 929.

(77) S. 47, O. XXI, r. 2—Agreement that no decrees should be obtained if question to be decided in execution. See **EXECUTION OF DECREE**, No. 22, 8 L.W. 205.

(78) S. 47, O. XXI, rr. 2, 53 (6)—Application by holder of attached decree to enter satisfaction—Judgment-debtor not made party but attaching creditors brought on record by Court—Adjustment after attachment, if effective against attaching creditors—Question if covered by S. 47, Civ. Pro. Code. See **ADJUSTMENT OF DECREE**, No. 2, (1918) M.W.N. 874.

(79) S. 47, O. XXI, r. 22—Notice under r. 22, Omission to serve—Effect on execution sale—Notice is basis of jurisdiction to direct such sale—Remedy of party aggrieved by suppression of process. See **EXECUTION SALE**, No. 1, 27 O.L.J. 528.

(80) S. 47, O. XXI, r. 32—*Compromise decree—Failure by defendant to endorse pro-note to plaintiff—If suit lies for damages.*

Where, under a compromise decree, defendant bound himself to endorse certain promissory notes in plaintiffs' favour, and, on his failing to do so, plaintiff brought the present suit for damages against defendant, as the promissory notes had become barred. *Held*, the suit is not maintainable, as it is barred under S. 47, Civ. Pro. Code.

The proper course is to proceed under O. XXI, r. 32 or 34. **Muthu Karu Yeena Alagappa Chettiar v. Kanakasabhai Chettiar**, (1918) M.W.N. 333=7 L.W. 563=24 M.L.T. 34=46 Ind. Cas. 689.

OLDFIELD and SADASIYA AIYAR, JJ.

References:—31 M. 87; 35 O. 1100; 7 Ind. Cas. 248, *Dist.*

(81) S. 47, O. XXI, r. 53—*Attachment of decree—Satisfaction—Appeal.*

It is not competent to the holder of a decree, which has been attached, to apply to enter up satisfaction of the decree, even though notice of the attachment was not given to the judgment-debtor under sub r. (6) of O. XXI, r. 53.

Where the attaching creditors have been made parties to the decree-holder's application for entering up satisfaction, the question that arises between them is one falling within S. 47, Civ. Pro. Code, and an appeal lies from an order thereon. **Kuppusamy Iyer v. Kuppusamy Iyer**, 24 M.L.T. 495.

ABDUR RAHIM and OLDFIELD, JJ.

(81-a) S. 47, O. XXI, r. 90—Execution sale, Order setting aside, under S. 173, Bengal Tenancy Act—Purchaser, Benamidar of judgment-debtor—S. 47 inapplicable to the case of a benamidar. See **APPEAL (GENERAL)**, No. 23-c, 46 Ind. Cas. 748.

Civ. Pro. Code (1908)—(Continued).

- (82) S. 47 and O. XXI, r. 95—Decree-holder purchasing property in auction-sale—He is bound to obtain possession in execution proceedings—S. 47 bars a suit for possession.

When a decree-holder by his own action combines the position of decree-holder and auction-purchaser by purchasing at an auction sale with the permission of the Court, he does not lose his character of a party to the suit and the proceedings in the execution are not terminated, until the auction-purchaser obtains possession of the property, as the Civ. Pro. Code provides for delivery of possession being enforced. If such an auction-purchaser fails to enforce delivery of possession in execution proceedings, S. 47, Civ. Pro. Code, will prove a bar to a suit for possession of the property. *Lachusa Motilal v. Maherall Rahimall*, 44 Ind. Cas. 563.

BATTEN, A.J.C.

References:—31 A. 82, Diss; 35 B. 452; 27 C. 34; 28 M. 87, Appr.

- (83) S. 47, O. XXI, r. 95—Purchase of judgment-debtor's property by decree-holder in execution sale—Permission of Court obtained for purchase—Separate suit for possession by decree-holder—Suit if barred by Code. See SEPARATE SUIT, No. 3, 8 P.R. 1918.

(83-a) S. 47, O. XXI, r. 100—Non-transferable occupancy holding. Purchaser of, if a representative of judgment-debtor under S. 47—Execution sale, if entitled to object to—If can maintain proceedings under r. 100. See EXECUTION SALE, No. 4 a, 3 Pat. L.J. 579.

(83-b) S. 47, O. XXI, r. 100—Non-transferable occupancy holding—Purchaser of, a representative of judgment-debtor, entitled to object to execution sale under S. 47—Not entitled to proceedings under r. 100. See REPRESENTATIVE, 49 Ind. Cas. 969.

(84) S. 47, O. XXI, rr. 100, 101, 103—Order dismissing application under O. XXI, r. 100—Appeal from the order not permissible—Separate suit by aggrieved party. *Zipru Talhoo v. Hari Supdashet Vani*, 19 Bom. L.R. 774=42 B. 10. See Final Part, 1917, Col. 217.

(85) S. 47, O. XXXIV, rr. 7, 8—Preliminary and final decree—Malabar mortgage suits how far governed by the new rules in the Civ. Pro. Code. See MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS), No. 6. (1918) M.W.N. 551.

(86) S. 47, O. XLI, r. 1, O. XLIII—Execution of decrees—Copy of decrees to be filed with memorandum of appeal—Limitation. *Quasim Ali Khan v. Bhagwanta Kuar*, 15 A.L.J. 801=40 A. 12. See Final Part, 1917, Col. 217.

(87) S. 47 and O. XLI, r. 5 (3)—Security ordered by Court under O. XLI, r. 5 (3)—Immovable property given as security by the judgment-debtor—Realisation of the security—If can be effected in execution—Separate suit

Civ. Pro. Code (1908)—(Continued).

therefor—If necessary or maintainable—Realisation of the security, whether a matter relating to execution, discharge or satisfaction of the decree. *Subramania Uthettiar v. The Hon'ble Raja Rajeswara Sethupathi*, 6 L.W. 762= (1917) M.W.N. 872=34 M.L.J. 84=41 M. 327=43 Ind. Cas. 187. See Final Part, 1917, Col. 218.

(88) S. 47, O. XLVII—Delivery of possession of property, Order for, if order in execution proceedings—Review of order—Appeal if, lies from order passed on review. See REVIEW, No. 8, 3 Pat. L.J. 571.

(88-a) S. 47. See Nos. 4 and 31, *supra*, and Nos. 147 and 366-a, *infra*.

(89) S. 48—Subsequent order—Meaning of—Order giving time for payment by executing Court—Limitation Act (IX of 1908), S. 15—Exclusion of time.

The expression "subsequent order" in S. 48 (b) of the Code of Civil Procedure means a subsequent order made by the Court which made the decree and acting as that Court and not as a Court executing the decree. Where therefore a Court executing the decree, allows a judgment-debtor two months' time to pay up the decree, the order allowing time is not a subsequent order within the meaning of S. 48 and does not give a fresh period to the decree-holder to execute his decree. *Jurawan v. Mahabir Dube*, 16 A.L.J. 71=40 A. 198=44 Ind. Cas. 24.

RICHARDS, C.J.

References:—37 A. 638; 7 M. 152; 31 Ind. Cas. 393; 16 C. 16, R.

(90) S. 48—Conciliator's certificate under the Dekhan Agriculturists' Relief Act—Exclusion of time in obtaining certificate—Limitation. See DEKHAN AGRICULTURISTS' RELIEF ACT, No. 2, 20 Bom. L.R. 360.

(91) S. 48—Applicability of section to revival of antecedent decree for execution kept lawfully in suspense. See EXECUTION OF DECREE, No. 26, 3 Pat. L.J. 103.

(91-a) S. 48—Execution proceedings in mortgage suit, pending when Code came into force—Applicability of S. 48 to. See MORTGAGE (GENERAL), No. 9-c, 47 Ind. Cas. 143.

(92) S. 48, O. XXXIV, r. 5—Limitation Act (IX of 1908), Arts. 181, 182—Limitation Act (XV of 1877), Art. 179—Execution of decree—Application for execution—Application for decrees absolute for sale—Right to apply, accrual of.

On the 7th November 1897, the Court to whom an award was presented, ordered it to be filed and a decree to be made in accordance with it. In 1898, when an application was made to execute the decree, the defendant objected that no executable decrees had as yet been drawn up. The decree was, on plaintiff's application, amended on the 28th January 1899, so as to bring it into consonance with the award. The decree, which was passed for Rs. 56,575,

Civ. Pro. Code (1908)—(Continued).

ordered payment of Rs. 575 and Rs. 6,000 forthwith. Another sum of Rs. 6,000 was made payable on the 31st January 1898; and the balance of Rs. 44,000 was made payable in annual instalments of Rs. 1,000 each, the first instalment having been made payable by the end of January 1898. The amount of decree was made a charge on the mortgaged property; and failure to pay any instalment in time rendered the whole decree payable at once. Default in payment was made in 1902. The plaintiff, after making several applications to execute the decree all within the time, filed the present application on the 2nd of December 1909, to execute the decree. It was objected that the application was barred by limitation:

Held, (1) that, as regards the amount of Rs. 575 and 6,000, the correct starting point of limitation was the 17th November, 1897, and the application was, therefore, barred by time under S. 48, Civ. Pro. Code, 1908;

(2) that as regards the rest of the decree, the execution was not time barred: for, though O. XXXIV, r. 4 of the Civ. Pro. Code, 1908, rendered an application necessary to make the decree absolute for sale, Art. 181 of the Limitation Act did not govern the case, the right so to apply not having accrued to the plaintiff till the new Civ. Pro. Code conferred it upon him in 1908. *Narsingrao Konher Inamdar v. Bandud Krishna Kuikarni*, 20 Bom. L.R. 481 = 12 B. 309 = 46 Ind. Cas. 107.

BATCHELOR, AG. C.J. and KEMP, J.

References:—36 A. 350 (P.C.); 36 A. 281 (P.C.); 46 A. 1, R.; 38 O. 913, Dist.

—(93) S. 48. See No. 450, *infra*.

(93 a) Ss. 51, 68, 72, O. XXI, r. 30, Sch. III—*Execution—Money-decree—Revenue Court, Power of, to make temporary alienation of judgment-debtor's land—Punjab Alienation of Land Act (XIII of 1900)*, S. 16 (1)—*Rules and orders of the Punjab Chief Court, Vol. 1, Ch. II, S. 21, Part F—Financial Commissioner, Punjab's, Standing Order No. 64*.

A Revenue Court executing a decree for money is bound by the provisions of the Civ. Pro. Code.

The Civ. Pro. Code nowhere confers on an original Court in the process of execution of decree a power of temporarily transferring the property of the judgment-debtor to the decree-holder or to any other person, nor has an appellate Court such power.

A temporary alienation of the immoveable property of the judgment-debtor to the decree-holder or other person in satisfaction of a decree is only possible under (a) the conditions specified in S. 72 of the Civ. Pro. Code, or under (b) the system prescribed by S. 69 and Sch. III wherever that system may have been made applicable by the Local Government. The system is not in force in this Province at present, so that the only provision allowing of temporary alienation in execution of a decree is S. 72.

Civ. Pro. Code (1908)—(Continued).

Such alienation, however, is to be made by the Collector as a Revenue Officer under the authority of the executing Court after a representation has been made by him and accepted by the Court proposing such alienation.

The sale in execution of a decree of the land of a member of an agricultural tribe being illegal under S. 16 (1) of the Alienation of Land Act, any representation by the Collector in regard to such land of the purport contemplated by S. 72, Civ. Pro. Code, would be uncalled for, meaningless and *ultra vires*, whether made of his own motion or after a reference to him by the executing Court in the manner prescribed by the instructions contained in the Rules and Orders of the Chief Court or in Financial Commissioner's Standing Order No. 64. Therefore no temporary alienation of the land of a member of an agricultural tribe in execution of a decree can be made by Collector under the authority of the section. Though such land can be attached by a Court in execution of a decree, no further action can be taken towards satisfying the decree by selling or otherwise dealing with that land. *Ahmad Khan v. Parmanand*, 43 Ind. Cas. 356 = 7 P.W.R. 1917 (Rev.) = 8 P.R. 1917 (Rev.).

FAGAN, F.O.

(94) S. 53—*Liability of Hindu sons for contract of indemnity entered into by their father—Sons bound as legal representatives to pay debt only if payable under the Hindu law*. See HINDU LAW (DEBTS), No. 12, 3 Pat. L.J. 396.

(95) Ss. 53, 2 (11)—*Decree for injunction against adult members of the family—Death of adults—Execution against other members of family not parties to suit—Legal representative, meaning of*. See EXECUTION OF DECREE, No. 5, 20 Bom. L.R. 660.

(96) S. 54—*Decree—Execution—Partition made by Collector—Civil Court cannot re-open partition*.

When the Collector, acting under S. 54, Civ. Pro. Code, 1908, once effects a partition, it is not competent to the Civil Court to entertain any application seeking to reopen the partition (a). *Bhimangauda Konapgauda Patil v. Hanmant Rangappa Patil*, 20 Bom. L.R. 411 = 43 B. 699 = 46 Ind. Cas. 10.

BEAMAN and HEATON, JJ.

References:—15 B. 527, F.; 12 B. 371, R.

(97) S. 54—*Revenue paying estate, Partition of—Decree for partition by Civil Court—Partition if can be re-opened—Review*. See ACT V OF 1897 (BENGAL ESTATES PARTITION), No. 1, 45 Ind. Cas. 895.

(98) S. 60—*Right to attach half salary of insolvent*. See PROVINCIAL INSOLVENCY ACT (III OF 1907), No. 8, 16 A.L.J. 107.

(99) S. 60 (f)—*Birt Jijmani—Whether liable to attachment and sale in execution of decree*.

Civ. Pro. Code (1908)—(Continued).

Birt Jijmani is really a right of personal service and as such it is property which cannot be attached and sold. *Durga Prasad v. Shambhu*, 43 Ind. Cas. 650.

TUDBALL, J.

References:—A.W.N. (1889) 169; 10 B. 395; 12 B. 366; 23 B. 131, *Appr.*; 15 A.L.J. 41; 13 O.L.J. 263; 6 B.H.O.R.A.C. 137; 9 B.H. O.R. 99, R.

(100) S. 60 (g)—Grant of usufruct of *ilaka* as well as zamindari rights, if political pension or grant of land—Liability of grant to attachment. See MAINTENANCE GRANT, No. 1, (1918) M.W.N. 384 (P.C.).

(101) Ss. 60, 25, O. XXI, r. 43—Wasika, Arrears of, due in lifetime of wasikadar, Nature of—Liability to attachment for debts. See ATTACHMENT, No. 4, 21 O.C. 329.

(102) S. 60, O. XXI, r. 92—Execution sale of agriculturist's house—No objection raised to sale on ground of exemption of house from liability to sale—Suit for possession by auction-purchaser, Resistance to, on ground of such exemption—Estoppel. See AUCTION-PURCHASER, No. 2, 16 A.L.J. 691.

(103) S. 64—Affects only private alienations made during subsistence of attachment—Award if affected by. See AWARD, No. 7, 35 M.L.J. 441.

(104) S. 64—Transfers avoided by section if includes award made before execution sale, though after attachment ending in such sale. See LIS PENDENS, No. 2, 35 M.L.J. 441.

(105) Ss. 64, 73—Attachment by one decree-holder—Non attaching decree-holders applying for rateable distribution—Private alienation pending attachment—Subsequent satisfaction of attaching decree holder—Whether alienation good against non-attaching creditors. *Annammal Chettiar v. Palamalai Pillai*, 22 M.L.T. 461=33 M.L.J. 707=(1917) M.W.N. 892=7 L.W. 298=41 M. 265=43 Ind. Cas. 599 (F.B.). See Final Part, 1917, Col. 221.

(106) S. 64, O. XXI, r. 89—Two decrees held by same decree-holder against same judgment-debtor—Attachment and sale in execution of first decree—Sale set aside and decretal amount deposited—Subsequent private sale by judgment-debtor—Right of decree-holder to realise second decree by resort to same property. See ATTACHMENT, No. 1-b, 7 L.W. 573.

(106-a) S. 68. See No. 93-a, *supra*.

(107) S. 70, O. XXI, r. 72—Transfer of execution proceedings to Collector—Application for leave to bid at auction-sale to be made to Collector only—Set-off if can be allowed either by Collector or Court. See EXECUTION OF DECREE, No. 6, 20 Bom. L.R. 708.

(107-a) S. 72. See No. 98-a, *supra*.

(108) S. 73—Whether money held by purchasing decree-holder to be set off towards his decree, held by Court—Whether such money

Civ. Pro. Code (1908)—(Continued).

liable to be rateably distributed—How to enforce refund of such money.

Where a purchasing decree-holder is allowed by the Court to hold the purchase-money bid at Court-sale, held that as it was open to the Court to direct the purchasing decree-holder to pay that sum into Court, it is in the power and under the disposal of the Court and is held by Court within the meaning of S. 73.

Though a purchasing decree-holder is permitted by the Court to hold the bid money in his hands in order that he might set-off the bid money towards his decree, held that other decree-holders against the same decree-debtors are entitled to have the purchase-money held by the purchasing decree-holder rateably distributed among the several decree-holders. A refund of such money can be enforced by process in execution. *Bijoy Kumar Addya v. Rama Nath Barman*, 43 Ind. Cas. 715.

TEUNON and NEWBOULD, JJ.

References:—30 C. 583; 11 M. 356; 30 Ind. Cas. 49, F.

(108-a) S. 73—Partnership suit—Surety-bond—Rateable distribution in amount of, by all those who eventually get a decree. See PARTNERSHIP, No. 7 a, 167 P.W.R. 1917.

(109) S. 73—Decree against estate of deceased testator—Decrees obtained against two out of three executors—One executor common to both suits—Rateable distribution. See RATEABLE DISTRIBUTION, No. 3, 27 O.L.J. 100.

(110) S. 73—Execution of decrees—Proportionate distribution of sale-proceeds—Suit for refund of assets distributed. See RATEABLE DISTRIBUTION, No. 2, 16 A.L.J. 580.

(111) S. 73—Payment into Court and application for rateable distribution made on the same day—Priority, Presumption if any as to—Same judgment-debtor. See RATEABLE DISTRIBUTION, No. 5, (1918) M.W.N. 520.

(112) S. 73—Sale proceeds of moveable properties held by Court Nazir are assets held by Court—Application for execution of decrees made after realisation of such assets—Decree-holder not entitled to claim rateable distribution. See RATEABLE DISTRIBUTION, No. 6, 33 P.R. 1918.

(113) S. 73—Same property attached in execution of two decrees, one by superior and other by inferior Court—Sale by superior Court proper—Procedure where inferior Court holds proceeds. See RATEABLE DISTRIBUTION, No. 4, 27 O.L.J. 145.

(114) S. 73, O. XXI, r. 83—Separate attachments under separate decrees—Money raised by private sale under permission granted in one execution proceeding—Money paid thus into Court if ear-marked for decree-holder in whose execution permission obtained or liable to be shared by others who have applied for execution. See RATEABLE DISTRIBUTION, No. 1, 41 M. 616.

Civ. Pro. Code (1908)—(Continued).

(115) S. 73. See No. 103, *supra*.

(116) S. 80—*Notice—Act purporting to be done by a public officer in his official capacity, meaning of—Bona fides, if necessary—Attachment over distrained properties—Revenue sale—Village Munsif aware of attachment—Handing over surplus sale proceeds to defaulter—Whether an act purporting to be done by a public officer in his official capacity.*

A public officer is entitled to notice of suit under S. 80 of Act V of 1908 irrespective of the fact whether in performing the act sued against, he was acting *bona fide* or *malā fide*, provided only the act was purported to be done in the discharge of his duties as such public officer (a).

The words "any act purporting to be done by a public officer in his official capacity" in S. 80 of the Civ. Pro. Code, 1908, are very wide and mean any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who became aware of the fact, the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming appearance irrespective of the fact whether it was properly and rightly done in such capacity or not.

The act of a Village Munsif in handing over the surplus proceeds of a revenue sale to the defaulting owner in spite of the fact that the Village Munsif was aware of an attachment of Court over the distrained properties effected at the instance of a creditor of the defaulter is an act purporting to be done by him as a public officer, in his official capacity and he would be entitled to notice under S. 80 of the Civ. Pro. Code. *Samanthala Koti Reddi v. Pothuril Subbiah*, 34 M.L.J. 494 = 7 L.W. 586 = 41 M. 792 = 23 M.L.T. 357 = (1913) M.W.N. 414 = 46 Ind. Cas. 86 (F.B.).

WALLIS, C.J., SADASIVA AIYAR and SPENCER, JJ.

References:—(a) 7 C. 499, *Diss.*; 24 C. 584, *R.*

(116-a) S. 80—*Notice under, in case of suit against Secretary of State under S. 104-H of the Bengal Tenancy Act (1885)—Two months during which notice current, if to be excluded in the calculation of limitation. See LIMITATION, No. 9, 46 Ind. Cas. 899.*

(117) S. 80—*Notice given prior to institution of suit under S. 104-H of Bengal Tenancy Act—Period of six months prescribed for such suits if can be extended by adding period of notice thereto. See LIMITATION ACT (1908), No. 61, 45 C. 934.*

(118) S. 80—*Whether person is entitled to exclude time during currency of notice to Secretary of State. See LIMITATION ACT (1908), No. 59, 28 C.L.J. 537.*

(119) S. 80—*Notice under, Time of currency of, if can be excluded in calculating period of limitation for suit under S. 104-H, Bengal Tenancy Act. See LIMITATION ACT (1908), No. 62, 22 C.W.N. 817.*

Civ. Pro. Code (1908)—(Continued).

(120) S. 80—*Suit against Secretary of State under Bengal Tenancy Act—Right of plaintiff to deduct period of notice to Secretary of State in computing six months prescribed. See LIMITATION ACT (1908), No. 104, 22 C.W.N. 802.*

(120-a) S. 86—*Ruling chief, Suit against, without consent of Government of India requisite under—Maintainability of—Submission to jurisdiction without raising objection—Objection if can be taken in appeal. See RULING CHIEF OR PRINCE, 46 Ind. Cas. 558.*

(120-b) S. 91—*Village pathway, Use of, Right to, Declaration of, Suit for, if governed by. See PUBLIC NUISANCE, No. 2, 46 Ind. Cas. 970.*

(120-c) S. 92—*Indian Courts, Power of, under, to frame scheme on Cypres application—Suit under, Compromise of, Validity of, where portion of trust property intended to be given to a party. See HINDU LAW (WILL), No. 2, 47 Ind. Cas. 611.*

(121) S. 92. See PUBLIC CHARITIES.

(122) S. 92—*Trust for religious purposes—Endowment, deed of, silent as to nature of trust—Persons having right to worship, position of—Court's power to frame a scheme for management of trust.*

Where a temple was built and that temple has been, from its very beginning, open to the public for worship and the customary religious festivals have been celebrated therein in a public manner, held, that the intention of the author of trust was for public worship and, consequently, any person having a right to use the temple for purposes of devotion was entitled to seek proper administration of the trust and to prevent its breach, under S. 92 of the Civ. Pro. Code, 1908, and the Court is justified in framing a proper scheme for the management of the trust. *Lakshmi Kunwar v. Murari Kunwar*, 45 Ind. Cas. 213.

STUART and KANHAIYA LAL, A.Js.

References:—14 M.I.A. 112, *R.*; 35 A. 283; 24 C. 418; 7 A. 178; 23 B. 659, *Appr.*

(123) S. 92—*Application to be appointed Mutwalli rejected by District Judge—District Judge whether has powers of kazi—Petitioner's remedy whether by suit or by application. See MAHOMEDAN LAW (WAKF), No. 5, 23 C.W.N. 138.*

(124) S. 92—*Persons resident in place where choultry is situated for whose benefit it is founded—Such persons if entitled to sue for removal of trustees and for a scheme for its management—Liability of trustee for trust funds collected and misappropriated by his father and grandfather—Period for which liable—Courts, Power of, to limit period for which accounts to be given. See PUBLIC CHARITIES, No. 1, 35 M.L.J. 661.*

(125) S. 92—*Suit for removal of Mahant declared unfit by his electors and election of*

Civ. Pro. Code (1908)—(Continued).

another as new Mahant—Leave granted for institution—New Mahant if necessary party plaintiff to suit—Court-fee if payable *ad valorem* on value of property—Death of one plaintiff of two to whom leave given, if abates suit. See PUBLIC CHARITIES, No. 3, 97 P.R. 1918.

(126) S. 92—Suit for removal of manager or trustee of religious institution—Collector's sanction essential. See RELIGIOUS ENDOWMENTS, No. 9, 11 P.W.R. 1918.

(127) S. 92—Suspension by District Judge of mahant of public endowment on mere report—Suit under section with necessary sanction essential to give Judge jurisdiction. See RELIGIOUS ENDOWMENTS, No. 2, 16 A.L.J. 744.

(128) S. 92—Jurisdiction of Civil Court to try suit relating to trust created for public religious purposes—Written leave of Advocate-General. See RELIGIOUS ENDOWMENTS ACT, No. 1, 20 Bom. L.R. 954.

(129) S. 92, O. I, r. 3—Suit for recovery of possession of trust property, if governed by this section. See TRUST, No. 1, 29 C.L.J. 4.

(130) S. 94 and O. XXXIX, r. 2, cl. 3—Disobedience to order of Court—Single act—Contempt of Court.

The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by r. 2 of O XXXIX, O. XXXIX has to be read along with S. 94.

Cl. 3 of r. 2 of O. XXXIX applies to cases of disobedience even though the disobedience is to an order to do or abstain from doing a single act. *Yidyapurna Thirthaswamy v. The Vicar of Suratkal Church*, 7 L.W. 328=44 Ind. Cas. 56.

KUMARASWAMI SASTRI, J.

Reference:—39 M. 907, R.

(130 a) S. 96 (3), O. XXIII, r. 3—Consent decree, what is—Decree based on compromise if—Appeal if lies from such decree. See CONSENT DECREE, 46 Ind. Cas. 775.

(131) S. 97—Appeal against preliminary decree if lies, when filed after passing of final decree, but before its signature. See APPEAL (GENERAL), No. 15, 22 C.W.N. 831.

(132) S. 97—Preliminary decree upset on appeal by reversal or modification—Effect on final decree. See PRELIMINARY DECREE, No. 1, 35 M.L.J. 361.

(133) S. 99. See No. 384, *infra*.

(133 a) S. 99, O. XX, r. 2—Judge hearing case—Judgment written and signed by him—But pronounced in Court by his colleague, if invalid under O. XX, r. 2 or a mere irregularity covered by S. 99. See JUDGMENT, No. 2, 46 Ind. Cas. 618.

Civ. Pro. Code (1908)—(Continued).

(134) S. 100 (a)—Usage having the force of law—Finding as to custom, how far examinable in second appeal—Mirasi rights in Chingleput—Thunduvaram—Swatantram—Admission.

On the question how far the evidence on which a finding as to custom or usage is based can be examined by the High Court in second appeal.

Held, the question of the existence of a custom or usage having the force of law is a mixed question of law and fact. So far as it involves a finding as to what were the things actually done in alleged pursuance of the custom it is a question of fact; and the High Court under S. 100 (a) has no large powers of interference with findings as to custom in so far as they are findings of fact than with any other findings of fact. But so far as it involves a finding that the facts found satisfy the requirements of law the question is one of law; and the High Court can examine the evidence to see (a) whether the facts proved sufficiently establish the essential attributes of a custom, (b) whether correct legal principles have been applied as to those attributes, and (c) whether irrelevant evidence has been received or relevant evidence excluded (a).

The liability to pay *swatantram* is a well-known incident of Mirasi tenure in Chingleput but as it is not universally applicable it is for the Mirasidar to show that he is entitled to it (b).

A record in a settlement register that lands are liable to pay *swatantram* must be given great weight while the refusal of the settlement officers to register the *swatantram* as payable is not conclusive as they had no authority to determine that question.

Admissions against interest cannot be dismissed as of no importance because they are recent. *Kumarappa Reddi v. Manayala Goundan*, 23 M.L.T. 44=34 M.L.J. 104=7 L.W. 243=41 M. 374=(1918) M.W.N. 350=44 Ind. Cas. 699 (F.B.).

WALLIS, C.J., SADASIVA AIYAR and KUMARASWAMI SASTRI, JJ.

References:—(a) 21 M.L.T. 411; 25 C.L.J. 613; 33 M.L.J. 1, F.; 39 M. 24, overruled. (b) 2 M. 149, F.

(135) S. 100, sub-S. (1) — "Contrary to law." Meaning of, in—Appeal, Entertainment of, by Court without jurisdiction to hear—Decree by such Court, Appealability of. See APPEAL (GENERAL), No. 7, 27 C.L.J. 115.

(136) S. 102—Provincial Small Cause Courts Act (IX of 1887), 2nd Sch., Art. 35, cl. (ii)—Prov. S.C. Court Amendment Act (VI of 1914), S. 2—Suit cognisable by a Small Cause Court—Amendment of Act pending suit—Second appeal.

A suit as originally filed was of the nature cognisable by the Small Cause Court, but as it involved a question of title to immovable property was returned under S. 23 and was tried as an original suit and an appeal taken

Civ. Pro. Code (1908)—(Continued).

to the District Court. 'By the Amending Act of 1914, Small Cause Courts were deprived of jurisdiction over that class of suits. On a second appeal being filed by the defeated party it was contended that S. 102 of the Civ. Pro. Code, was a bar to a second appeal.

Held, that the word 'cognisable' must be restricted to the nature of the proceeding prior to decree, and not to its character at the time of second appeal and that S. 102, Civ. Pro. Code, was therefore a bar.

The right of a party to prevent the finality attaching to the decree obtained by him from being disturbed, is as much a vested right as the right of a party to take up the matter in appeal, and it will not be affected by a new legislation (a).

It is a well-recognised principle in the construction of statutes that it operates only on cases and facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. This is especially applicable where the giving of a retrospective effect would prejudicially affect vested rights or the legal character of past transactions (b). *Subramania Aiyar v. Namasivaya Asari*, 23 M.L.T. 855=85 M.L.J. 377=8 L.W. 374= (1918) M.W.N. 238=45 Ind. Cas. 11.

SEBHAGIRI AIYAR and NAPIER, JJ.

References:—(a) *Colonial Sugar Refining Co. v. Irving*, (1905) A.C. 263, P. (b) *Attorney-General v. Theobald*, 24 Q.B.D. 557, D.; *In re School Board Election for the Parish of Pulborough*, *Burke v. Nutt*, 1 Q.B.D. 737, F.

(137) S. 102—Second appeal—Small Cause suit, Execution of decree in, Order passed in, if subject to. See APPEAL (SECOND APPEAL), No. 10, 46 Ind. Cas. 81=5 O.L.J. 187.

(137-a) S. 102—Small Cause Court decree, Execution of—Order in—Second appeal if lies from. See APPEAL (SECOND APPEAL), No. 6-a, 43 Ind. Cas. 15=3 Pat. L.W. 132.

(138) S. 103—Pre-emption—Custom—Pre-emptor and vendee co-sharers with vendor—Pre-emptor brother of vendor—Acquiescence—Issue not decided by lower appellate Court—High Court if can decide it. See APPEAL (SECOND APPEAL), No. 2, 16 A.L.J. 779.

(139) S. 104 (2), O. XLIII, r. 1 (j)—Petition by auction-purchaser to set aside sale, dismissal of—Second appeal if lies. See APPEAL (SECOND APPEAL), No. 8, 45 Ind. Cas. 701.

(140) S. 104 (f), Sch. II, Paras 1, 15, 17, 20—Order refusing to file award on private reference, Nature of—Application to file award on private arbitration—Subsequent reference to new arbitrator through Court—Application to file second award—Order setting aside award, if decree—Appeal, if lies. See ARBITRATION, No. 10, 154 P.W.R. 1918.

(140-a) Ss. 107, 151—Power of appellate Court to add for first time party to appeal. See PARTIES TO SUIT, No. 1-o, 3 Pat. L.J. 409.

Civ. Pro. Code (1908)—(Continued).

(141) Ss. 107, 151, O. XLI, r. 33. See BEN. ACT XI OF 1869 (LAND REVENUE SALES), No. 5, 23 M.L.T. 147 (F.G.).

(142) S. 109—Remand directing that defendants should be sued not merely in individual capacity but as executor and another defendant as residuary legatee and heir—Final order or decree. See APPEAL (TO PRIVY COUNCIL), No. 4, 22 O.W.N. 640.

(143) S. 109—Remand, after reversal of decision of question of limitation, for retrial on merits—Order of remand if final order. See APPEAL (TO PRIVY COUNCIL), No. 9, 21 O.C. 336.

(141) S. 109 (a)—Order of remand by High Court, when final claim as regards two sets of properties—Judgment final as regards one only—Leave to appeal. See APPEAL (TO PRIVY COUNCIL), No. 7, (1918) M.W.N. 844.

(145) Ss. 109, 110—Cross appeals to High Court—No substantial question of law—Leave to appeal to Privy Council if claimable. See APPEAL (TO PRIVY COUNCIL), No. 1, 16 A.L.J. 864.

(146) Ss. 109 to 112, O. XLIV, r. 1—Jurisdiction of High Court to grant leave to appeal in *forma pauperis* to Privy Council. See PAUPER APPEAL No. 1, 3 Pat. L.J. 179.

(147) Ss. 109 (a), 110, 47—Partition of estate, proceedings for, termination of, before Privy Council decree—No reference in Privy Council decree to shares allotted in such partition proceedings—Application for execution of decrees against shares allotted in partition—Reference to separate suit made by ex-outing Court—Decision of High Court that question should be determined in execution and remand—Order of High Court, if final order from which appeal to Privy Council lies. See APPEAL (TO PRIVY COUNCIL), No. 11, 3 Pat. L.J. 339.

(148 and 149) S. 109, O. XLI, r. 23—Dismissal of a suit in the lower Court on a preliminary point—High Court sets the dismissal order aside and remands the case for re trial—Order of remand not 'final' within S. 109, Civ. Pro. Code—Leave to appeal to Privy Council.

An order of the High Court setting aside the decision of a subordinate Court that the trial of the suit was barred by the rule of *res judicata* and remanding the suit for retrial on the merits, is an ordinary order of remand which does not decide any of the questions in dispute between the parties except that the suit is not barred by the rule of *res judicata* and the order is not 'final' within the meaning of S. 109, Civ. Pro. Code, in respect of which leave to appeal to the Privy Council can be granted. *G.B. Danby v. Tafazul Hussain*, 45 Ind. Cas. 290.

CHAMBER, C.J. and SHARFUDDIN, J.

References:—17 A. 112; 25 A. 699; 15 B. 155, R.; 85 O. 618, Dist.

Civ. Pro. Code (1908)—(Continued).

(149-a) S. 109, O. XLI, r. 23—Order of remand under r. 23, O. XLI—Appeal from, if lies to Privy Council under S. 109. See REMAND, No. 3, 46 Ind. Cas. 922.

(150) S. 110—*Suit by minor against Administrator for accounts—Applicability of S. 10, Limitation Act—Question of law.*

In a suit by a minor against the administrator of the estate claiming that an account might be taken from the administrator of the income and expenditure of the minor's share of the estate during his management, held that there does arise a substantial question of law as to the applicability of S. 10 of the Limitation Act within the meaning of S. 110 of Civ. Pro. Code. *Janandan Prasad Thakur v. Janabhati Thakurain*, 45 Ind. Cas. 182.

MILLER, C.J. and MULLICK, J.

(151) S. 110, O. XLV, r. 5—Value of subject-matter once assessed for assessing pleader's fees—Valuation not to be re-opened, but binding on question of appeal to Privy Council. See APPEAL (TO PRIVY COUNCIL), No. 2, 20 Bom. L.R. 418.

(152) S. 110—Appeal to Privy Council, Certificate of fitness of case for—Value of subject-matter. See APPEAL (TO PRIVY COUNCIL), No. 10, 3 Pat. L.J. 317.

(153) S. 110—Gross income of property not to be taken into consideration—Right method is to deduct Government revenue and other outgoings and to consider net income—Mesne profits of property if can be added to its value to make up appealable amount. See APPEAL (TO PRIVY COUNCIL), No. 12, 3 Pat. L.J. 377.

(154) S. 110. See Nos. 145, 146 and 147, *supra*.

(155) S. 111. See No. 146, *supra*.

(156) S. 112. See No. 146, *supra*.

(156-a) S. 113, O. I, r. 12, O. III, rr. 2, 4 and 6, O. XIII, r. 9, and O. XVIII, r. 1—General power-of-attorney, copy of, produced in Court for verification—Court-fee—Court Fees Act, Sec. I, Art. 8—Construction of Court Fees Act—Case contemplated in O. XIII, r. 9, Fee of 8 annas in respect of. See STAMP ACT (1899), No. 16, 136 P.W.R. 1917.

(157) S. 114. See ENLARGEMENT OF TIME.

(159) S. 114, O. XLI, r. 27, O. XLVII, r. 1—Appellate Court receiving additional evidence—Objection not raised—Happening of event subsequent to decree under appeal—Omission to comply with cl. 2, r. 27, O. XLI—Effect—Review of decree right when made. See PRE-EMPTION, No. 28, 111 P.W.R. 1918.

(159) S. 115. See REVISION.

(160) S. 115—*High Court—Extraordinary jurisdiction—Order passed by District Judge under S. 4 of the Public Accountants' Default Act (XII of 1950).* In re D B. Cooper, 19 Bom. L.R. 926=42 B. L. 119=43 Ind. Cas. 465. See Final Part, 1917, Col. 283.

Civ. Pro. Code (1908)—(Continued).

(161) S. 115—*Return of plaint for presentation to proper Court—Long delay of plaintiff in filing revision petition—Effect.*

Where a plaint was returned by the Court of first instance for presentation to the proper Court and the plaintiff delayed long after the order of return and also after the lower appellate Court's order, held that in view of the long delay, it was not desirable for the High Court to interfere in revision. *Bihari Lal v. Ram Niranjan Das*, 49 Ind. Cas. 470=4 O. L.J. 551.

KANHAIYA LAL, A.J.O.

(162) S. 115—*Interlocutory orders—When can be interfered in revision.*

Interlocutory orders will not be interfered with in revision unless for the most cogent reasons and in order to prevent otherwise irreparable injury. *Maung Po Hlaik v. Maung Sein Bu*, 43 Ind. Cas. 684.

PARLETT, J.

References:—29 Ind. Cas. 876=8 L.B.R. 77, F.

(163) S. 115—*Chota Nagpur Tenancy Act, S. 217—Powers of High Court—Revision.* See BEN. ACT VI OF 1908 (CHOTA NAGPUR TENANCY), No. 3, 43 Ind. Cas. 933.

(164) S. 115—*Receiver appointed to recover property—Suit by Receiver to so recover—Adjournment of suit by Court pending trial of suit in which Receiver appointed—Refusal to exercise jurisdiction—Revision lies.* See RECEIVER, No. 5, 8 L.W. 436.

(165) S. 115—*Error of law committed by Court in matter within its jurisdiction—No revision.* See REVISION, No. 2, 16 A.L.J. 441.

(166) S. 115—*Plaint returned by Munsif for presentation to proper Court—Order returning plaint affirmed on appeal—Erroneous decision of question of law—No revision lies.* See REVISION, No. 4, 16 A.L.J. 535.

(167) S. 115—*Mistake as to extent of property sold in execution committed by lower appellate Court—Whether such mistake is exercise of jurisdiction illegally or irregularly—High Court's powers of revision.* See REVISION, No. 12, 22 C.W.N. 627.

(167-a) S. 115—*Revision—Interlocutory orders, Interference with, in.* See REVISION, No. 16-a, 47 Ind. Cas. 676.

(168) Ss. 115, 151, O. XLI, r. 23—*Remand by appellate Court—Refusal to order refund of Court-fees.* See REVISION, No. 10, 20 Bom. L.R. 348.

(169) S. 115 and O. I, r. 10 (2)—*Addition of parties—Power of the High Court to interfere—Government of India Act, 1915, S. 107.*

Where a widow brought a suit as the administratrix to the estate of her deceased husband, her adopted son applied to be made a party plaintiff in the suit, on the ground that

Civ. Pro. Code (1908)—(Continued).

he had been adopted by her to her deceased husband; *Held* that the petitioner had made out a *prima facie* case sufficient to entitle him to be made a party to the suit.

Neither S. 115, Civ. Pro. Code, nor S. 107, the Government of India Act, prevents the interference of the High Court in the matter of addition or substitution of parties. *Jugal Krishna Mullick v. Phul Kumari Dasal*, 44 Ind. Cas. 564.

TRUNON and NEWBOULD, JJ.

Reference:—14 O.W.N. 793, F.

(170) S. 115, O. XX, r. 12—*Partition suit—Profits after filing of plaint—Failure of notice of enquiry—Effect—Revision by High Court.*

Under O. XX, r. 12, the profits, prior to plaint, in a partition suit, should be decreed in the decree which gives possession, i.e., in the final decree; and the profits after it may be the subject of a direction in that decree for an enquiry and of a separate final decree after its conclusion.

The failure to give a clear notice to the opposite party of the enquiry into profits after the filing of plaint, is a material irregularity, which justifies interference of High Court under S. 115, Civ. Pro. Code. *Yenkamamidi Mahalakshamma v. Yenkamamidi Rajamma*, 43 Ind. Cas. 469.

OLDFIELD, J.

(171) S. 115, O. XXI, r. 2—*Action of Court in allowing application to record satisfaction in decree to be withdrawn and in not making enquiry—Material irregularity in exercise of jurisdiction—Revision—Allegation of satisfaction of decree—Burden of proving collusion and fraud of certificate.* See BURDEN OF PROOF, No. 7, 35 M.L.J. 253.

(172) S. 115, O. XXI, r. 58—*Claims to property directed to be sold under mortgage decree if can be entertained or preferred.* See REVISION, No. 23, 58 P.R. 1918.

(173) S. 115, O. XXI, rr. 91, 92—*Persons entitled to rateable distribution not served with notice of application to set aside auction-sale—Order passed cancelling sale if binds such persons.* See REVISION, No. 17, 35 M.L.J. 604.

(173-a) S. 115, O. XXIII, r. 1—*Object of r. 1—Jurisdiction under, Exercise of—Formal defect, Existence of, Necessity of—Withdrawal of suit with permission to bring fresh suit on ground of some legal defects—No finding as to existence of legal defect—High Court, Power of, to interfere with order permitting withdrawal—Revision—Civ. Pro. Code (1908), S. 115, "Case," Meaning of, in.*

The object of O. XXIII, r. 1, Civ. Pro. Code (1908), is not to enable a plaintiff after he has failed to conduct his suit with proper care and diligence, and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid

Civ. Pro. Code (1908)—(Continued).

the result of his previous misconduct of the case and prejudice the opposite party (a).

When allowing a suit to be withdrawn with permission to bring a fresh suit, it is not sufficient for the trial Court to say or suggest that there is a formal defect but that the existence of such a defect is a condition precedent to the exercise of jurisdiction under this rule.

Where a trial Court permitted the withdrawal of a suit on a mortgage bond after merely reciting that the plaintiffs had filed a petition withdrawing the suit on the ground that some legal defects had occurred in the suit and that there was defect of parties and where it was found that no legal defect had been set out in the plaintiff's petition nor did the trial Court find as a fact that any specific defect existed:

Held that the High Court had power to interfere with such an order in the exercise of its revisional jurisdiction under S. 115, Civ. Pro. Code (1908), and set aside the order of the trial Court (b).

The word "case" in S. 115 should be understood in its broadest and most ordinary sense unless there are specific reasons for narrowing its meaning (c).

It is within the competence of the High Court to declare a suit instituted afresh, before the High Court could be moved to set aside the order, to be null and void and direct the trial Court to proceed with the suit permitted to be withdrawn from the stage it had reached when the order of permitting the withdrawal was made. *Nathuni Ram v. Moosammatt Shoo Koer*, 3 Pat. L.J. 460=5 Pat. L.W. 104=46 Ind. Cas. 179.

MULLICK and THORNHILL, JJ.

References:—(a) 16 C.L.J. 103, *Ref. to.* (b) 41 C. 632; 18 B. 35; 14 C. 768; 7 A. 661; 11 C.L.J. 45, *Ref. to.* (c) 18 B. 35; 14 C. 768; 7 A. 661, *Ref. to.*

(174) S. 115, O. XXIII, r. 1—*Application to withdraw suit with liberty to bring fresh one granted after close of evidence and during or after arguments—Leave granted if can be disturbed in revision.* See REVISION, No. 3, 16 A.L.J. 495.

(175) S. 115, O. XXIII, r. 1—*Permission to withdraw suit with liberty to bring fresh one—Sufficient grounds—Revision, whether lies.* See REVISION, No. 28, 117 P.W.R. 1918.

(176) S. 115, O. XXXII, r. 4 (2)—*Guardian appointed by competent authority, Power of, to represent minor—Guardian, Appointment of, Discretion of Court, re—Error in appointment—High Court, Interference by—Revision.* See GUARDIAN AND MINOR, No. 4, 46 Ind. Cas. 316.

(177) S. 115, O. XLIV, r. 1—*Rejection of application to appeal in forma pauperis—Subsequent refusal of permission to pay Court-fees on appeal memorandum—Refusal to exercise jurisdiction vested by law.* See REVISION, No. 1, 16 A.L.J. 309.

Civ. Pro. Code (1908)—(Continued).

(178) S. 115. See Nos. 203, 245, 260-a, 363 and 398, *infra*.

(179) S. 133, O. XXVI—Conditions under which witnesses may be examined under commission. See **HINDU LAW (GIFT)**, No. 3, 20 Bom. L.R. 1.

(180) S. 141. See No. 184, *infra*.

(181) S. 144—Pre-emptor entitled to deduct costs from pre-emption price—No need to apply under section. See **PRE-EMPTION**, No. 27, 96 P.W.R. 1918.

(182) S. 144—Application for restitution if application for execution. See **RESTITUTION**, No. 6, 15 P.L.R. 1918.

(183) Ss. 144 and 35 (3)—Interest on costs—Refund by judgment-debtor—Discretion on Court, interference with the exercise of. **Indar Bikram Singh v. Chandriko Bakhsh Singh**, 20 O.C. 327=4 O.L.J. 729=43 Ind. Cas. 337. See Final Part, 1917, Col. 239.

(184) Ss. 144, 141, O. II, r. 2—Application for restitution if a suit or execution or miscellaneous proceeding—Rule of constructive *res judicata*—It applies to such application. See **RESTITUTION**, No. 5, 3 Pat. L.J. 367.

(185) Ss. 144, 151, O. XXI, r. 90—Auction-purchaser in execution sale not party to proceedings to set aside sale or appeal in which it was set aside—Restitution if claimable against auction-purchaser. See **RESTITUTION**, No. 1, 41 M. 467.

(186) S. 144. See Nos. 74 and 75, *supra*.

(187) S. 145—Security for stay of execution given outside the Court—If section applicable to execution against such surety.

S. 145, Civ. Pro. Code, is limited by its terms to surety bonds taken through Court and cannot apply to bonds taken by a judgment-creditor outside Court.

Case law reviewed. **Subbaraya Pillai v. Sathanasantha Pandaram**, (1918) M.W.N. 764=8 L.W. 507.

SADASIVA AIYAR and NAPIER, JJ.

Reference:—16 Ind. Cas. 863, Diss.

(188) S. 145—Surety making himself liable for decretal money in case dispute not settled—Suit compromised—Decree based "on compromise, whether can be executed against surety."

In an application for execution of a decree against the sureties of the judgment-debtor, it appeared that the sureties had made themselves liable to pay the decretal amount only in case the defendants did not settle the dispute and judgment was passed against them. But the plaintiff had entered into a compromise with the defendants, according to which the latter had made themselves liable to pay the total amount of money claimed by the plaintiff by certain instalments set forth in the deed of compromise:

Held that, as the decree was passed on the basis of the compromise without any mention

Civ. Pro. Code (1908)—(Continued).

being made of the sureties, it could not be executed against them under the terms of the surety bond. **R. K. Kapur v. Sankardas**, 99 P.W.R. 1918=45 Ind. Cas. 992.

SHAH DIN, J.

(189) S. 145—Execution of surety bond in execution proceedings—Liability of surety continues after termination of that particular execution proceeding. See **SURETY BOND**, No. 1, 22 O.W.N. 919.

(190) S. 146 and O. XXII, r. 10—Assignee of interest, if can appeal—Assignment pending suit—Suit disposed of—No appeal preferred—Application by assignee to be made a party—Devolution in the course of the suit.

The 'proceeding' contemplated by S. 146, Civ. Pro. Code, includes an appeal and the expression "claiming under" is wide enough to cover the case of devolution of interest mentioned in O. XXII, r. 10.

A person obtained an assignment of the suit property pending a suit but did not make himself a party in the suit. The suit having been decided against his assignor:

Held that the assignee was entitled to appeal against the decree.

O. XXII, r. 10, governs only applications made to continue a suit; consequently an application made after the termination of a suit and before an appeal is filed does not come within the rule (a).

Obiter.—Where a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court, is a devolution in the course of the suit which is subsequently tried in the second (proper) Court. **Sitaramaswamy v. Lakshmi Narasimma**, 8 L.W. 21.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) (1917) M.W.N. 306; 18 A. 86, Rel. on.

(191) S. 146, O. XXII, r. 10—Suit filed first in inferior Court—Return of plaint for presentation to superior Court—Transfer of property by defendant during pendency of suit in first Court—Suit decreed against defendant—Omission by defendant to appeal—Transferee's right to apply for leave to appeal and to appeal against decree. See **APPEAL (GENERAL)**, No. 3, 41 M. 510.

(192) S. 146. See No. 368, *infra*.

(193) S. 148, O. IX, r. 13—Selling aside ex parte decree—Direction to pay costs not complied with in time—Extension of time—Jurisdiction—Revision or appeal. **Chandra Govindan v. Palaniappa Govindan**, (1917) M.W.N. 870=23 M.L.T. 7. See Final Part, 1917, Col. 241.

(194) S. 150. See No. 54, *supra*.

(195) S. 151—Court, Inherent power of—Delay, whether can be excused, where second

Civ. Pro. Code (1908)—(Continued).

application for leave to appeal to Privy Council barred by limitation—First application rejected on ground of disqualification. See APPEAL (TO PRIVY COUNCIL), No. 5, 46 Ind. Cas. 68.

(196) S. 151—Execution sale—Auction-purchaser, Summary proceeding for refund of purchase-money taken out by, Liability of person not party to purchase, Determination of—Jurisdiction of Court. See AUCTION-PURCHASER, No. 4, 46 Ind. Cas. 275.

(197) S. 151—Inherent power to order consolidation of appeals. See CONSOLIDATION (OF APPEALS), 34 M.L.J. 279.

(197-a) S. 151, Inherent power of High Court under, to order refund of excess Court-fee paid on a memorandum of appeal. See COURT-FEES, No. 3, 3 Pat. L.J. 452.

(197-b) S. 151—High Court, Inherent power of, under—Interference when its decree is being wrongly executed. See HIGH COURT, POWERS OF, No. 2, 3 Pat. L.J. 485.

(197-c) S. 151—Inherent power of Court to revive pre-emption suit dismissed on loss of title to property qualifying for right of pre-emption. See PRE-EMPTION, No. 14-a, 47 Ind. Cas. 137.

(198) S. 151—Suit by undischarged insolvent—Security for costs if can be demanded of him under inherent powers. See SECURITY FOR COSTS, 22 C.W.N. 1018.

(198-a) S. 151, O. IX—O. IX, Provisions of, Applicability of, to execution proceedings—Execution application, Dismissal of, for default—Restoration of, under O. IX, or S. 151—Court executing decree, jurisdiction of, to go into merits when decree-holder absent—Decision, Binding nature of. See EXECUTION PROCEEDINGS, No. 3, 47 Ind. Cas. 154.

(199) S. 151, O. IX, rr. 9 and 13, O. XXI, r. 100—Party not bound by decree, claim under r. 100, O. XXI—Dismissal of claim for default—Rehearing of claim under O. IX, r. 9—Proceedings in suits apply to applications for claims under O. XXI, r. 100—Nature of such claim applications.

An application under O. XXI, r. 100, being in the nature of a summary suit to which the provisions of the Code as to trial of suits would apply, (a) a party not bound by a decree can, under O. IX, r. 9, obtain a rehearing of a claim under O. XXI, r. 100, dismissed for default (b). Satya Narain Lall v. Govind Sahay, 3 Pat. L.J. 250—4 Pat. L.W. 102.

ROE and JWALA PRASAD, JJ.

References:—(a) 17 A. 106, R. (b) 19 C.W.N. 768; 37 M. 464, F.; 21 C.W.N. 769; 41 C. 1, R.

(200) S. 151, O. XLIII, rr. 23, 25—Inherent power of appellate Court to remand, independently of provisions re appeal in Civ. Pro. Code. See REMAND, No. 14, 3 Pat. L.J. 263.

(201) S. 151. See Nos. 75, 76, 141, 168, 185, *supra*.

Civ. Pro. Code (1908)—(Continued).

(201-a) S. 151, O. XLV, r. 4—Appeals to Privy Council, Consolidation of, under r. 4—High Court, Power of, under S. 151 to consolidate, in other cases. See APPEAL (TO PRIVY COUNCIL), No. 12-a, 3 Pat. L.J. 446.

(201-b) S. 151. See No. 140-a, *supra*.

(202) S. 152—Clerical mistakes and accidental slips in the Court's decree or order—Appeal therefrom pending in a superior Court—Court which committed the error, if entitled to rectify—Proper Court for amendment in such cases, what is.

A Court has jurisdiction to correct any clerical error or accidental slip occurring in its own order notwithstanding the pendency of an appeal therefrom in a superior Court.

The proper Court to correct clerical errors in a decree or order is the Court in which the errors were made and not the Court wherein at the time of the prayer for amendment, an appeal from the decree or order is pending. Muthu Bhattar v. Mrithunjaya Bhattar, 7 L.W. 8—44 Ind. Cas. 248.

SPENCER, J.

(203) Ss. 152, 115—Application to amend consent order for examination of accounts—Jurisdiction of Court to annul order itself—Revision of such order, if lies. See REVISION, Nos. 30 and 31, 9 L.B.R. 263.

(204) S. 152—O. XLI, rr. 17, 11 (1)—Dismissal of decree appealed from for default—Effect.

Dismissal of an appeal under O. XLI, r. 11 (1), amounts to an adjudication, confirming the decree of the lower Court. But this principle cannot be extended to the case of a dismissal of an appeal for default. Daulat v. Rajaram, 43 Ind. Cas. 360.

MITRA, A.J.C.

(204-a) O. I, rr. 1 and 8—Suit by leading mirasidar in respect of common forest land—Declaration, injunction, damages and scheme prayed for—Only 19 out of 200 mirasidars objecting—Plaintiff, if may be allowed to represent all or unobjecting mirasidars only—Combination of claims if permissible—Possibility of scheme involving partition—Whether a valid objection to frame of suit.

In a suit brought by a leading mirasidar as trustee in management of certain forest land on behalf of the other mirasidars against the defendants, some of the mirasidars, for having trespassed on the forest and removed a quantity of forest produce, the reliefs prayed for were declarations, an injunction, damages measured by the value of the produce received and if necessary a scheme for future management and an order was passed under O. I, r. 8, Civ. Pro. Code, granting leave to the plaintiff to sue as representing those of his fellow mirasidars who have not opposed his application. On objection taken to the order on the ground that the suit should be framed in accordance with O. I, r. 2, Civ. Pro. Code,

Civ. Pro. Code (1908)—(Continued).

and a representative suit cannot be brought for damages:

Held (i) that the order was right and the suit was properly constituted as regards all the reliefs claimed except damages (a); and

(ii) that even as regards the relief of damages, the plaint might be regarded as a combination of claims under O. I, r. 1, and in that view, the suit was not open to objection. Where only 19 out of 200 mirasidars, objected to a suit brought by a leading mirasidar in respect of property common to them all and even the 19, in their objection, merely referred to some others not specified as showing objections:

Held (i) that the discretion of the Court below in giving the plaintiff permission to represent all unobjecting mirasidars was rightly exercised; and

(ii) that the lower Court should not have limited the plaintiff's representation to those who did not oppose the grant of leave but should have permitted him to sue as representing all who had not been made or did not apply to be made parties to the suit.

The objection that in such a suit a scheme of management involving a partition of property among the various mirasidars may be framed is a matter for the defendants to object when one is proposed and not at the inception of the suit. *Katha Pillai v. Katakasundaram Pillai*, 8 L.W. 160=24 M.L.T. 20=(1918) M.W.N. 794=45 Ind. Cas. 428.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—*Duke of Bedford v. Ellis*, (1901) A. C. 1, F.; *Markt and Co., Ltd. v. Knight Steamship Co., Ltd.*, (1910) 2 K.B. 1021, R.

(205) O. I, r. 3; O. XXIII, r. 1—*Multifariousness*—*Dismissal of suit*—*Withdrawal of suit in second appeal*. *Afzal Shah v. Lachmi Narain*, 15 A.L.J. 809=40 A. 7. See Final Part, 1917, Col. 245.

(206) O. I, r. 3. See No. 199, *supra*.

(207) O. I, r. 8—*Representative suit to establish public right*—*Payment into Court of amount necessary for service of notice of suit*—*Notice not served*—*Adjudication on merits, if permissible*. See REPRESENTATIVE SUIT, No. 1, 42 Ind. Cas. 543.

(207-a) O. I, r. 5. See No. 204-a, *supra*.

(208) O. I, r. 10—*Administration suit*—*Dispute as to original plaintiff's right to share*—*No dispute as to right of a defendant to such share*—*Right of such defendant to be made plaintiff*. See ADMINISTRATION SUIT, (1918) M.W.N. 929.

(209) O. I, r. 10 (2)—*Addition of parties*—*Rent suit by landlord against one of the heirs of original tenant*—*Whether the addition of other heirs as parties is proper*.

A landlord instituted a rent suit against one of the heirs of the original tenant. Heirs other than the defendant applied to be added as parties to the suit. *Held* that though they

Civ. Pro. Code (1908)—(Continued).

were not strictly necessary parties to the suit, it cannot be said that the original Courts have exercised their discretion improperly by adding the co-sharer tenants of the holding as parties to the suit. *Guru Prasanna Lahiri v. Samiruddin Sarkar*, 44 Ind. Cas. 465.

TEUNON and NEWBOULD, JJ.

Reference:—12 O.L.J. 267, *Appr.*

(210) O. I, r. 10 (2). See No. 169, *supra*.

(210-a) O. I, r. 12. See No. 156-a, *supra*.

(211) O. II, r. 2—*Scope and effect of—Res judicata*—*No decision on merits in previous suit*—*Construction*—*Leave to withdraw suit with liberty to bring a fresh suit on payment of costs*.

One K executed a mortgage in favour of R in 1892. In 1898 K granted a power-of-attorney to R to facilitate the collection of rents. Under the power-of-attorney, R was to pay K a certain sum and appropriate the balance towards the mortgage. The mortgagor brought a suit for cancellation of the power-of-attorney and for accounts. The suit was dismissed on the ground that the remedy was by a suit for redemption. K now brought the present suit for redemption. It was contended that the suit was barred under O. II, r. 2, Civ. Pro. Code.

Held that O. II, r. 2, did not bar the present suit for redemption.

O. II, r. 2 of the Civ. Pro. Code, bars a subsequent suit only when the cause of action in the subsequent suit is the same as in the previous suit. It does not apply where the cause of action in the subsequent suit could also have been made the subject of litigation in the former suit. In such a case, the second suit is not barred under O. II, r. 2.

Where a former suit is brought either on a non-existent cause of action or upon a false cause of action, that will not bar the institution of a suit upon the true cause of action.

Where the matter has not been heard and finally decided on the merits, there can be no bar of *res judicata*.

An order granting permission to withdraw a suit ran as follows—"Leave to withdraw with liberty to bring a fresh suit on payment of defendant's costs here and below within two months."

Held, that the payment of costs was not a condition precedent to the institution of the suit within two months. *Dasarathy Naidu v. Palala Kumaramull Raja*, 7 L.W. 557=24 M.L.T. 311=(1918) M.W.N. 427=45 Ind. Cas. 969.

AYLING and SESHAGIRI AIYAR, JJ.

(212) O. II, r. 2, *Effect of—Suit brought in ignorance of all rights*.

A person is not deteriorously affected by the provisions of O. II, r. 2, Civ. Pro. Code, if, at the time he brought his former suit, he was not in a position to know all his rights. *Ram Khelawan v. Jaskaran*, 21 O.C. 307.

STUART, A.J.C.

Civ. Pro. Code (1908)—(Continued):

(213) O. II, r. 2—Provision in mortgage for execution of lease—Lease and mortgage executed on same day—Provision for realisation of interest made by lease—Suit for rent on lease merely—Suit for mortgage money barred. See RELINQUISHMENT OF PORTION OF CLAIM, No. 3, 69 P.R. 1918.

(214) O. II, r. 2—Suit for refund of money paid in excess of mortgage-debt, Dismissal of—Subsequent suit for redemption barred under r. 2; See RELINQUISHMENT OF PORTION OF CLAIM, No. 4, 119 P.R. 1918.

(215) O. II, r. 2—Defendant seeking to plead bar of relinquishment—Proof, not mere allegation, necessary. See RES JUDICATA, No. 44, 192 P.W.R. 1918.

(216) O. II, r. 2; See Nos. 32, 184, *supra*, and No. 455, *infra*.

(217) O. II, r. 2; O. VII, r. 10—Suit by assignee of equitable mortgage praying for personal decree against his mortgagor and for mortgage decree against his mortgagor's mortgagor—Subsequent prayer for amendment of plaint by striking out prayer for mortgage decree—Property mortgaged outside jurisdiction—Order returning plaint for institution in proper Court if the only order—Amendment prayed for if allowable. See RELINQUISHMENT OF PORTION OF CLAIM, No. 5, 9 L.B.R. 275.

(218) O. II, r. 2; O. XXXIV, r. 1—First suit only against some mortgagees—Subsequent suit against others—Maintainability. See RELINQUISHMENT OF PORTION OF CLAIM, No. 1, 8 L.W. 152.

(219) O. II, r. 2 (2)—Suit for specific performance of agreement to lease—Prayer for possession not made—Decree directing execution of lease deed—Subsequent suit for possession if barred. See RELINQUISHMENT OF PORTION OF CLAIM, No. 2, 14 N.L.R. 176.

(220) O. II, r. 4—Suit for partition of immoveables, moveables and funds of joint family business—Suit if bad for misjoinder. See COURT FEES ACT, No. 17, 22 C.W.N. 669.

(221) O. II, rr. 6 and 7—Suit in the alternative to recover possession of land on foot of partition or for joint possession—No objection in Courts below for exclusion of one cause of action—Objection as to misjoinder if may be raised in second appeal. See MISJOINDER OF CAUSES OF ACTION, No. 1, 40 Ind. Cas. 462.

(222) O. II, r. 7. See No. 221, *supra*.

(223) O. III, r. 1; O. VI, r. 14—*Plaint signed by authorised agent—Act II of 1901 (Agra Tenancy)*, S. 193 (e). *Amir-un-Nissa v. Ram Charan Das*, 31 Ind. Cas. 869=22 C.W.N. 143. See Final Part, 1916, Col. 395.

(224) O. III, r. 1; O. IX, r. 9—Appearance of plaintiff, Necessity of, when pleader instructed to appear—Dismissal of suit in presence of pleader, if for default—Review. See REVIEW, No. 5, 46 Ind. Cas. 492.

Civ. Pro. Code (1908)—(Continued):

(225) O. III, r. 1 and O. IX, r. 12—*Party, when bound to attend in person—Consequence of non-appearance*. *Yalguntathammal v. Vallammal*, 6 L.W. 337=(1917) M.W.N. 748=41 M. 266. See Final Part, 1917, Col. 251.

(226) O. III, r. 2—Recognised agent of party under power-of-attorney—Right of such agent to conduct principal's case in Court by examining and cross-examining witnesses and addressing Court. See RECOGNISED AGENT, No. 1, U.B.R. (1918), 3rd Qr., 24.

(226-a) O. III, r. 2. See No. 156-a, *supra*.

(226-b) O. III, r. 4. See No. 156-a, *supra*.

(226-c) O. III, r. 6. See No. 156-a, *supra*.

(227) O. V, rr. 6, 19 and O. IX, r. 13—Duly served in O. V, r. 19, Meaning of. See LIMITATION ACT (1908), No. 200, 42 Ind. Cas. 611.

(228) O. V, rr. 10 and 17—Service of summons, Rules re—Delivery or tender of summons to defendant, Presumption arising from—Non-compliance with formalities, Effect of. See SERVICE OF SUMMONS, 46 Ind. Cas. 277.

(229) O. V, r. 15; O. IX, r. 9—Service of summons on *munim* of firm—Whether service on member of family. See DISMISSAL FOR DEFAULT, No. 1, 106 P.W.R. 1918.

(230) O. V, rr. 16 and 17—Delivery of copy to defendant but no acknowledgment endorsed by him—Service if proper under rr. 16 and 17. See SUMMONS, No. 1, 99 P.R. 1918.

(231) O. V, r. 17—*Defendant refusing to accept service—Ex parte proceedings, validity of—Time for compliance with summons, Sufficiency of*.

In a suit for dissolution of partnership and rendition of accounts, the defendant was summoned for the 3rd June, 1916, which date having subsequently been declared a Court holiday, that date was changed to the 15th June. It appeared from the affidavit of the serving officer that the defendant refused to accept service of the summons which was, therefore, affixed to the outer door of his dwelling. The defendant having failed to appear on the date fixed, the Court granted an *ex parte* preliminary decree to the plaintiff and directed the defendant to file a true and full account of the partnership by the 20th June. Notice of this was served on the defendant on the 18th. The defendant had in the meantime made an application on the 17th for setting aside the *ex parte* decree, which was eventually dismissed on the 3rd July and a final decree was passed in favour of the plaintiff on the basis of the accounts filed by him. The defendant then applied to set aside the final decree, and this application having also been dismissed, he appealed to the Chief Court:

Held, (1) that inasmuch as the defendant refused to accept service of the notice although it was read out to him and he was repeatedly asked to receive it, and as he did not categorically deny the facts stated by the process-server

Civ. Pro. Code (1908)—(Continued).

in his affidavit, the Court was justified in proceeding *ex parte* against the defendant :

(2) that inasmuch as the notice calling on the defendant to file a statement of accounts was not served on him till the 18th June 1916, he was justified in asking the Court to allow him sufficient time for a proper rendition of accounts and further time should have been granted to him for the purpose ;

(8) that the statement of accounts filed by the plaintiff not having been properly proved and not supported by any independent evidence, a final decree could not be passed in favour of the plaintiff on the strength of a statement of accounts of this description. *Radha Kishen v. Tirath Ram*, 41 P.L.R. 1918=31 P.W.R. 1918=43 Ind. Cas. 718.

RATTIGAN, C.J. and SHAH DIN, J.

(332) O. V. r. 17—*Scope and application of rule—Legal service of summons, what is.*

A plaint was filed on 1-11-1917, when summonses for settlement of issues were ordered for 12-11-1917. On 12-11-1917 the summons was returned with an endorsement, dated 6-11-1917, that the defendant, who resided in the same place as that where the trial Court was situated, was not found, that his daughter said he had gone out and that the summons had been affixed to the house. The process-server made an affidavit to that effect and the Court passed an *ex parte* decree. *Held* that the *ex parte* must be set aside as O. V. r. 17, was not complied with either in the letter or the spirit, due and reasonable diligence not having been used to find the defendant. Before service like this can be effected, it must be shewn that proper efforts have been made to find out when and where the defendant is likely to be found. It is not sufficient for the serving officer to go to his house in a perfunctory way, and, because he has not been found there, to affix a copy of the summons on the outer door of his house. The return must show that there was no other person on whom service could be made, that the summons was affixed on the outer door or some other conspicuous part of the house, and that the house was one in which the defendant ordinarily resided, or carried on business or personally worked for gain. *Maung Maung Than v. L.K.S.M. Somasundaram Chetty*, U.B.R. (1918), 4th Qr. 129=50 Ind. Cas. 666.

SAUNDERS, J.C.

References :—U.B.R. (1892-1896) II, 362 ; 19 C. 201, F.

(333) O. V. r. 17—Power of Court to allow amendment after adjournment of case for arguments. See *PLEADINGS*, No. 8, 113 P.W.R. 1918.

(334) O. V. r. 17. See Nos. 228 and 230, *supra*.

(335) O. V. r. 19—O. IX, r. 18—*Mode of service of summons—Ex parte decree—When to set aside—Rights of defendant.*

Civ. Pro. Code (1908)—(Continued).

A defendant could not be said to have been "duly served" until an order had been made by the Court declaring that the summons had been "duly served" and such an order ought to be obtained as soon as possible after the summons is returned by the serving officer.

Under O. IX, r. 18, a defendant, unless the summons has been duly served upon him, is entitled as of right to have the *ex parte* decree set aside. *Champat Singh v. Mahabir Pershad*, 43 Ind. Cas. 632.

RICHARDS, C.J. and BANERJI, J.

Reference :—24 A. 302, R.

(236) O. V. r. 19. See No. 227, *supra*.

(236-a) O. VI, r. 4—Undue influence, Particulars of, Failure to give under—Mortgagor also denying execution of mortgage-bond—Undue influence, Question of, cannot be raised and decided. See *UNDUE INFLUENCE*, No. 2, 47 Ind. Cas. 11.

(237) O. VI, r. 7—Pleadings, Amendment of, after case closed for judgment. See *PLEADINGS*, No. 5, 45 Ind. Cas. 894.

(238) O. VI, r. 14—*Signature of plaint authorised by a man in jail—Validity of signature—Jail Regulations, breach of—Whether cause of action destroyed—Practice—Professional misconduct—Mixing up of questions of—Decision of case.*

Jail Regulations and Manuals have the force of law but they cannot override or alter the general law. A plaint signed or a suit authorised by a man in jail is just as good as any other plaint or suit, however many Jail Regulations are broken. The breach of Jail Regulations by the prisoner, his pleader or friends cannot destroy a cause of action and the Court should not enter into the question whether permission of Jail authorities had been given or not.

A person in jail who is unable to sign a plaint may authorise some other person under O. VI, r. 14, to sign it for him and the plaint so signed will be a valid plaint (a).

The object of Courts is to decide the right of parties and not to punish them for mistakes which they make in the conduct of their case by deciding otherwise than in accordance with their rights.

If a Court thinks that there has been any breach of professional etiquette, or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case, it should decide the merits and reserve such question for further consideration after the disposal of the suit. *Bhagshar Nath v. Emperor*, 16 A.L.J. 64=40 A. 147=19 Or. L.J. 865=44 Ind. Cas. 28.

WALSH, J.

References :—(a) 22 A. 55, R. ; *Croffer v. Smith*, (1884) 26 Ch. D. 700, R.

(239) O. VI, r. 14. See No. 228, *supra*.

(239-a) O. VI, r. 16—General principles of framing pleadings and rights of parties and

Civ. Pro. Code (1908)—(Continued).

powers of Courts—Suit for possession—Denial by plaintiff of execution of deed of wakt alleged to have been executed by her, suggesting practice of fraud and undue influence—Pleadings if inconsistent. See PLEADINGS, No. 1-a, 40 Ind. Cas. 488.

(289-b) O. VI, r. 17—Amendments of pleadings—Principles governing the grant of amendments.

An amendment of pleadings should ordinarily be allowed, provided the opposite party is not taken by surprise, nor precluded from adducing evidence nor from raising the necessary issues.

Where a plaintiff is agitating only a technical claim or where the character of the suit is likely to be altered, or where there has been an inordinate delay in asking for amendment, the Court will be justified in refusing to grant an amendment.

The main considerations to be borne in mind are that multiplicity of suits should be avoided and the interests of substantial justice should be advanced. *Ramasami Reddy v. Ganga Reddi*, 45 Ind. Cas. 649.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—37 Ind. Cas. 914, *Appr.*; *Weldon v. Neal*, (1887) 19 Q.B.D. 394, *Dist.*; 11 M.I.A. 468, *Appr.*; 27 M.L.J. 25, *Diss.*; 26 M.L.J. 83; 36 M. 378, *Appr.*

(240) O. VI, r. 17—Amendment of plaint so as to include cause of action arising subsequent to suit—Power of Court to allow. See HINDU LAW (ADOPTION), No. 11, 7 L.W. 335.

(241) O. VI, r. 17—Suit against dead person—Amendment of pleadings. See PLEADINGS, No. 2, 42 Ind. Cas. 589.

(241-a) O. VI, r. 17; O. XXIII, r. 1—Amendment of pleadings or withdrawal of suit in second appeal if allowed. See AMENDMENT OF PLAINT, No. 4, 47 Ind. Cas. 908.

(242) O. VII, r. 6—Construction of, to be liberal and reasonable—Ground of exemption from limitation law—Leave to amend plaint for stating such ground. See AMENDMENT OF PLAINT, No. 2, 116 F.A.B. 1918.

(243) O. VII, r. 10; O. XXII, r. 1, cl. 2—Gross under-valuation of suit item—Liberty to file fresh plaint if can be given. See WITHDRAWAL OF SUIT, No. 3, 35 M.L.J. 27.

(244) O. VII, r. 10; O. XXII, r. (1) (3) (b)—Other sufficient ground, meaning of—Gross under-valuation of one of suit items—Permission to withdraw claim as to that item—Grant of such permission whether judicial exercise of discretion—Power of Court under such circumstances. See WITHDRAWAL OF SUIT, No. 3, 35 M.L.J. 27.

(245) O. VII, r. 10; O. XLIII, r. 1, S. 115—Rent suit in Revenue Court—Order by District Court directing plaint to be presented to Civil Court as proper Court—Appeal against order if lies to High Court—Revision if lies. See APPEAL (SECOND APPEAL), No. 11, 34 M.L.J. 309.

Civ. Pro. Code (1908)—(Continued).

(246) O. VII, r. 10. See No. 217, *supra*.

(247) O. VII, rr. 14, 18—Document not filed with plaint—Subsequent production of the document—Rejection by Court, whether proper.

Where a document was not filed with the plaint, as required by O. VII, r. 14, and the Court refused to accept it in evidence, when it was produced subsequently, held that the rejection of the document by the Court was not proper or judicial exercise of the discretion conferred by r. 18 of the order. *Jogendra Kumar Ghose v. Ananda Chandra Mozumdar*, 44 Ind. Cas. 21.

RICHARDSON and BEACHCROFT, JJ.

References:—13 O.W.N. 797; 8 B. 377, *Appr.*

(248) O. VII, r. 18. See No. 247, *supra*.

(248-a) O. VIII, r. 2—Written statement, Special rule of limitation not pleaded in, as required by—Appellate Court, if can dismiss suit as barred by special rule of limitation. See APPELLATE COURT, JURISDICTION OF, 46 Ind. Cas. 787.

(249) O. VIII, r. 2—Limitation to be specially pleaded. See LIMITATION, No. 2, 28 C.L.J. 316.

(250) O. VIII, r. 5—Discretion of Court to require proof of due attestation in spite of admission of execution. See MORTGAGE (GENERAL), No. 13, (1918) M.W.N. 858.

(251) O. VIII, r. 5—Plaint, allegation of title in—Written statement. No denial as to title in—Effect. See PLEADINGS, No. 4, 45 Ind. Cas. 578.

(252) O. VIII, r. 5—Scope of—Suit on mortgage against minor—Omission to object to propriety of execution of mortgage deed—Decree—Right to raise objection, Waiver of. See PLEADINGS, No. 7, 35 M.L.J. 372.

(252-a) O. IX. See No. 198-a, *supra*.

(253) O. IX, rr. 3 and 4—Dismissal of suit—Right of appeal—Restoration of suit.

Held that no appeal lies against an order made under O. IX, r. 4, and the Court is not entitled indirectly to allow an appeal which is not given expressly by the Code.

Held that the fact that a case had been previously dismissed for default, is not a good ground for not restoring the case on another occasion. *Ramji Das v. Bhagwan Das*, 43 Ind. Cas. 180.

RICHARDS, C.J. and BANERJI, J.

(254) O. IX, rr. 3, 6; O. XVII, rr. 2, 3—One plaintiff out of six present—Appearing plaintiff general attorney for the others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on same cause of action barred.

On the date fixed for hearing of a suit, the defendants and their pleader did not appear. The plaintiffs' pleader also did not appear, but one of the plaintiffs was present. He was also

Civ. Pro. Code (1908)—(Continued).

the general attorney of the other plaintiffs. The Court dismissed the suit for "want of prosecution." The plaintiffs thereupon applied to have the dismissal set aside, but the application was refused on the ground that their remedy was by means of a separate suit. They consequently brought a second suit claiming the same reliefs as they had claimed in the former suit:—*Held* that, inasmuch as all the plaintiffs must be deemed to have been present through the plaintiff who had appeared and was general attorney for the non-appearing plaintiffs, the suit must be regarded as having been dismissed on the merits, and not under O. IX, r. 3 of the Code of Civil Procedure and a second suit on the same cause of action was therefore barred. *Hlogo Singh v. Jhurl Singh*, 16 A.L.J. 462=40 A. 590=46 Ind. Cas. 390.

BANERJI and ABDUL RAOOF, JJ.

(355) O. IX, r. 4—Application for execution of decree—Dismissal for default—No application to cancel *ex parte* order—Appeal against dismissal, if competent. See APPEAL (GENERAL), No. 34, 64 P.L.R. 1918.

(356) O. IX, r. 4—Refusal to set aside dismissal of suit—Appeal. See APPEAL (GENERAL), No. 8, 27 C.L.J. 117.

(357) O. IX, r. 4. See No. 353, *supra*.

(357-a) O. IX, r. 6. See No. 354, *supra*.

(358) O. IX, r. 8—Plaintiff present in Court—No further step taken—Suit dismissed—Suit not dismissed for default.

Where at least one of the plaintiffs was present when the case was taken up for hearing and the case was dismissed as the plaintiff took no further step in the case, it cannot be held that the suit was dismissed for default. *Jageshar Rai v. Rallal Bahadur*, 45 Ind. Cas. 189.

CHAPMAN and ATKINSON, JJ.

(359) O. IX, rr. 8 and 9—Plaintiff and defendant present in Court—Non-prosecution by plaintiff of case—Record of dismissal of suit for default—Application for restoration of case—Refusal to restore—Revision—Appeal.

A suit in which the plaintiff appeared on call, but did not prosecute the case, though the defendant was ready was dismissed for default. An application for restoration of the case was rejected on the ground that the Court had no jurisdiction to make any order restoring it.

Held, that, the first order dismissing the suit was an order made under Civ. Pro. Code, O. IX, r. 8, that the matter should be dealt with under O. IX, r. 9, and that the rejection of the restoration petition was a refusal to exercise jurisdiction justifying interference in revision.

Where the plaintiff is not appearing in person, and his pleader is absent, the presence of the plaintiff in Court is not an appearance. *Lalji Babu v. Lachmi Narain Singh*, 3 Pat. L.J. 355=37 Ind. Cas. 27.

ROE and JWALA PRASAD, JJ.

References:—30 M. 274, F.; 33 B. 475, Not F.

Civ. Pro. Code (1908)—(Continued).

(260) O. IX, rr. 8, 9, Sob. II, cls. 14, 16—Reference of suit to arbitration—Non-appearance of plaintiff before arbitrator—Dismissal by arbitrator for default—Decree on award in spite of plaintiff's excuse—Application to set aside decree, if competent—Remission of award to arbitrator for reconsideration is proper course. See ARBITRATION, No. 5, 22 O.W.N. 293.

(260-a) O. IX, r. 9, S. 115—Application to set aside order dismissing suit for default of appearance should be disposed of on evidence—Revision.

Where an application by the plaintiff for postponement of a case fixed for peremptory disposal on the ground that the plaintiff was ill and unable to attend Court having been refused, the suit was called on for disposal and dismissed for default; and an application to set aside the order under O. IX, r. 9 of the Civ. Pro. Code was, without recording evidence, summarily dismissed, the Judge observing that he would not go over the same grounds again.

Held, in revision under S. 115 of the Civ. Pro. Code, that an application under O. IX, r. 9, must be disposed of on the evidence after it has been properly recorded, whether the procedure of the Court be to take the evidence *viva voce* or by affidavit. It could not be disposed of on the view of the Judge merely as to whether the application was *bona fide* or not. *Durga Kanta Sarma v. Anto Koch*, 22 C.W.N. 671=42 Ind. Cas. 649.

FLETCHER and NEWBOULD, JJ.

(261) O. IX, r. 9; O. XVII, r. 3—Application for adjournment of suit on ground of plaintiff's illness—Application rejected and suit dismissed—Petition to restore suit—Duty of the Court—O. XVII, r. 3, inapplicable. See RESTORATION OF SUIT, No. 1, 42 Ind. Cas. 649.

(262) O. IX, r. 9. See Nos. 199, 224, 229, 259 and 260, *supra* and Nos. 369 and 523-a, *infra*.

(263) O. IX, r. 12. See No. 225, *supra*.

(263-a) O. IX, r. 13 and XVII, rr. 2, 3—O. IX, r. 13, 4th possibility of, to case decided under O. XVII, r. 2, 3—Decision of case under the 2 or 3, question of, a question of fact—Pleader sitting in Court with instructions only to ask for time, if appearance.

O. IX, r. 13 of Civ. Pro. Code (1908), does not apply to cases decided under O. XVII, r. 3. The question is one of fact, whether or not a case was decided under O. XVII, r. 3. It does not make a decision, a decision under O. XVII, r. 3, that the Court should have erroneously imagined that it was acting under that rule.

Where, in a suit for partition, an application for adjournment for purposes of a compromise was made in good faith jointly by the plaintiff and the defendant, and after rejection of the application, the hearing of the plaintiff and his witness being proceeded with, a decision was made in the absence of the defendant, the pleader for the defendant having declined to

Civ. Pro. Code (1908)—(Continued).

cross-examine saying he had no instructions save to ask for time:

Held that this was a proceeding under O. XVII, r. 2, not under r. 3 and O. IX, r. 13, therefore applied to it.

Where a pleader has instructions only to ask for time, his sitting in the Court room is not an appearance (a). *Ram Kishun Lal v. Jata-dhari Lal*, 3 Pat. L.J. 481=46 Ind. Cas. 488.

ROE and COUTTS, JJ.

Reference:—(a) 34 C. 403, F.

(264) O. IX, r. 13—Application to set aside compromise decree passed *ex parte*, Refusal of—Appeal if lies against order of refusal. See APPEAL (GENERAL), No. 13, 22 O.W.N. 571.

(265) O. IX, r. 13—*Ex parte* final decree passed in mortgage suit—Application to set aside such final decree, if lies. See SETTING ASIDE EX PARTE DECREE, No. 1, 35 M.L.J. 375.

(266) O. IX, r. 13, O. XVII, r. 2—Minor, *Ex parte* decree against, Remedy in case of. See GUARDIAN AND MINOR, No. 3, 45 Ind. Cas. 892.

(267) O. IX, r. 13, O. XLI, rr. 4, 33—Decree against two defendants, one after contest, the other *ex parte*—Appeal by first—Petition under O. IX, r. 13, by second before appellate Court—If appellate Court can set aside *ex parte* decree. *Ramachandra Mallaya v. Narayana Hegade*, (1917) M.W.N. 808=22 M.L.T. 480=7 L.W. 10. See Final Part, 1917, Col. 257.

(268) O. IX, r. 13; O. XLIII, r. 1, cl. (d)—Conditional order for dismissal of application to set aside *ex parte* decree—If appeal lies. *Venkatasami Naidu v. Shunmugam Pillai*, (1917) M.W.N. 815=6 L.W. 757=43 Ind. Cas. 1. See Final Part, 1917, Col. 257.

(269) O. IX, r. 13. See Nos. 193, 199, 227 and 235, *supra*.

(270) O. X, r. 4—Parties when to be required to personally attend. See APPEARANCE, No. 2, 21 O.C. 252.

(271) O. XI, rr. 6, 7, 21—Suit for breach of contract—Irrelevant interrogatories—Duty of Court to adjudicate whether interrogatories irrelevant. See INTERROGATORIES, No. 1, 16 A.L.J. 762.

(272) O. XI, r. 7. See No. 271, *supra*.

(273) O. XI, r. 21—Failure by defendant to press for production of documents at the trial—Effect. See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), No. 1, 43 Ind. Cas. 71.

(274) O. XI, r. 21. See No. 271, *supra*.

(275) O. XII, r. 6—Defendant's partial admission of claim—Plaintiff's right to judgment on such admission, scope of. See ADMISSION, No. 1, 44 C. 188.

Civ. Pro. Code (1908)—(Continued).

(276) O. XIII, r. 1—Documentary evidence not produced at first hearing of suit—Admissibility at subsequent stage of suit. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 35 M.L.J. 422.

(277) O. XIII, rr. 1, 2; O. XVII, r. 1—*Hearing of the suit—Evidence, production of—Delay, if reasonable—Discretion—Appellate Court, interference by—Hindu Law—Mitakshara—Adoption—Daughter's daughter's son.*

O. XVII, r. 1 of the Civ. Pro. Code, which gives the Court power to adjourn the hearing of a suit draws a distinction between the hearing of the suit and the hearing of evidence.

Held therefore that the trial Court had, under O. XVII, r. 2 of the Civ. Pro. Code, a discretion to refuse to accept the documentary evidence on which the plaintiffs intended to rely, and which were not produced before the date fixed for the hearing of the suit, on which date the parties had been directed to produce their documentary evidence, though the hearing resulted only in an adjournment.

Held also, that the appellate Court ought not to interfere with the discretion exercised by the trial Court on the question whether the delay in producing the documentary evidence was or was not unreasonable, unless it is satisfied that the trial Court exercised the discretion improperly or capriciously.

Under the Mitakshara, the adoption of a daughter's daughter's son in a family coming from Rajputana in Western India, is valid (a). *Biwanath Sinha v. Kallacharan Sinha*, 27 C. L.J. 119=46 Ind. Cas. 246.

CHITTY and RICHARDSON, JJ.

References:—(a) 32 B. 619; 36 B. 533; 39 B. 410, F.

(278) O. XIII, r. 2. See No. 277, *supra*.

(279) O. XIII, r. 4—Records produced as evidence—Admission of document in evidence—Legal requirements.

The Judge is required to endorse with his own hand a statement on each document that it was proved against or admitted by the person against whom it was used, and, until this has been done, the document is not to be filed as part of the record. Failure to do this is illegal as well as slovenly and embarrassing. The mere production of a document and the handing it over to some officer of the Court to put it on the file is not sufficient. *Shyam Lal v. Ram Charan*, 43 Ind. Cas. 525.

KNOX, J.

Reference:—38 A. 627, F.

(279-a) O. XIII, r. 9. See No. 156-a, *supra*.

(280) O. XIII, r. 10—Obtaining of copies of records entailing heavy expenses and causing considerable delay—Court neglecting to consider such matters—Effect. See REMAND, No. 1, 43 Ind. Cas. 57.

Civ. Pro. Code (1908)—(Continued).

(281) O. XVI, r. 20—*Suit, dismissal of—Document, Production of—Refusal to exhibit as evidence.*

R. 20 of O. XVI of the Code of Civil Procedure authorises the Court to pronounce judgment against a person who, without lawful excuse, declines to produce a document then and there in his possession or power; if the document is produced, the requirement of the law is fulfilled.

Where the plaintiff, who was present in Court, on being asked by Court, produced a certified copy of a judgment in his possession but declined to exhibit it as evidence in the case:

Held, that the Court could not pass an order for dismissal of the suit under O. XVI, r. 20 of the Code of Civil Procedure. *Radhanath v. Uttam*, 28 C.L.J. 24=46 Ind. Cas. 879.

MOOKERJEE and WALMSLEY, JJ.

(282) O. XVII, r. 1. See No. 277, *supra*.

(283) O. XVII, r. 1 (i)—Adjournment, Power of Court to grant—Order refusing adjournment, if appealable—Appellate Court, Discretion of, to interfere with such order, See ADJOURNMENT, No. 1, 45 Ind. Cas. 898.

(284) O. XVII, r. 2—Date fixed for appointing Commissioner—Failure of defendant to appear—Case if can be set down for *ex parte* hearing. See APPEARANCE, No. 1, 42 Ind. Cas. 537.

(285) O. XVII, rr. 2 and 3—Dismissal for default—R. 2 applicable when no sufficient material is on record—Costs—Plaintiff's liability.

When there is no sufficient material on record to enable the Court to proceed to judgment, r. 2, O. XVII, should be applied. (34 C. 235; 95 C. 1023; 41 C. 956; 41 P.R. 1880, *F.*)

On account of dilatory tactics of the plaintiff, he was ordered to pay costs incurred by the defendant up to the date of the Chief Court's judgment.

There is a conflict of authority among High Courts whether O. XVII, r. 2 or r. 3 should be applied where there is material on record to enable the Court to pronounce judgment, but there is no such conflict when such material does not exist. *Hargopal v. Harish Chaudar*, 66 P.L.R. 1918=169 P.W.R. 1918=47 Ind. Cas. 536.

SHADI LAL and WILBERFORCE, JJ.

(286) O. XVII, rr. 2, 3, *Scope and meaning of.*

The correct rule is to treat O. XVII, r. 3, as applying only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were given time to do.

Rule 2 empowers the Court to apply to adjourned hearings the same procedure which is to be followed in case of failure of the parties to attend at the first hearing. It however expressly empowers the Court, instead of

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following the said procedure, to pass such other order as it thinks fit. There is nothing to prevent the Court from adjourning the case to another day if the parties fail to appear and the Court thinks that in the interests of justice it should not dismiss the suit or decree *ex parte*.

Per Chief Justice.—There is no conflict at all between the two rules and the case *Chandramathi Ammal v. Narayanaswamy Aiyar* (33 M. 241) goes too far in so far as it decides that the two rules must be read as mutually exclusive. *Pratiyadhi Bhayankaram Pichamma v. Komiseti Sricamulu*, 23 M.L.T. 1=34 M.L.J. 24=(1918) M.W.N. 92=41 M. 286=43 Ind. Cas. 566 (F.B.).

WALLIS, C.J., SADASIVA AİYAR and KUMARASWAMI SASTRI, JJ.

References:—34 M. 97, *overruled*; 33 M. 241, *Affir.*

(287) O. XVII, r. 2. See Nos. 5, 76, 77, 78, 254, 263-a and 266, *supra*.

(288) O. XVII, r. 3—Bench appeal—Failure to pay translation and copying fees—Dismissal of appeal for default, if proper. See APPEAL (GENERAL), No. 24, 9 L.B.R. 266.

(289) O. XVII, r. 3. See Nos. 5, 254, 261, 263-a and 265, *supra*.

(289-a) O. XVIII, r. 1. See No. 156-a, *supra*.

(290) O. XVIII, r. 5—Deposition not read over in the presence of Judge and signed by witness—Admissibility—*Indian Evidence Act* (I of 1872), Ss. 80 and 91.

Where the deposition of a witness properly recorded by the presiding officer of the Court, but read over to the witness by a clerk in a room next to the Court but not in the actual presence and hearing of the Judge, was put in evidence in a petition to sanction the prosecution of the witness for perjury.

Held that the deposition was admissible in evidence against the deponent.

Held, further, that the irregularities in recording the deposition were matters affecting the value to be attached to the statements therein contained but not its admissibility.

S. 80, Evidence Act, does not make such a deposition inadmissible in evidence nor does S. 91 of the Evidence Act prohibit the admission of such a deposition.

The requirements of O. XVIII, r. 5 of the Civ. Pro. Code are satisfied if the deposition is read over in such a place that the witness can invoke the aid of the Judge to enable him to make any corrections that may be necessary. The Judge is not required to do more than exercise a general supervision over the reading over of the deposition (a). *A. L. Meango v. J. C. Baylah*, 7 L.W. 435=24 M.L.T. 242=(1918) M.W.N. 289=45 Ind. Cas. 507.

AYLING and PHILLIPS, JJ.

References:—(a) 9 M.L.T. 825; *Rel. on*; 34 M. 141; 36 C. 808, *Appr.*; 36 C. 955, B.

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(290-a) O. XX, r. 2. See No. 88-a, *supra*.

(291) O. XX, r. 6. See No. 450, *supra*.

(292) O. XX, r. 12—"Decree," meaning of—*Mesne profits, calculation of*.

Where a decree is appealed against and the Privy Council dismisses the appeal, the decree which is executed is the decree of the Privy Council, and the terms of the decree can be ascertained by enquiring into what the decree of the original Court was.

The "decree," for the purposes of O. XX, r. 12, must be taken to mean the Privy Council decree.

Where an original Court gave plaintiffs a decree for possession and mesne profits from the date of decree up to the date of delivery of possession and the original decree is affirmed by the Privy Council, and the plaintiffs obtained delivery of possession subsequent to the passing of the Privy Council decree, *held* that the calculation for mesne profits should be made from the date of the original decree up to the date when possession was delivered. *Nand Kumar Singh v. Bilas Ram Marwarl*, 42 Ind. Cas. 855=3 Pat. L.J. 116=4 Pat. L.W. 100.

CHAPMAN and JWAHA PRASAD, JJ.

Reference:—23 A. 152, F.

(293) O. XX, r. 12—Affirmation by Privy Council of first Court's decree awarding mesne profits—Decree to be executed is Privy Council decree which adopted first Court's dates. See *MESNE PROFITS*, No. 2, 3 Pat. L.J. 116.

(294) O. XX, r. 12. See No. 170, *supra*.

(295) O. XX, r. 13—Priority of Crown debts—Administration under decree of Court, Rules governing—English mortgages, Rights of. See *CROWN DEBTS*, No. 1, 22 C.W.N. 793.

(296) O. XX, r. 15—Partnership, suit for dissolution of, Decree—Time from which partnership to be declared dissolved—Discretion of Court, Nature of. See *PARTNERSHIP*, No. 1, 45 Ind. Cas. 727.

(296-a) O. XXI, rr. 2, 15 and 16—*Execution*
—*Joint decree in favour of four partners*—*Two of them releasing their interests in the partnership in favour of the other two*—*Assignment by the latter*—*Rights of assignee*—*Absence of consideration for assignment immaterial*—*Certificate of payment by two partners*—*Effect of*—*Formal record by the Court not indispensable*.

A joint decree for money was passed in favour of four partners, two of whom released their interests in the partnership concern in favour of the other two who assigned the decree to the petitioner-appellant. The releasee, however, did not expressly refer to the decree.

The assignee applied for recognition of assignment and execution.

In a previous application by him, notices were issued to all the four partners as well as the judgment-debtor; and the two partners who had released their interests stated in their

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counter-petition that the decree had been satisfied prior to the assignment by payment to all the partners, which was duly entered in the partnership accounts.

The Courts below found that there was no consideration for the assignment and that the decree had been discharged; and holding that the certificates of the two partners were legally valid certificates of satisfaction, refused to recognise the assignment.

Held, in Second Appeal, *Sadasiva Aiyar, J.*

(1) that the absence of consideration for the assignment is immaterial and will not deprive the assignee of his right to execute the decree, provided the assignment is not a sham transaction (a);

(2) that a certificate under O. XXI, r. 2, need not be in any particular form and even the mention of payment to the Court at any time by the decree-holder, as for example, in his execution petition is a sufficient certificate (b);

(3) that the words "certified or recorded" in sub-r. 3 cannot be read as "certified and recorded" when there is a certificate by the decree-holder under sub-r. (1) and the mere neglect by the Court of the duty expressly imposed on it under sub-r. (1) cannot prejudice the judgment-debtor.

The record by the Courts being a formal matter may be made at any time or even be treated as having been made (c);

(4) that the certificates given by some of the joint decree-holders cannot bind the others and that the certificates given in this case by plaintiffs 1 and 2 cannot be treated by the executing Court as having discharged the decree passed in favour of all the four plaintiffs unless plaintiffs 3 and 4 had given authority, express or implied, to plaintiffs 1 and 2 to certify satisfaction (d);

(5) that the releases had not the effect of vesting the entire rights in the decree in the plaintiffs 3 and 4 alone and it must be taken that, notwithstanding the releases, the decree was alive in favour of all the four decree-holders, so far as the executing Court was concerned; and the transfer by the plaintiffs 3 and 4 alone conveyed no title to any interest in the decree-debt in favour of the petitioner (e); and

(6) that even if the petitioner by reason of the deed he obtained from plaintiffs 3 and 4 secured the status of a joint decree-holder he ought to have applied for the execution of the decree for the benefit of himself and the other plaintiffs under O. XXI, r. 15.

Napier, J.—Where payment has been made to all the partners, certificates of some of them would be legally valid certificates of satisfaction.

The real question is whether there had in fact been a discharge and whether the fact of discharge had been brought to the notice of the Court for the purpose of staying further proceedings.

To allow one of several joint decree-holders who have already received payment to come in and apply for execution after the other decree-holders have certified discharge of the debt

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would open the door to fraud and defeat the object of the section which is not aimed at the prevention of payment out of Court but merely requires notice of it, so as to prevent execution issuing. *Thimma Reddy v. Subba Reddy*, (1918) M.W.N. 507.

SADASIVA AIYAR and NAPIER, JJ.

References:—(a) (1918) M.W.N. 226, *F.* (b) (1916) 1 M.W.N. 471, *R.* (c) 25 M. 431; 26 A. 334; 41 M. 251, *R.*; 13 A.L.J. 887, *Not F.* (d) (1916) 1 M.W.N. 471, *Appl.* (e) (1916) 1 M.W.N. 471, *R.*

(297) O. XXI, r. 2—Payment out of Court not certified if keeps alive decree—Payment by minor's brother while their mother is alive if payment by lawful guardian. See **EXECUTION OF DECREE**, No. 1, 45 C. 630.

(298) O. XXI, r. 2—Duty of decree-holder—Breach of duty—Fraud—Effect. See **EXECUTION OF DECREE**, No. 19, 46 Ind. Cas. 222.

(299) O. XXI, r. 2—Certificate of payment by decree-holder, if judgment-debtor can question—Time for certifying payment—Duty of Court—Value of certificates of payment for or against decree-holder or judgment-debtor. See **PAYMENT OUT OF COURT**, No. 1, 21 O.C. 161.

(300) O. XXI, r. 2. See Nos. 79, 171 and 296-a, *supra*, and No. 435, *infra*.

(301) O. XXI, r. 7. See No. 10, *supra*.

(301-a) O. XXI, r. 8 and Ss. 38, 39—*Execution—Decree transferred for execution—Attachment and sale of property—Property ceasing to be situated within the jurisdiction—Transfer of jurisdiction.*

Pending proceedings are transferred by the operation of law on the occurrence of any change in territorial jurisdiction over the property with which they are concerned. Hence though a Court to which a decree is sent for execution may have had jurisdiction over the property against which it is sought to be executed yet when such property is taken out of its jurisdiction that Court forfeits its competence to keep such property under attachment or to sell it from that date. The reference in S. 38 to "the Court to which the decrees is sent" must be read with reference to a sending authorised by law, that is subject to S. 39. The meaning of the words "Court of competent jurisdiction," in O. XXI, r. 8, considered. *Vijvanadhan Chetty v. Murugappa Chetty*, 33 M.L.J. 750 = 23 M.L.T. 24 = (1918) M.W.N. 132 = 43 Ind. Cas. 79.

ABDUR RAHIM and OLDFIELD, JJ.

(302) O. XXI, r. 11—Application in accordance with section—Copy of decree not filed—Time given for filing copy—Copy not filed—Application struck off—Subsequent application within three years of first—Limitation saved. See **LIMITATION ACT (1908)**, No. 215, 16 A.L.J. 87.

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(303) O. XXI, rr. 11, 17 (2)—Execution application—Eyes of limitation not adjudicated upon—*Res judicata*. See **EXECUTION OF DECREE**, No. 17, 44 Ind. Cas. 220.

(303-a) O. XXI, rr. 13, 17 (2)—*Execution, application for—Supplementary list of properties, whether allowable after registration of application—Fresh application, whether can be treated as continuation of previous application.*

An application for execution, which was on the face of it, in accordance with law, was subsequently, on objection taken by the judgment-debtor, discovered to be defective, inasmuch as against the properties specified in the list furnished under O. XXI, r. 13 of the Civ. Pro. Code, proceedings could not be taken. The decree-holder then applied to the Court requesting it to accept a further and supplementary list of the properties and praying that execution should proceed by attachment and sale of those properties:

Held, that, even after the admission and registration of the original application for execution, it was open to the decree-holder to ask the Court to proceed against the properties specified in his supplementary list, which should be taken as part of the original application under the provisions of O. XXI, r. 7 (2), Civ. Pro. Code, or, if a fresh application were at all necessary, that the application should be treated as one made in continuation of the application first presented, so that no question of limitation could arise in the case. *Gnanendra Kumar Rai Choudhuri v. Shayama Sunder Jen*, 44 Ind. Cas. 553.

TEUNON and NEWBOULD, JJ.

References:—17 C. 631; 22 Ind. Cas. 337 = 18 C.L.J. 538, *Dist.*

(304) O. XXI, rr. 13, 17 (2)—Defect in first list of properties for execution—Supplementary list filed—Subsequent list to be treated as valid and continuation of first under O. XXI, r. 17 (2); See **EXECUTION OF DECREE**, No. 12, 22 C.W.N. 540.

(304-a) O. XXI, r. 14—Decree for sale of mortgaged property—Application for sale, Applicability of rule to. See **ATTACHMENT**, No. 1-a, 47 Ind. Cas. 639.

(305) O. XXI, r. 15—*Death of one of several joint decree-holders—Execution by surviving decree-holders—Procedure.*

On the death of one of several joint decree-holders the surviving decree-holders are entitled, under O. XXI, r. 15, to execute the decree for their own benefit and for the benefit of the legal representatives of the deceased joint decree-holder.

In executing a decree under O. XXI, r. 15, if a person claims to be the heir of a deceased joint decree-holder and is brought on the record and raises the question as to his heirship, the proper course for the Court is to proceed to enquire into the matter and dispose

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of it according to law. *Korada Bottamma v. Korada Audanarayana*, 43 Ind. Cas. 1008.

ABDUR RAHIM and OLDFIELD, JJ.

(306) O. XXI, rr. 15, 19 (b)—*Decree where-by both parties are entitled to recover sums of money each from the other—Execution proceedings—Duty of Court.*

Where a co-sharer landlord brought a suit for rent against tenants and made his co-sharers parties to the suit, as *pro forma* defendants, and decree was passed in favour of plaintiffs and the *pro forma* defendants and where the *pro forma* defendants applied for execution of the decree. *Held* that under O. XXI, r. 19 (b), both parties being entitled to recover sums of money each from the other, the respective amounts due from each to the other should first have been ascertained and execution thereafter proceeded for the difference, the Court, under the provisions of O. XXI, r. 15, making such order, as it deemed necessary for protecting the interests of the person who had not joined in the application. *Ram Lal Mandal v. Ashtosh Mandal*, 44 Ind. Cas. 445.

TEUNON and NEWBOULD, JJ.

(306-a) O. XXI, r. 15. See No. 296-a, *supra*.

(307) O. XXI, r. 16—*Assignment of decree in the name of another—Rights of assignee to execute decree—Benamidar assignee, whether entitled to execution—Benamidar's right of action in general—Assignee decree-holder's application for execution—Matters to be inquired into by the Court.*

Per *Sadasiva Aiyar, J.*—An assignee of a decree who is a benamidar of the real decree-holder assignor, is entitled to execute the decree in his own name, at least in cases where no title to immoveable property is in question (a).

Also per *Sadasiva Aiyar, J.*—(Obiter). The observations of the Privy Council in some cases that the benamidar has no title must be confined to cases where the benamidar sets up a title as against the real owner so as not to allow a third person to delay or evade performing his own undoubted obligations to the real owner of a right or to the benamidar who is suing to enforce the right, even where the suit is in ejectment by the benamidar for possession of immoveable property.

Per *Bakewell, J.*—The question how far a person to whom a decree is transferred by assignment can execute the decree is concluded by the provisions of O. XXI, r. 16, Civ. Pro. Code, and the only matter for inquiry by the Court in an application for execution by such assignee is any objection by the assignor or the debtor to the execution of the assignment.

Per *Sadasiva Aiyar, J.*—Where it is practically admitted that the real beneficiary owner of a decree purposely assigned the decree in the name of another in order to enable the latter to execute the decree for the benefit of the former, the latter (benamidar) would be entitled to execute the decree, the assignment constituting

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him a trustee for the former (b). *Chellam Chettai v. Seeni Chetti*, 7 L.W. 301 = (1918) M.W.N. 226 = 43 Ind. Cas. 801.

SADASIVA AIYAR and BAKEWELL, JJ.

References:—(a) 37 A. 414, F.; (1911) 1 M. W.N. 5, Dis; 37 A. 113; 35 M. 659; 15 M. 267; 21 M. 353, R. (b) 30 M. 245, F.; 8 M.L. T. 377, R.

(308) O. XXI, r. 16—Rule governs Ss. 200 and 201 of Companies Act—Order of payment under S. 186, Companies Act—Applications for its execution to be made to what Court. See EXECUTION OF DECREE, No. 28, 92 P.R. 1918.

(308-a) O. XXI, r. 16. See No. 296-a, *supra*.

(309) O. XXI, rr. 17 and 22—Application of. See EXECUTION SALE, No. 2, 45 Ind. Cas. 699.

(310) O. XXI, r. 17 (2). See Nos. 303, 303-a and 304, *supra*.

(311) O. XXI, rr. 18, 19 — *Principles explained — Original decree merges in appellate decree.*

When an appeal has been decided, then the original decree is merged in the appellate decree and, for purposes of execution as for purposes of amendment, the appellate decree, even when it merely affirms the original decree, is to be taken as embodying and superseding that decree.

In a partition suit, the plaintiff obtained a decree for a sum of Rs. 2,130 in the original Court and he preferred an appeal against that decree which was dismissed and he was directed to pay Rs. 506 to respondent by way of costs; subsequently he applied for leave to appeal to the Privy Council and the application was dismissed and the applicant was directed to pay to respondent Rs. 80 as costs of the application.

When the respondent applied to realize the amount awarded to him by way of costs, *held* that, on the principles embodied in O. XXI, rr. 18 and 19 and in S. 151 of the Code, execution in respect of the smaller sum should have been refused, when the respondent was liable to pay the appellant a larger sum in the course of the same litigation. *Bepin Behari Sen v. Krishna Behari Sen*, 45 Ind. Cas. 246.

TEUNON and NEWBOULD, JJ.

(312) O. XXI, r. 19. See No. 311, *supra*.

(313) O. XXI, r. 19 (b). See No. 306, *supra*.

(314) O. XXI, r. 22. See No. 309, *supra*.

(315) O. XXI, r. 32—Decree for injunction—Disobedience to decree—Enforcement through police. See HEREDITARY OFFICE, No. 1, 16 A.L.J. 700.

(316) O. XXI, r. 32 (5)—Breach of prohibitory injunction, Remedy for, it by separate suit or execution proceedings. See INJUNCTION, No. 1, 22 O.W.N. 851.

(317) O. XXI, r. 35. See No. 80, *supra*.

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- (318) O. XXI, r. 35 (1)—*Execution application for actual possession in a partition decree—Whether maintainable.*

In a partition suit the plaintiff obtained a decree, and in execution of the decree, the decree-holder was given formal possession of the properties allotted to his share. Subsequently he applied to be put into actual possession of the properties.

Held that the decree-holder is entitled to be put into actual possession under O. XXI, r. 35, sub-r. (1) of the Civ. Pro. Code. *Khetra Mohan Kundu v. Jogendrachandra Kundu*, 45 Ind. Cas. 7.

RICHARDSON and BEACHCROFT, JJ.

- (319) O. XXI, r. 43. See No. 101, *supra*.

(320) O. XXI, r. 53—Execution of decrees by attachment of another decree—Rights over attached decree of decree-holder attaching same. See APPEAL (GENERAL), No. 36, 86 P.W.R. 1918.

- (321) O. XXI, r. 53. See Nos. 68 and 81, *supra*.

- (322) O. XXI, r. 53 (6). See No. 78, *supra*.

(323) O. XXI, r. 54—Setting aside sale, on ground of irregularity in publishing proclamation of sale—Right of fishery over stream extending 30 to 40 miles and flowing over 138 villages, Sale of—Affixing copy of order in only one village, if irregular procedure. See EXECUTION SALE, No. 1-a, 44 Ind. Cas. 412.

(324) O. XXI, r. 57—Attachment prior to execution sale—Cancellation of sale for default not due to decree-holder—Prior attachment if revives for purposes of fresh execution application. See ATTACHMENT, No. 5, 3 Pat. L.J. 310.

- (325) O. XXI, r. 58—*No suit brought within one year from such dismissal—Order conclusive—Decree, execution of—Objection to attachment and sale—Claimant's objection dismissed for want of evidence.*

Where an objection under O. XXI, r. 58 of the Civ. Pro. Code, was dismissed because the objector failed to produce any evidence, and no suit was brought to challenge the validity of that order within one year from the date of the order under Art. 11 of Sch. II to the Limitation Act, held that the order had become conclusive.

The only order under O. XXI, r. 59 of the Civ. Pro. Code, upon which the character of finality is impressed is an order made after enquiry. It does not follow, however, that because a claimant does not adduce evidence or is absent, there are no materials before the Court to enable it to enquire into it. *Gokul v. Mohri Bibi*, 40 A. 326—16 A.L.J. 256—44 Ind. Cas. 1005.

PIGGOTT and RAFIQ, JJ.

References:—6 C.L.J. 362, F.; 8 A.L.J. 636, D.

Civ. Pro. Code (1908)—(Continued).

- (326) O. XXI, r. 58—*Claim petition—Whether Court has jurisdiction to grant conditional orders.*

Where a claimant is in possession of property on his own account under title of the conveyance executed in his favour by the original judgment-debtor, the claim should be allowed and allowed unconditionally. But a Court has no jurisdiction to make any conditional order on a claim petition. *Kamala Kantha Sen v. Durga Kumar Sen*, 44 Ind. Cas. 1007.

RICHARDSON and WALMSLEY, JJ.

- (327) O. XXI, rr. 58, 63—*Rejection of claim preferred under r. 58 without investigation for default—Limitation for suit to establish right—Limitation Act (1908), Art. 11.*

R. 63, O. XXI of the present Civ. Pro. Code and Art. 11 of the present Limitation Act are quite general in their terms. All that is now necessary is that a claim should be preferred under r. 58 of O. XXI, Civ. Pro. Code, 1908, and that there should be an order either allowing or rejecting it. The party against whom the order is made may then bring a suit in the language of r. 63 "to establish the right which he claims to the property in dispute" or in the language of Art. 11 "to establish the right which he claims to the property comprised in the order" and the suit must be brought within the year allowed by Art. 11, which is not to be restricted only to those cases in which an investigation had taken place. *Nagendra Lal Chowdhury v. Faut Bhusan Das*, 45 C. 785—44 Ind. Cas. 365.

RICHARDSON and BEACHCROFT, JJ.

References:—15 C. 521; 16 C.W.N. 882; 27 Ind. Cas. 944; 31 M.L.J. 247, R.; 18 C.W.N. 770, Dist.

- (328) O. XXI, rr. 58, 63—Scope and meaning of, explained. See LIMITATION ACT (1908), No. 112, (1918) M.W.N. 598.

- (329) O. XXI, rr. 58, 63—Suit regarding property, claim to which rejected. See SPECIFIC RELIEF ACT, No. 23, 3 Pat. L.J. 182.

- (330) O. XXI, r. 58. See No. 172, *supra*.

- (331) O. XXI, r. 63—*Frame of suit under the order—Collusive transfer and collusive decrees—Person not a party not bound by collusive decrees—His rights to set aside such decrees—Collusive decree, its nature.*

O. XXI, r. 63, does not provide anything about the frame of the suit which is to be instituted under the order nor does the order exclude any particular prayers out of the scope of such suit.

A person who is not a party to the decree and against whose interest a collusive decree has been obtained, is bound by a collusive decree.

A decree-holder can be said to be a person deriving his title from the judgment-debtor. His right to attach property which has been fraudulently conveyed by the judgment-debtor is recognised in law, and he can set aside such

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a fraudulent transfer. He can also set aside a collusive decree.

The fact that a decree was based upon a special oath does not make it a collusive decree.

A decree cannot be said to be collusive even if it were obtained on a sale-deed which was only nominal. *Dhondiram Mangalram v. Ramgopal Kaniram*, 43 Ind. Cas. 960.

MITTRA, A.J.C.

References:—35 O. 202, Dist. C.; 16 B. 608, Appr.

(332) O. XXI, r. 63—*Objection dismissed without investigation—Objection does not come under r. 63—Limitation Act, Sch. I, Art. 11.*

. Where a plaintiff brought an objection to an attachment under O. XXI, r. 62, Civ. Pro. Code, and the objection was dismissed without any investigation, held, that the plaintiff's objection does not come within r. 63, and that the suit does not fall within one year period laid down by Art. 11 of the Limitation Act. *Nanhu v. Malloo*, 44 Ind. Cas. 528.

PRIDEAUX, A.J.C.

References:—81 M. 5; 4 O.W.N. 24; 18 O. P.L.R. 69, Appr.; 32 O. 537; 15 O. 521, R.

(333) O. XXI, r. 63—*Claim to property attached before judgment—Applicability of rule to such claims. See CLAIM TO ATTACHED PROPERTY, No. 1, 8 L.W. 197.*

(334) O. XXI, r. 63. See LIMITATION ACT (1908), Nos. 115, 7 L.W. 280.

(335) O. XXI, r. 63—*Suit praying for declaration that the attachment of a decree invalid and for substitution of plaintiff's name in the place of a benami decree-holder—Whether suit comes within terms of S. 42, Specific Relief Act. See SPECIFIC RELIEF ACT, No. 23, 43 Ind. Cas. 396.*

(336) O. XXI, r. 63—*Property attached in execution of decree—Suit for declaration that property not saleable—Value for jurisdiction. See VALUATION OF SUIT, No. 1, 16 A.L.J. 374.*

(337) O. XXI, r. 63. See Nos. 327—329, *supra*.

(338) O. XXI, r. 66—*Issue of proclamation sale before disposal of objections of a judgment-debtor—Validity.*

There are no words in O. XXI, r. 66, suggesting that the proclamation of sale cannot be issued until after the objections of the judgment-debtor have been disposed of. *Harendra Nath Banerji v. Hari Charan Datt*, 43 Ind. Cas. 450.

FLETCHER and NEWBOULD, JJ.

Reference:—15 C.W.N. 713, R.

(339) O. XXI, r. 66—*Failure to give notice to judgment-debtor—Effect.*

The provision for notice under O. XXI, r. 66, is directory and not mandatory. It does not seem to have been enacted for the benefit of the judgment-debtor but with a view to ascertaining the exact rights which should be set forth

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in the proclamation for sale. Notice to the judgment-debtor is not a condition precedent to the sale. Failure to give notice is an irregularity which if it had in any way prejudiced the judgment-debtor might have entitled him to have the sale set aside. *Krishnaji v. Ballram*, 44 Ind. Cas. 252.

MITTRA, A.J.C.

Reference:—42 O. 897, F.

(339-a) O. XXI, r. 66, Sale proclamation under Order settling terms of, Appeal it lies from. See APPEAL (GENERAL), No. 23-b, 46 Ind. Cas. 564.

(340) O. XXI, rr. 71, 84—*Right to reconveyance of property by payment on or before a certain date sold in Court—Auction-purchaser's default to pay balance of purchase-money—Expiry of the date of payment in the meanwhile—Right to reconveyance consequently gone—Property described as the right to redeem a prior mortgage and resold—First purchaser, if liable, to pay deficiency on resale—Substantial identity of the property on resale, meaning of—Changes in the condition of or title to the property occurring in the natural course of things—Whether offend against the substantial identity—Court auction-purchaser—Position of, between date of sale and date of confirmation—Interest of the purchaser prior to confirmation—Whether sufficient to prevent a forfeiture.*

The right to a reconveyance of a certain taluk in the Zamindari of Kalahasti from one M who had obtained a sale-deed thereof in his favour, by payment of six lakhs to him on or before 31st August 1914, under a *varthamanam* of even date with the sale executed to the vendor by M was put up for sale in Court auction and purchased by the appellant on 25th August 1914, on which date he paid also the fourth of the price under O. XXI, r. 84, Civ. Pro. Code. On his failure to pay the remaining three-fourths within fifteen days under r. 85 of O. XXI, Civ. Pro. Code, the taluk was resold but as 31st August 1914 had already passed, the property was described as the right to redeem the mortgage to M for six lakhs and the sale and *varthamanam* were also recited in the proclamation. On an application to recover the deficiency in price at the resale, the purchaser in default contended that as there was a substantial difference between the property sold and that resold he was not liable for the deficiency.

Held (1) that there was no substantial difference between the property sold and that resold, (2) that the difference in description, if any, was such as would have attracted a higher bid at the resale and (3) that the purchaser in default was therefore liable for the deficiency (a).

Per *Kumaraswami Sastri, J.*—The reasonable construction to place on O. XXI, r. 71, Civ. Pro. Code, is (4) that the resale should be within a reasonable time after the first sale and

Civ. Pro. Code (1908)—(Continued).

(ii) that the property resold should be substantially the same. Any difference in the condition of the property or the title thereto will not matter provided it is one which would occur in the ordinary course of things having regard either to the nature of the property or the transaction in respect thereof having legal force at the date of the sale or was brought about by the first purchaser's default.

Per *Wallis, C. J.*—O. XXI, r. 71, Civ. Pro. Code, is a salutary provision intended to minimise the hardship from the purchaser's default and Courts should not refuse to give effect to it unless the defaulting purchaser would be substantially prejudiced (b).

Per *Kumaraswami Sastri, J.*—It is a principle of natural justice that a person should be given an opportunity of showing cause before an order adverse to him is passed and though r. 71 of O. XXI, Civ. Pro. Code, does not expressly provide for the issue of a notice to the defaulting purchaser, it is the duty of the Court to give him notice and to hear and decide on his objections before it orders execution against him. The defaulting purchaser shall also have a right of appeal (c).

Also per *Kumaraswami Sastri, J.*—The position of a purchaser in Court auction between the date of a sale and the date of its confirmation is not that of a person who has only an agreement to sell in his favour and a person who has under O. XXI, r. 84, Civ. Pro. Code, been "declared to be the purchaser" by the officer conducting the sale has even before its confirmation sufficient interest in the property to prevent a forfeiture or preserve the title from destruction (d). *Annarajulu Yenkatasehalmayya Garu v. Ramagiri Neelakanta Giree*, 41 M. 474 = 7 L. W. 159 = 23 M.L.T. 9 = 84 M.L.J. 156 = (1918) M.W.N. 121 = 43 Ind. Cas. 685 (F.B.).

WALLIS, C.J., AYLING and KUMARASWAMI SASTRI, JJ.

References:—(a) 16 C. 535; 25 C. 99; 36 B. 329, R. (b) 16 C. 535, D. (c) 6 W.R. (Mis.) 126; 18 M. 439, R. (d) 40 C. 89 (P.C.), R.

(341) O. XXI, r. 72. See No. 107, *supra*.

(342) O. XXI, r. 83. See No. 114, *supra*.

(343) O. XXI, r. 84. See No. 340, *supra*.

(343-a) O. XXI, r. 89, Amount to be deposited under, to set aside execution sale—Rent sale—Amount to be deposited to set aside a—Bengal Tenancy Act (1885), S. 174. See RENT SALE, 47 Ind. Cas. 654.

(344) O. XXI, rr. 89, 91—Court, meaning of—Deposit by judgment-debtor in the treasury—Whether deposit in accordance with rule—Auction sale not set aside—Jurisdiction—Revision.

The word "Court" in rr. 89 and 92 of the Code of Civil Procedure means the Civil Court.

The provisions of r. 89 are an indulgence to a judgment debtor, and an auction-purchaser is entitled to the benefit of his purchase unless

Civ. Pro. Code (1908)—(Continued).

the section has been strictly and completely complied with. Whether or not the section has been so complied with is clearly a question which a Court has jurisdiction to decide, and, in the exercise of such jurisdiction, if the Court has come to an erroneous conclusion, its decision cannot be interfered with in revision by the High Court. Hence, where a judgment-debtor deposited the purchase-money plus five per cent. compensation for payment to the auction-purchaser in the treasury owing to the Civil Court being closed, and the Court below refused to set aside the sale because on the Court re-opening the money had not been withdrawn and re-deposited in the Civil Court, *held* that the Court had exercised its jurisdiction, and even though the decision might be erroneous, it could not be interfered with in revision. *Held*, also, that an appeal by the auction-purchaser lay from an order setting aside a sale. *Fazal Rab v. Manzur Ahmad*, 40 A. 425 = 16 A.L.J. 438 = 45 Ind. Cas. 773.

RICHARDS, C.J. and BANERJI, J.

(345) O. XXI, r. 89. See No. 104, *supra*.

(346) O. XXI, r. 90—Sale in execution—Order for stay obtained by fraud on Court—Effect of such order—Whether sale taking place on date fixed a nullity.

An *ex parte* order for stay of an auction sale was obtained by fraud, and it was subsequently discharged by the Judge who had passed it. Before the *ex parte* order was set aside the sale was held and the property sold. *Held* that the sale was not void. *The Ganges Flour Mills Co., Ltd. v. Shadi Ram*, 16 A.L.J. 46 = 43 Ind. Cas. 656.

RICHARDS, C.J., and BANERJI, J.

(347) O. XXI, r. 90—Non-transferable occupancy holding, sale of, under rent-decree—Right of mortgagee to set aside. *Sallabala Debi v. Nritya Gopal Sen Poddar*, 31 Ind. Cas. 859 = 22 C.W.N. 143. See Final Part, 1916, Col. 435.

(348) O. XXI, r. 90—Execution sale—Irrregularity—Whether sufficient to set aside.

Where a property was sold in execution of a decree and an application was made under O. XXI, r. 90, to set aside the sale, on the ground that there was material irregularity in conducting the sale: *Held* that as there was nothing to warrant the necessary, or at least reasonable, inference that the inadequacy of price, if there were any, was the result of the admitted irregularity, the sale could not be set aside. *Talmuddi Bepari v. Lakpat Bepari*, 45 Ind. Cas. 212.

TEUNON and NEWBOULD, JJ.

Reference:—31 O. 815, F.

(349) O. XXI, r. 90—Insolvency—Receiver—Contract of sale by—Provincial Insolvent

Civ. Pro. Code (1908)—(Continued).

Act (III of 1907), S. 22—Power of District Court.

O. XXI, r. 90 of the Civ. Pro. Code, has no application to a contract of sale entered into by a Receiver under the Provincial Insolvency Act. The District Court can interfere with such a contract only under S. 22, Provincial Insolvency Act, on an application made within 21 days of the contract. The District Judge may in the exercise of his powers of supervision over the Receiver direct him not to complete the sale. *Avanashi Ghetti v. Muthkaruppa Ghetti*, 7 L.W. 406=23 M.L.T. 319=(1918) M.W.N. 345=44 Ind. Cas. 885.

SADASIVA AIYAR and BAKEWELL, JJ.

(350) O. XXI, r. 90, dismissal for default of application under—Civ. Pro. Code, O XXI, r. 89, maintainability of a subsequent application under—Withdrawal of petition, meaning of. *Murlidhar v. Baldeo Singh*, 20 O.C. 329=43 Ind. Cas. 340. See Final Part, 1917, Col. 271.

(351) O. XXI, r. 90, Proviso—Execution sale—Publication of sale, Irregularity in—If sale could be set aside where no substantial injury proved. See EXECUTION SALE, No. 3, 46 Ind. Cas. 84.

(352) O. XXI, r. 90. See Nos. 4, 81-a and 185, *supra*.

(353) O. XXI, rr. 91, 92, 93—Confirmation of sale—Suit by stranger—Sale found invalid—Auction-purchaser's right to refund of purchase money. See REFUND, No. 2, (1919) M.W.N. 655.

(354) O. XXI, r. 91. See No. 173, *supra*.

(355) O. XXI, r. 91—Execution sale and confirmation of sale—Its effect—Title by estoppel.

A decree-holder was allowed to bid at an auction held on a simple money decree and purchased one-third share in the land of judgment-debtor. The sale was confirmed subsequently, the decree-holder accepted the decretal amount from the judgment-debtor and promised to give back the land to him, but no document of transfer was effected. Subsequent to this, the judgment-debtor sold the land to a third person, the present plaintiff. While so, the auction-purchaser's son applied for possession of the property. The plaintiff brought a suit asking for a declaration that the defendant, the auction-purchaser's son, has no right to the property.

Held (1) that the confirmation of sale has made the decree-holder under O. XXI, r. 92, the absolute owner of the property, and (2) that, as his re-sale to judgment-debtor was not effected by registered document, the oral re-conveyance was of no legal effect and he had no title to convey to plaintiff, (3) that there is no such thing as title by estoppel. *Deeba v. Lakman*, 44 Ind. Cas. 978.

BATTEN, A.J.C.

Civ. Pro. Code (1908)—(Continued).

(356) O. XXI, r. 92 (8)—Sale in execution of rent-decree set aside—Declaratory suit, whether maintainable. See BEN. ACT VIII OF 1885 (TENANCY), No. 87, 44 Ind. Cas. 532.

(357) O. XXI, rr. 92, 93—Execution of decree—Purchaser at auction—Transfer of property by auction-purchaser—Vendee deprived of possession—Auction-purchaser refunding money to his vendee—Suit for refund of purchase-money—Sale not set aside—Suit not maintainable.

Certain persons obtained a decree against A. In execution of the decree certain property was attached, and one B came forward with a claim that the property was his and not liable to sale. His claim was disallowed and the property was sold at auction and purchased by S1. S1 sold the property to S2, who obtained possession. In the meantime, B succeeded in his appeal against the dismissal of his suit and in due course ousted S2. S1 had to refund to S2 the money received by him. S1 then transferred his rights to the plaintiffs. The auction-sale had not been set aside. In a suit for refund of the purchase-money, *held* that the suit was not maintainable. *Man Mohan Lal v. Gopi Nath*, 16 A.L.J. 511=46 Ind. Cas. 103.

TUDBALL and ABDUL RAOOF, JJ.

Reference :—39 A. 114, F.

(358) O. XXI, r. 92. See Nos. 102, 173, 344 and 353, *supra*.

(359) O. XXI, r. 93—Execution of decree—Sale in execution—Property sold by auction a second time after a previous sale—Suit by purchaser for refund of purchase-money—Maintainability of suit.

Where, on the date of an auction sale held under the Civ. Pro. Code of 1882, the judgment-debtor had no saleable interest in the property by reason of the fact that the property had been previously sold by auction, the purchasers at the second sale acquired no interest by their purchase and became entitled to maintain a suit for the refund of the money paid by them into Court. *Girdhar Das v. Sidheswar Prasad, Narain Singh*, 40 A. 411=16 A.L.J. 236=41 Ind. Cas. 697.

PIGGOTT and WALSH, JJ.

References :—13 A. 389; 36 A. 529, R. (*vide* 39 A. 114).

(360) O. XXI, r. 93—Suit by purchaser of occupancy holding evicted in execution of landlord's decree to recover purchase money, if maintainable.

The plaintiff purchased an occupancy holding in execution of a decree obtained by the mortgagee of the property and took possession of it; he was sued in ejectment by landlords in whose favour a decree was subsequently made. The plaintiff sued to recover the purchase money with interest :

Civ. Pro. Code (1908)—(Continued).

Held—That, under the present Code of Civil Procedure, the suit was incompetent. *Juramu Mahamad v. Jathi Mahamad*, 22 C.W.N. 760—46 Ind. Cas 789.

N. R. CHATTERJEA and RICHARDSON, JJ.

References:—5 A. 577; 11 M. 269; 22 B. 789; 37 O. 67, *Dist.*; 39 A. 114; 5 I.A. 116; 39 M. 808; 17 M. 228, *R.*; 35 B. 29, *Diss.*

(361) O. XXI, r. 93. See No. 353, *supra*.

(362) O. XXI, r. 95—Application under, if can result in mere general order for delivery. See LIMITATION ACT (1908), No. 204, 7 L.W. 16.

(363) O. XXI, r. 95, Ss. 115, 146—*Revisional jurisdiction of High Court—Another remedy open to applicant—Delivery of possession to transferee from auction-purchaser—Whether transferee may apply for delivery of possession.*

No appeal lies from an order delivering possession under O. XXI, r. 95 of the Civ. Pro. Code, and a Court entertaining an appeal therefrom acts without jurisdiction (a).

Having regard to S. 146 of the Code a transferee from an auction-purchaser is entitled to delivery of possession under O. XXI, r. 95 of the Code.

Ordinarily the High Court does not interfere where another remedy is open to a party, but each case must be judged on its peculiar facts. Where, therefore, in a case there were no complicated questions of fact or law and the applicants were clearly entitled to possession by virtue of their purchase from the auction-purchaser, the High Court interfered in revision with the order dismissing the application for delivery of possession (b). *Budhu Mialr v. Bhagirathi Kuar*, 16 A.L.J. 150=40 A. 316.

BANERJI and TUDBALL, JJ.

References:—(a) 31 A. 82 (F.B.), *Rel. on*. (b) 12 A.L.J. 899, *R.*

(364) O. XXI, r. 95. See Nos. 82 and 83, *supra*.

(365) O. XXI, r. 96—*Symbolical possession, meaning of.*

Symbolical possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under O. XXI, r. 96 of the Code of Civil Procedure and should not be confounded with cases where a party is entitled to actual possession, but obtains only what is called a paper delivery, that is, where he gets no possession at all. *Govindasami Pillai v. Petha Perumal Chetty*, 44 Ind. Cas. 839 (F.B.).

SPENCER, SRINIVASA AIYANGAR and KRISHNAN, JJ.

(366) O. XXI, r. 96—*Formal possession, Effect of, against stranger to decree. See POSSESSION, No. 6, 21 O. C. 70.*

(366-a) O. XXI, r. 96, S. 47—*Execution sale—Lands not included in sale certificate*

Civ. Pro. Code (1908)—(Continued).

put in possession of purchaser—Whether the land can be claimed by separate suit—Nature of order directing delivery of possession—Conversion of suit to execution application.

Under a Court sale, certain lands not included in the sale-certificate were put in possession of a person by an order of the Court. The only Court which can determine whether the lands so delivered were included in the sale-certificate or not, was the Court, which was executing the decree on an application under S. 47 of the Civ. Pro. Code and not by a separate suit.

The order directing delivery of possession to a purchaser under S. 319 of the old Code which corresponds to O. XXI, r. 96 of the present Code, is a judicial order.

A suit cannot be treated as an execution application under S. 47 of the Civ. Pro. Code, where such treatment would prejudice defendant in his plea of limitation. *Kathirayasami Nalcker v. Ramabhadra Naidu*, 45 Ind. Cas. 608.

ABDUR RAHIM and NAPIER, JJ.

References:—10 M.L.T. 527; 13 C.W.N. 694; 35 M. 678, *Appr.*

(367) O. XXI, rr. 97, 98—*Rules relating to sale of property in execution of decree if applicable to sales held by Official Receiver under power conferred on him by Insolvency Act. See PROVINCIAL INSOLVENCY ACT (1907), No. 16, 8 L.W. 136.*

(368) O. XXI, r. 98. See No. 367, *supra*.

(369) O. XXI, r. 100 and O. IX, r. 9—*Application under O. XXI, r. 100—Its nature—Restoration of the application.*

Where a claimant to property attached in execution of a decree to which he was not a party instituted proceedings under O. XXI, r. 100 and failed to appear on the day of hearing and subsequently he made an application, under O. IX, r. 9, for re-hearing.

Held, that the application under O. XXI, r. 100 was in the nature of a summary suit and the provisions of the Civ. Pro. Code did apply. *Satya Narayan Lal v. Gobind Sahay*, 43 Ind. Cas. 951=3 Pat. L.J. 250=4 Pat. L.W. 102.

ROE and JWALA PRASAD, JJ.

References:—19 C.W.N. 758; 37 M. 462, *Appr.*; 21 C.W.N. 769; 18 C.W.N. 349; 17 A. 106 (P.O.), *R.*

(370) O. XXI, rr. 100, 101—*Investigation and order under rules, Nature of—Order to be an adjudication on merits—Dismissal for default or non-prosecution if such order as contemplated by r. 101.*

However short and summary an investigation under O. XXI, r. 100, Civ. Pro. Code, 1908, may be, the order must be based on an adjudication upon the merits of the application, or on opinion on such facts as are before the Court. The Court, under O. XXI, r. 101, must be satisfied as to whether the applicant was in possession or not. A mere dismissal in default or for non-prosecution is not such an order.

Civ. Pro. Code (1908)—(Continued).

The test to find out whether an order is on the merits or not is, not whether the applicant was present or not, but whether there was an investigation and the order passed as the result of that investigation. *Bhlma Rao v. Martand*, 14 N.L.R. 66=45 Ind. Cas. 102.

MITTRA, J.C.

References:—15 O. 521 (P.C.); 6 C.L.J. 362; 34 C. 491; 1 C.W.N. 24, *Rel. on*; 20 W.R. 345; 12 C.L.R. 43; 32 O. 537; 21 W.R. 409, R.

(371) O. XXI, r. 100. See Nos. 83-a, 84, 199, *supra*.

(372) O. XXI, r. 101. See Nos. 84 and 370, *supra*.

(373) O. XXII—Death of residuary legates after applying for grant of administration with copy of will annexed—Right to letters if survives to his son. See *LETTERS OF ADMINISTRATION*, No. 1, 45 O. 862.

(374) O. XXII, r. 1 (2). See No. 243, *supra*.

(375) O. XXII, r. 1 (2) (b). See No. 244, *supra*.

(376) O. XXII, r. 3, (2)—Death of some plaintiffs appellants pending appeal—Appeal if totally abates. See *OCCUPANCY TENURE*, No. 13, 108 P.W.R. 1918.

(377) O. XXII, rr. 3 and 5—*Legal representative of deceased plaintiff—Duty of Court to decide—Finality of order.*

Where a question arises as to who are the legal representatives of a deceased plaintiff, it is obligatory on the Court to decide it.

Where the Court of first instance, without deciding the question, added the rival claimants as legal representatives, and the lower appellate Court called, for a finding on the question and itself decided it, its decision is final and no appeal lies therefrom; nor can the question be agitated in an appeal from the decree.

An appeal does not lie from the decree, where the only question raised in the appeal was the propriety of the order passed under O. XXII, r. 5, *Civ. Pro. Code*. *Subramania Iyer v. Muthu Yalchilinga Mudaliar*, (1918) M.W.N. 198=44 Ind. Cas. 987.

AYLING and PHILLIPS, JJ.

(378) O. XXII, rr. 3, 5—Legal representative impleaded after death of party—Dispute by other side as to legal representative's right—Duty of Court to determine dispute. See *PARTIES TO SUIT*, No. 1, 20 Bom. L.R. 902.

(379) O. XXII, r. 4—Death of respondent—Application for bringing legal representative on record not made within limitation—Appellant living at great distance from respondent—Sufficient cause—Limitation Act, S. 5. See *MORTGAGE (REDEMPTION)*, No. 21, 24 P.L.R. 1918.

(379-a) O. XXII, rr. 4 and 12—Appeal in execution proceedings—Respondent, Death of one, during pendency of—Legal representative

Civ. Pro. Code (1908)—(Continued).

not brought on record—Appeal if abates as against other respondents. See *ABATEMENT OF APPEAL*, No. 3, 46 Ind. Cas. 911.

(380) O. XXII, r. 5—Rival claims to be brought on record as legal representative of deceased plaintiff—Duty of Court to enquire into claim however contentious and prolonged the enquiry may be and to determine who shall be brought on record—Failure to enquire and summary rejection of one of such claims—High Court, not Revenue Board, has jurisdiction to interfere. See *REVISION*, No. 18, 35 M.L.J. 632.

(381) O. XXII, r. 5. See No. 377, *supra*.

(382) O. XXII, r. 6, S. 99—Death of defendant before hearing arguments—Legal representative not brought on record—Judgment pronounced—Judgment and decree *ultra vires*. See *ABATEMENT OF SUIT*, No. 1, 14 N.L.R. 71.

(383) O. XXII, r. 9—Reversioner, Declaratory suit by—Death of plaintiff—*Ex parte* order of abatement—Application by next reversioner to continue suit—Discretion of lower Court in such matters—Limitation. See *HINDU LAW (REVERSIONERS)*, No. 6, (1916) M.W.N.

(384) O. XXII, rr. 9 and 11—Abatement of appeal—Setting aside order of abatement, grounds for. See *ABATEMENT OF APPEAL*, No. 1, 21 O.C. 68.

(385) O. XXII, r. 10—“*Interest*,” meaning of—*Addition of parties—Discretion of Court.*

The “interest” contemplated in O. XXII, r. 10, is any interest which will be vitally affected by the suit. It is clear that the addition of parties under the above rule, is a matter within the discretion of the Court.

Where a plaintiff deliberately delayed in applying for the addition of a party, the Court which rejected the application cannot be said to have exercised its discretion intemperately. *Harihar Prasad v. Gendi Lal*, 43 Ind. Cas. 811.

ROE and IMAM, JJ.

Reference:—38 Ind. Cas. 237, *Appr.*

(386) O. XXII, r. 10—Inapplicability of the rule to an adoption. See *RES JUDICATA*, No. 15, 43 Ind. Cas. 61.

(387) O. XXII, r. 10. See Nos. 190 and 191, *supra*.

(388) O. XXII, r. 11. See No. 391, *supra*.

(388-a) O. XXII, r. 12. See No. 379-a, *supra*.

(388-b) O. XXIII, r. 1—*Withdrawal of suit with permission to bring fresh suit on payment of costs, effect of—Second suit, maintainability of, without payment of costs—Order of withdrawal, form of.*

Where a plaintiff is allowed to withdraw a suit with permission to bring a fresh suit, the payment of the costs of the first suit being

Civ. Pro. Code (1908)—(Continued).

made a condition precedent to the institution of a fresh suit and a second suit is instituted without payment of such costs, the suit is maintainable provided the costs are paid before the suit comes on for trial.

In such cases, until the costs are paid, the permission is not operative and, therefore, there is no withdrawal with liberty to bring a fresh suit, the result being that until there is such a withdrawal, the former suit remains pending and is under S. 10 of the Civ. Pro. Code a bar to the trial of the second.

The order allowing withdrawal of the suit in such cases should limit the time within which costs should be paid and should go on to direct that, on failure to pay costs within that time, the original suit shall stand dismissed with costs. **Kuldip Singh v. Kuldip Choudhuri**, 44 Ind. Cas. 79.

CHAMBER, C.J. and SHARFUDDIN, J.

(389) O. XXIII, r. 1—*Suit, withdrawal of. Leave for—Liberty to bring fresh suit—Judgment, Statement in, on point not raised, but left open, inadvisability of making.*

In a suit brought to recover a jote on the ground that it was a kuemi jote, which was dismissed by the trial Court on the ground of the jote not being kuemi, the trial Court left open the question whether the plaintiffs had acquired an occupancy right. The appellate Court however observed in its judgment, while affirming the decision of the trial Court that if the question of occupancy right had been before the Court, the plaintiff's suit was barred by limitation.

Held, that the question of limitation, just as much as the right of occupancy must be left open, as the plaintiffs might be seriously prejudiced by the judgment made by the lower appellate Court in any subsequent proceeding to enforce the right of occupancy.

Held, also, that the plaintiff could not be permitted to withdraw the whole suit with liberty to bring a fresh suit. **Ambika Charan Chakravorthy v. Narad Chandra Bera** 45 Ind. Cas. 919.

FLETCHER and MIAMUL HUDA, JJ.

(390) O. XXIII, r. 1—*Leave to withdraw suit with liberty to bring a fresh suit—Sufficient grounds, meaning of—Formal defect, defect of—Leave, grant of, if purely discretionary—Practice.*

The words 'sufficient grounds' occurring in r. 1 (2) (b) of O. XXIII of the Civ. Pro. Code must be interpreted as being *ejusdem generis* with the formal defects referred to in r. 1 (2) (a).

It is not a mere question of general discretion with Court to allow or not to allow a suit to be withdrawn with liberty to bring a fresh suit and unless there is a defect in the suit of a character akin to a formal defect, any order of withdrawal cannot be sustained in law.

Where the suit was brought by the adopted son against the adoptive mother for recovery of certain family properties including a house

Civ. Pro. Code (1908)—(Continued).

actually worth more than Rs. 6,000 but which was originally valued in the plaint only at Rs. 200 and where after the proper value of the said house was ascertained, the plaintiff applied for leave to withdraw the suit with respect to the house with liberty to bring a fresh suit, and the lower Court granted the application.

Held that there was no question of formal defect or any other defect akin to it involved in the case and that therefore the leave to withdraw was not properly granted and was unauthorized by law. **Jagathambal v. Kannusami Pillai**, 7 L.W. 131—(1918) M.W.N. 106 = 43 Ind. Cas. 985.

ABDUR RAHIM, J.

Reference:—(a) 27 M.L.J. 480, F.

(391) O. XXIII, r. 1—*Suit in ejectment without notice—Withdrawal of suit without the leave of the Court for fresh suit—Second suit after notice—Subject matter of both suits not the same—Second suit maintainable.*

The plaintiff first brought a suit for the ejectment of defendants who claimed to be Mirasidars (permanent tenants) on the allegation that they were not Mirasidars and that he was entitled to determine the tenancy. As there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Having then given a formal notice to quit, the plaintiff brought a second suit for ejectment. A question having arisen whether the second suit was barred under O. XXI, r. 1 of the Civ. Pro. Code of 1908:

Held, that the suit was not so barred, for the term "subject-matter" in the rule meant "the series of acts or transactions alleged to exist giving rise to the relief claimed" and the two suits were not in respect of the same subject-matter as in the first suit the series of acts was incomplete owing to want of notice, while in the second suit the series of acts was complete because of the notice to quit.

Held, also, that the same result followed, if the term "subject-matter" was to be taken to be "the cause of action" in the sense of the bundle of facts which have to be proved in order to entitle the plaintiff to relief; the cause of action in both suits were not the same; for in the first suit there was no cause of action for want of notice and in the second suit the giving of notice constituted the cause of action (a). **Rakhmabhai Praji Sappal v. Mahadeo Narayan Bundre**, 42 B. 155—20 Bom. L.R. 35 = 43 Ind. Cas. 752.

SCOTT, C.J. and BATCHELOR, J.

References:—(a) 21 M. 35; 21 C. 265, R.

(392) O. XXIII, r. 1—*Duty of Court to satisfy itself that withdrawal of minor's suit is for his benefit—Suit withdrawn without any consideration by Court of such question—Subsequent suit by minor for same relief if barred. See MINOR, No. 8, 164 P.W.R. 1918.*

Civ. Pro. Code (1908)—(Continued).

(393) O. XXIII, r. 1. See WITHDRAWAL OF SUIT.

(394) O. XXIII, r. 1—Petition to withdraw suit with liberty to bring fresh suit—Liberty not expressly reserved in order granting petition—Construction of order—Right of suit on same cause of action. See WITHDRAWAL OF SUIT, No. 2, 34 M.L.J. 515.

(395) O. XXIII, r. 1—Application for withdrawal with liberty to bring fresh suit, conditions for grant of. See WITHDRAWAL OF SUIT, No. 4, 31 O.C. 66.

(396) O. XXIII, r. 1—Leave to withdraw from suit given in appeal by appellate Court—Right of defendant to object to leave granted after admission by him of formal defect in suit—Revision if lies against order granting leave. See WITHDRAWAL OF SUIT, No. 6, 3 Pat. L. J. 630.

(397) O. XXIII, r. 1—Withdrawal of suit, valid grounds for—Sufficient grounds, what are—Duty of Court to make serious enquiry and to record definite, and not vague, opinion about defects in suit justifying permission, to withdraw. See WITHDRAWAL OF SUIT, No. 7, 3 Pat. L.J. 651.

(398) O. XXIII, r. 1, S. 115—Revision—Material irregularity in granting withdrawal of suit—Essentials in application to withdraw suit.

Where a party wishes to obtain an order under O. XXIII, r. 1, he must specify the formal defect or other ground on which his application is based and the Court must show by its order the facts which the provision as to withdrawal is applicable. A more general statement that there are formal defects is not sufficient. *Pundalik v. Chandrabai*, 43 Ind. Cas. 346.

STANYON, J.C.

(399) O. XXIII, r. 1. See Nos. 173-a, 174 and 175, *supra*.

(400) O. XXIII, r. 3—Separate petitions by plaintiff and defendants for passing decree—Court not taking the separate petitions as lawful compromise—Effect on appeal.

In a suit, the plaintiff and defendants filed separate petitions by which the plaintiff prayed for judgment and decree against the defendants and the defendants stated that they consented to a decree being made against them; the two petitions were severally rejected by the Court, *held* that no appeal lies from the order of rejection, as the trial Court did not take the two petitions together as amounting to a lawful agreement or compromise within the meaning of r. 3 of O. XXIII, Civ. Pro. Code. *Prasanna Deb Raitak v. Darpa Narayan Singh*, 44 Ind. Cas. 145.

RICHARDSON and BEACHCROFT, JJ.

(401) O. XXIII, r. 3—Agreement to abide by decision in connected case, Effect of. See ADJUSTMENT OF SUIT, No. 1, 24 M.L.J. 356.

Civ. Pro. Code (1908)—(Continued).

(401-a) O. XXIII, r. 3, Sch. II, para. 16—Arbitration, Reference to private, of subject-matter of *lis* without authority of Court. Validity of—Reference to such arbitration or award if amounts to adjustment under O. XXIII, r. 3. See ARBITRATION, No. 6-a, 46 Ind. Cas. 902.

(402) O. XXIII, r. 3—*Ex parte* decrees obtained by fraud—Such decrees set aside—Original suit revived by setting aside of *ex parte* decrees—Arrangement between parties to withdraw suit at time of such decrees also revived. See REVIVAL OF SUIT, No. 1, 28 O.L.J. 158.

(402-a) O. XXIII, r. 3.—Formal decrees under—Dismissal of suit at request of parties without a—Adjustment out of Court, request on ground of—Withdrawal of suit, without permission, if amounts to. See WITHDRAWAL OF SUIT, No. 1, 46 Ind. Cas. 913.

(403) O. XXIII, r. 3; O. XLIII, r. 1 (m)—Offer by one of several plaintiffs to be bound by oath—Acceptance of challenge by defendant—Dismissal of suit—Right of appeal of other plaintiffs not challenging—Adjustment of suit. See OATHS ACT, No. 3, 50 P.W.R. 1918.

(404) O. XXIII, rr. 3 and 7—Compromise relating to matters outside suit—Duty of Court—Procedure. See REGISTRATION ACT, No. 11, 3 Pat. L.J. 255.

(405) O. XXIII, r. 3. See Nos. 130-a, *supra* and 445, *infra*.

(406) O. XXIII, r. 7. See No. 404, *supra*.

(407) O. XXVI. See No. 179, *supra*.

(408) O. XXX, rr. 1 and 6—Plaintiff's right to know members of firm in suit against it—Appearance in person of partner, if enforceable—Effect of partner's appearance. See FIRM, No. 1, 78 P.R. 1918.

(409) O. XXX, r. 4—Suit in the name of a firm—One of the partners dying during pendency of suit—Whether addition of legal representatives necessary.

Where a suit is brought in the name of a firm, the suit may, if properly proved, be decreed, under the provision of O. XXX, r. 4, Civ. Pro. Code, in full, even in the case of a partner dying during the pendency of the suit, without adding the legal representatives of the deceased partner as party plaintiffs. *Pulin Behary Roy v. Abdul Majid*, 44 Ind. Cas. 911.

RICHARDSON and BEACHCROFT, JJ.

Reference:—17 O.L.J. 648, F.

(410) O. XXX, r. 4—Suit by persons named as proprietors of firm—Appeal by defendants—Death during appeal of one of plaintiffs-respondents—No substitution of legal representative—Failure of appeal for defect of parties. See APPEAL (GENERAL), No. 11, 28 O.L.J. 268^e

(411) O. XXX, r. 6. See No. 408, *supra*

Civ. Pro. Code (1908)—(Continued).

(412) O. XXX, r. 9—Suit by firms having common partners against one another. See LIMITATION ACT (1908), No. 126, 34 M.L.J. 32.

(413) O. XXX, r. 9—Scope of. See PARTNERSHIP, No. 4, 34 M.L.J. 408.

(414) O. XXX, r. 11. See No. 492, *infra*.

(415) O. XXXII, rr. 1, 2, 12—Suit by minor without next friend—Allegation by minor of having attained majority pending suit and application for permission to continue it—Plaint ordered to be struck off—Legality. See REVISION, No. 7, 16 A.L.J. 737.

(416) O. XXXII, r. 2. See No. 415, *supra*.

(417) O. XXXII, r. 3 (4)—Minor defendants—Court appointing mother as guardian without notice—Whether sufficient.

Where in a case, there were minor defendants, the original Court, without notice to the minors or to their mother who was also a defendant, appointed the mother as guardian and decreed the suit: *held*, per *Teunon, J.*, that as the provisions of O. XXXII, r. 3 (4) which imperatively require that notice should be served upon the minors have not been complied with, the minors had not been represented and were, properly speaking, no parties to the suit.

Per *Huda, J.*—The mother by appearing in the suit for herself and for her minor children consented to act as guardian of the minors and the order appointing her as such guardian was quite correct. *Syed Ali Sarkar v. Maulkyam Babi*, 43 Ind. Cas. 728.

TEUNON and HUDA, J.J.

(418) O. XXXII, r. 3 (4)—Requirements—Hindu Law—Mother, natural guardian of infant—Negligence by guardian *ad litem*—Minor not bound by decree—Decree imposing indivisible liabilities on defendants—Effect of setting aside the decree.

O. XXXII, r. 3 (4) of the Civ. Pro. Code, requires that consent of a natural guardian of a minor should be obtained for appointing a guardian *ad litem*.

Under Mitakshara Law, the guardian of an infant has been expressly named to be the parents and that the father has preference over the mother and, after the death of the father, the mother is the natural guardian of the infant. The guardianship of an infant is irrespective of the fact that the family is joint or separate.

Where the guardian *ad litem* of a minor is guilty of negligence and no attempt has been made by him to protect the interests of the minor, the decree so obtained will not bind the minor.

Where the liabilities of the defendants under a decree are indivisible and not liable to be split up, if the decree is set aside as against one of the defendants, it must be set aside as against the others also.

When a final decree in a suit is set aside on the ground of fraud or gross negligence by means of a separate and independent suit, the

Civ. Pro. Code (1908)—(Continued).

original suit cannot revive. *Bhatro Prasad Sahu v. Ram Chandra Prasad*, 45 Ind. Cas. 253.

JWALA PRASAD, J.

References:—30 O. 1021, *Dist*; 37 A. 179; 24 A. 393; 6 C.L.J. 226, *Appr*.

(419) O. XXXII, r. 4 (2). See No. 176, *supra*.

(420) O. XXXII, r. 4 (3)—Appointment of a guardian—Proper person—General rule when a minor would be bound by decree—Duty of guardian.

Where a person, who looked after the welfare of a minor and who was best qualified to protect his interest during the pendency of a suit, is appointed the guardian of a minor, then the minor is properly represented in the case.

If a minor be properly represented in a suit and no fraud or collusion between his guardian and the opposite party be established or gross-negligence on the part of the guardian be proved, the minor would be bound by a decree or order made in that suit or proceeding, whether it be for his benefit or not, as if he were of full age.

It is not the business of the guardian to defend every suit brought against the minor. *Bajjnath v. Radha Rawan Prasad*, 43 Ind. Cas. 563.

KANHAIYA LAL, A.J.C.

References:—*In re Hoghton v. Fiddey*, (1874) 18 Eq. 573; 14 M.I.A. 393; 19 B. 574; 24 B. 547; 13 O.C. 158, *Appr*; 22 C. 8, R. .

(421) O. XXXII, r. 7—Agreement or compromise when voidable—O. XXIII, rr. 3, 4—Inapplicability to execution proceedings—Contract for purchase of immoveable property—Guardian incompetent to bind minor.

Under O. XXXII, r. 7 (3), the agreement or compromise entered into without leave of the Court is voidable against all parties other than a minor.

O. XXIII, r. 3, which relates to compromise of a suit is inapplicable to execution proceedings as laid down in O. XXIII, r. 4.

It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property and specific performance of such a contract cannot be decreed even at the instance of the minor for want of mutuality. *Sakharam v. Bhivrabai*, 44 Ind. Cas. 164.

MITTRA, A.J.C.

References:—26 B. 109, *Appr*; 22 M. 182; 6 C. 786; 25 C. 718; 44 P.R. 1906, R.; 16 O.L.J. 106, *Appr*; 39 C. 292, F.; 40 B. 393, *Dist*.

(422) O. XXXII, r. 7—Applicability of, to Courts constituted under Land Revenue Act—Compromise in mutation proceedings on minor's behalf without leave of Court, Validity of. See COMPROMISE, No. 6, 21 O.O. 220.

(423) O. XXXII, r. 7, Sch. II, cl. 20—Reference by minor's mother to arbitration out of Court—Application by mother and guardian

Civ. Pro. Code (1908)—(Continued):

for decree upon award—Decree passed without reference to O. XXXII—Validity of decree. See GUARDIAN AND MINOR, No. 1, 20 Bom. L.R. 970.

(424) O. XXXII, r. 12. See No. 415, *supra*.

(425) O. XXXIII, r. 1—Leave to sue as pauper—Leave not to be refused if applicant's husband owns property—Real point is whether applicant is pauper. See PAUPER SUIT, No. 8, 8 Pat. L.J. 178.

(426) O. XXXIII, rr. 1, 3, 5 (e)—Company if can apply for leave to sue as pauper through its liquidator. See PAUPER SUIT, No. 2, 34 M.L.J. 421.

(427) O. XXXIII, r. 1 (a). See No. 83, *supra*.

(428) O. XXXIII, r. 3. See No. 426, *supra*.

(429) O. XXXIII, r. 5—Scope of—Limitation, Question as to, if can be decided upon application for leave to sue as pauper. See PAUPER SUIT, No. 1, 41 M. 620.

(430) O. XXXIII, r. 5 (d)—Application for leave to sue in forma pauperis—Power of Court to decide complicated and doubtful questions of law as limitation.

O. XXXIII, r. 5 (d), applies only to cases where the allegations of the petitioner do not show a cause of action and this should appear clearly upon the face of the petition.

A Court should not at this stage contemplate by O. XXXIII, r. 5 (d), consider a question of limitation or hold an elaborate enquiry into doubtful and complicated question of law. *Govindasamy Pillai v Municipal Council of Kumbakonam*, 34 M.L.J. 399=45 Ind. Cas. 95=41 M. 630.

BAKEWELL and KUMARASAMY SASTRI, JJ.

(431) O. XXXIII, r. 5 (e). See No. 416, *supra*.

(432) O. XXXIII, r. 10. See No. 33, *supra*.

(432-a) O. XXXIV, r. 1—Withdrawal of suit as against a necessary party—Effect on suit.

Where, in a redemption suit, the plaintiff withdraws his claim as against one of the necessary parties, the suit becomes defective and should be dismissed. *Dhurl Patak v. Timal Singh*, 45 Ind. Cas. 650.

IMAM, J.

Reference :—36 Ind. Cas. 542, F.

(433) O. XXXIV, rr. 1 and 5—Transfer of Property Act, ss. 85, 89—Suit for sale by first mortgagee—Omission to implead second mortgagee, Effect—Order absolute, for sales, construction of. See MORTGAGE (SALE), No. 6, 85 M.L.J. 1.

(434) O. XXXIV, r. 1. See No. 218, *supra*.

(435—437) O. XXXIV, rr. 2, 5; O. XXI, r. 2—Payment or settlement out of Court of the mortgage decree during the period between the preliminary and the final decree—Certificate under O. XXI, r. 2, not

Civ. Pro. Code (1908)—(Continued).

obtained—Final decree, if may be passed—Remedy of mortgagor—Transfer of Property Act (IV of 1882), S. 89.

Under O. XXXIV, rr. 2 and 5 of the Civ. Pro. Code, the Court has to pass a final decree if the amount made payable by the preliminary decree is not paid into Court within the period fixed therein.

Where between the date of the preliminary decree and the final decree, the mortgagor pays money to the mortgagee personally, if he takes out a certificate under O. XXI, r. 2 of the Civ. Pro. Code, he can take advantage of it to reduce the amount for which the property is to be sold. *Singa Raja v. Pethu Raja*, 35 M.L.J. 579=8 L.W. 497=24 M.L.T. 501=(1918) M. W.N. 809.

WALLIS, C.J. and SESHAGIRI Aiyar, J.

(438 & 439) O. XXXIV, rr. 4 and 5—Suit on mortgage—Decree passed by High Court on appeal—Application for decree absolute—Limitation. See LIMITATION ACT (1908), No. 32, 16 A.L.J. 85.

(440) O. XXXIV, r. 5—Decree in mortgage suit—Whether Court can alter final decree—Receiver, appointment of—Court, power of.

In a mortgage suit, the method in which the execution is to take place is provided for by the final decree. That cannot be altered at the instance of the judgment-debtor and to the prejudice of the decree-holder. There is no authority to justify an appellate Court's interference with the mortgagee's rights under the decree in any way either by intercepting the rents and profits or by restraining the sale of the property by the appointment of a Receiver. *Sita Nath Saha Bonik v. Madan Mohan Das*, 43 Ind. Cas. 22.

FLETCHER and CHATTERJEA, JJ.

(441) O. XXXIV, r. 5—Final decree for sale—Computation of time for application from date of final appellate preliminary decree. See FINAL DECREE, No. 1, 21 O.C. 176.

(442) O. XXXIV, r. 5—Preliminary decree for sale passed after passing of new Civ. Pro. Code—Application for final decree—Limitation. See LIMITATION ACT (1908), No. 210, 7 L.W. 438.

(443) O. XXXIV, r. 5 (2)—Application for final decree—Time for, when preliminary decree confirmed on appeal. See LIMITATION ACT (1908), No. 219, 35 M.L.J. 507.

(444) O. XXXIV, rr. 5 and 6—Second mortgage on same property to a Bank subject to first mortgage—Execution in favour of Bank of promissory note as security by sureties of mortgagor—Transfer by Bank of debt due to it and property mortgaged to sureties—Execution of sub-mortgage in favour of Bank—Preliminary decree given to Bank in mortgage suit against sureties and mortgagor—Insolvency of mortgagor before final decree—Order for sale by

Civ. Pro. Code (1908)—(Continued).

Official Assignee for satisfaction of first mortgage and retention of surplus to discharge other debts of insolvent mortgagor—Final decree in favour of Bank and sale thereunder of equity of redemption—Sale-proceeds insufficient to meet debt of Bank—Personal decree against sureties, if may be legally passed.

G, after a first mortgage of his property to A, subsequently gave a second mortgage on the same to the plaintiff Bank to secure his indebtedness to it, but subject to the first mortgage. The plaintiff Bank, after taking a promissory note in its own favour from certain sureties as security for G's indebtedness to it, transferred to the sureties the debt due to it from G and the mortgaged property. Subsequently, the sureties executed a declaration of mortgage by deposit of title-deeds in favour of the plaintiff Bank, to whom the sureties undertook also to execute a formal sub mortgage of the property. Sometime after, the plaintiff Bank obtained a preliminary mortgage decree against the sureties and G, the mortgagor, who became an insolvent in a few months after the passing of this decree. The first mortgagee then obtained an order from the Insolvency Court for sale by the Official Assignee of the mortgaged property to satisfy the debt due to such first mortgagee, but the sale did not raise money sufficient to meet the first mortgagee's debt. The plaintiff Bank had meanwhile obtained a final decree and the proceeds of the sale under this final decree not being sufficient to discharge the debt due to the said Bank, it applied for a personal decree against the sureties. *Held* that the plaintiff Bank, the sub-mortgagee, was entitled to the personal decree under Civ. Pro. Code, O. XXXIV, r. 6.

The object and reason of O. XXXIV, rr. 5 and 6, Civ. Pro. Code, 1908, discussed. *Satish Ranjan Das v. Mercantile Bank of India*, 45 C. 702.

SANDERSON, C.J. and WOODROFFE, J.

References :—22 A. 404; 33 C. 890, *Dist.*

(445) O. XXXIV, r. 5—O. XXIII, r. 3—*Transfer of Property Act*, Ss. 60, 89—*Conditional mortgage decree—Subsequent agreement for foreclosure of a part of mortgaged property—Validity of.*

Where a certain mortgagee obtained a conditional mortgage decree, covering a 10 anna 8 pies share and subsequently entered into an agreement with mortgagors for the foreclosure of 8 anna 5 pie share and also for a sum of Rs. 185 paid by plaintiffs to mortgagors, and there was no question of undue influence vitiating the agreement, *held* that the agreement can be given effect to. *Dharam Singh v. Ganeshram*, 43 Ind. Cas. 399.

MITTRA, J.C.

References :—4 N.L.R. 158, R.; *Liste v. Reeve*, (1902) 1 Ch. 53, R.; 27 B. 297, R.

(446) O. XXXIV, r. 5. See Nos. 92, 433, 435, 438, *supra*.

Civ. Pro. Code (1908)—(Continued).

(447) O. XXXIV, r. 6—*Application for decree thereunder—Whether application in execution—Limitation—When right to apply accrues—Limitation Act (IX of 1908), Sch. I, Art. 181.*

An application under the provisions of O. XXXIV, r. 6 of the Code of Civil Procedure is an application in the original suit for a new decree, and it cannot be regarded as an application in execution. Such an application is governed as to limitation by Art. 181 of Sch. I to the Limitation Act and must be made within three years from the date when the right to apply accrued. *Held*, therefore, that, where the entire mortgaged property was sold in 1911 in execution of a decree for sale on a mortgage, and the mortgagee made a fresh application under O. XXXIV, r. 6, in 1915 (an application for a similar decree having been made in 1913), *held* that the application was time-barred, and the application not being an application in execution of an original mortgage-decree, the intermediate application did not save limitation. *Mohammad Iftitah Hussain v. Allim-un-nissa*, 40 A. 551=16 A.L.J. 437=47 Ind. Cas. 562.

RICHARDS, O.J. and BANERJI, J.

Reference :—9 A.L.J. 569, R.

(448) O. XXXIV, r. 6—*Application for order under rule, Dismissal of—Court-fee payable on appeal from order of dismissal. See DECREE, No. 1, 40 A. 555.*

(448-a) O. XXXIV, r. 6—*Application under, to proceed against other properties of judgment-debtor for the balance of mortgage-debt due after sale of mortgaged property—Objection to, by mortgagor—Mortgagor if stopped from raising point not adjudicated in suit. See ESTOPPEL, No. 4 a, 46 Ind. Cas. 892.*

(449) O. XXXIV, r. 6—*Mortgage-decree based on compromise—Sale of mortgaged property not realising sufficient to discharge mortgage amount—Other properties, not mortgaged, of judgment-debtor if can be pursued without formal order under r. 6—Benefit of order under r. 6, what is. See MORTGAGE (SALE), No. 9, 3 Pat. L.J. 649.*

(450) O. XXXIV, r. 6, S. 48, O. XX, r. 6—*Mortgage-decree directing sale of other properties of judgment-debtor if sale-proceeds of mortgaged property insufficient—Limitation as to latter part of decree. See MORTGAGE (SALE), No. 3, 22 C.W.N. 145.*

(451) O. XXXIV, r. 6. See No. 444, *supra*.

(452) O. XXXIV, r. 7. See No. 85, *supra*.

(453) O. XXXIV, r. 8. See No. 85, *supra*.

(454) O. XXXIV, r. 10—*In suit on mortgage wherein accounts if adjusted once for all in preliminary decree—Subsequent payment by mortgagee, if can be added. Allahabad Bank, Ltd. v. Moti Lal Barman*, 35 Ind. Cas. 95=44 O. 448=22 C.W.N. 874. See *Final Part, 1916*, Col. 452 and Col. 285 of *Final Part, 1917*.

Civ. Pro. Code (1908)—(Continued).

(455) O. XXXIV, r. 14 ; O. II, r. 2, principle of O. XXXIV, r. 14, if applies to Punjab—First suit by mortgagee for interest alone—Plea of mortgage against sale in execution invoking O. XXXIV, r. 14—Subsequent suit by mortgagee for principal and interest if barred by O. II, r. 2—Mortgagor if estopped from relying in subsequent suit on O. II, r. 2. See MORTGAGE (GENERAL), No. 18, 88 P.R. 1919.

(456) O. XXXIV, rr. 14 and 15—Money decrees with lien on some property included in mortgage bond—Sale of property without mortgage—Suit in execution prevented by rules. See EXECUTION OF DECREE, No. 1, 45 C. 580.

(457) O. XXXIV, r. 15. See No. 456, *supra*.

(458) O. XXXVIII, rr. 1 to 6—Attachment before judgment—Necessary evidence.

When a party seeks to obtain an order of attachment before judgment, he must, by definite evidence, satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors. It is not sufficient to make only general allegations. *Khoka Marwari v. Ramachandra Marwari*, 44 Ind. Cas. 210.

CHAPMAN and ATKINSON, JJ.

(459) O. XXXVIII, r. 2—Deposit by arrested defendant of money to credit of suit—Insolvency of defendant before decree—Claim to deposit in Court of Official Receiver and plaintiff. See DEPOSIT IN COURT, No. 1, 35 M. L.J. 355.

(460) O. XXXVIII, r. 2. See No. 458, *supra*.

(461) O. XXXVIII, r. 3. See No. 458, *supra*.

(462) O. XXXVIII, r. 4. See No. 458, *supra*.

(463) O. XXXVIII, r. 5—Reference to arbitration—Decree in terms of arbitration award—Liability of surety.

When a suit is referred to arbitration, the Court pronounces judgment for the amount of the award, and the amount is, therefore, adjudged by the Court.

Where a person gives security under O. XXXVIII, r. 5 for the value of the property sought to be attached before judgment, and the suit was referred to arbitration and the Court passed decree for the amount of the arbitration award, held, that the surety was bound for the sum decreed. *Umermal Janimal v. Bhojraj Hassomal*, 45 Ind. Cas. 429.

PRATT, J.C. and HAYWARD, A.J.O.

References :—34 Ind. Cas. 845 ; *Faviell v. Eastern Counties Railway Co.*, (1918) 17 L.J. Ex. 297, *Appr.* ; *Tatum v. Evans*, (1886) 51 L.T. 336, *Dist.*

(464) O. XXXVIII, rr. 5 to 11, O. XXI, r. 57—Application for attachment before judgment—Attachment actually effected after judgment—Dismissal of subsequent execution application if determines attachment. See ATTACHMENT BEFORE JUDGMENT, No. 3, (1918) M.W.N. 606.

Civ. Pro. Code (1908)—(Continued).

(465) O. XXXVIII, r. 5. See No. 458, *supra*.

(466) O. XXXVIII, r. 3. See Nos. 458 and 464, *supra*.

(467) O. XXXVIII, r. 7. See No. 464, *supra*.

(468) O. XXXVIII, r. 8—Attachment before judgment—Claim to attached property—Claim allowed—Effect—Indian Limitation Act (IX of 1908), Arts. 11 and 13. *Ramanamma v. Bathula Kamaraju*, 5 L.W. 704=39 Ind. Cas. 863=41 M. 23. See Final Part, 1917, Col. 287.

(469) O. XXXVIII, r. 8. See No. 464, *supra*.

(470) O. XXXVIII, r. 9—Attachment before judgment not withdrawn when suit dismissed—Attachment if continued or if revives when appeal lodged. See ATTACHMENT BEFORE JUDGMENT, No. 1, 45 C. 780.

(471) O. XXXVIII, r. 9. See No. 464, *supra*.

(472) O. XXXVIII, rr. 9 and 11—Omission by Court to order withdrawal of attachment when dismissing suit—Attachment if continues on decree of suit in appeal. See ATTACHMENT BEFORE JUDGMENT, No. 2, 32 C.W.N. 927.

(473) O. XXXVIII, r. 10. See No. 464, *supra*.

(474) O. XXXVIII, r. 11. See Nos. 464 and 471, *supra*.

(475) O. XXXIX, r. 1—Permanent injunction, Suit for—Grant of temporary injunction. See INJUNCTION, No. 2, 43 Ind. Cas. 21.

(475-a) O. XXXIX, r. 1—Injunction, Issue of, Conditions requisite for, under—Attachment before judgment of sum due by District Board to debtor—Issue of precept after decree directing payment to decree-holder—Insolvency petition, Filing of, before decree but after filing of suit—Injunction to stop payment, Validity of. See PROVINCIAL INSOLVENCY ACT (III OF 1907), No. 26 a, 2 Pat. L.J. 456.

(476) O. XXXIX, r. 2—Injunction—Court cannot issue injunction against person not a party to suit.

A Court has no authority to issue an injunction against any person not a party to the suit. *Mahluddin Ahmed v. Athar Hussain*, 41 Ind. Cas. 496.

ROE and JWALA PRASAD, JJ.

(477) O. XXXIX, r. 2—Temporary injunction, grant of—Mandatory injunction, if can be issued temporarily pending suit—Practice. *Kandasawmy Ghetti v. Subramania Ghetti*, 6 L.W. 130=(1917) M.W.N. 501=33 M. L.J. 449=41 M. 208. See Final Part, 1917, Col. 287.

(478) O. XXXIX, r. 2 (3) See No. 130, *supra*.

(479) O. XL, r. 1—Appointment of Receiver—When proper.

Where the defendants are admittedly the original owners of the property and they claim to have been in uninterrupted possession thereof, the appointment of a Receiver would be

Civ. Pro. Code (1908)—(Continued).

justified only if a strong case were made out.
S. R. M. Meyappa Chetty v. P. L. L. N. Narayanan Chetty, 43 Ind. Cas. 550.

TWOMEY, C.J. and PARLETT, J.

(480) O. XL, r. 1—*Receiver—Effect of appointing Receiver on a person in possession of property and not a party to suit—Appeal and revision.*

In the execution proceedings of a mortgage decree, a Receiver was appointed. Before the Receiver took possession of the property, an objection was made by a person in possession of the property on the ground that his father had taken a lease of the property and that he was entitled to retain possession thereof as he had paid off debts and other charges prior to the decree in the suit under which the sale had been held, and the objection was dismissed; held that, as the objector was not a party to the suit, he had no right of appeal to the High Court and that he was entitled to make an application for revision; it was further held that the dismissal of the objection petition was wrong as the appointment of the Receiver cannot be an order to the objector, who was not a party to the suit, either to deliver possession to the Receiver or prohibiting him from interfering with what the Receiver was required to do by the Court. **Iodradeo Narain Singh v. Gauri Shankar**, 45 Ind. Cas. 177.

CHAPMAN and ATKINSON, JJ.

(481) O. XL, r. 1—*Receiver, principles of appointing—Appellate Courts—Powers of interference.*

The introduction of the words "just and convenient" in the new Civ. Pro. Code is to bring the law in India into conformity with that in England. The power of appointing Receivers must be exercised in India in accordance with principles already settled by the Court of Chancery, subject of course to such modifications as conditions peculiar to India may suggest.

The principles are the preservation of the estate pending litigation on a consideration of the merits of the conflicting titles, the risk to tenants and other circumstances of the case. The Court is always slow to dispossess a party in possession under a *prima facie* title.

A Receiver would only represent the interests of the litigating partners and an order of the Court appointing a Receiver to manage a business on behalf of the litigating partners and others who are not litigating is '*ultra vires*' in regard to those other partners.

It is true that the Court of appeal is slow to interfere with the discretion deliberately exercised by a lower Court but it must interfere when it is satisfied that that discretion has not been exercised in accordance with settled principles of law. **Thikanbai v. Dasulmal Gangaram**, 45 Ind. Cas. 224.

PRATT, J.C. and HAYWARD, A.J.C.

References:—26 A. 238; 27 Ind. Cas. 942; **Morgan v. Hart**, (1914) 2 K.B. 183; **Beddow v. Beddow**, (1878) 9 Ch. D. 89, *Appr.*

Civ. Pro. Code (1908)—(Continued).

(481-a) O. XL, r. 1—*Receiver, Objection to appointment of, Order dismissing—Appeal from, if lies under.* See APPEAL (GENERAL), No. 31-a, 3 Pat. L.J. 573.

(484) O. XL, r. 1—*Appointment of Receiver.* See MORTGAGE (SIMPLE), No. 1, 43 Ind. Cas. 533.

(483) O. XL, r. 1. See No. 86, *supra*.

(484) O. XLI, r. 4—*Appeal by joint decree-holders—Death of one appellant pending appeal—Appeal if abates.* See ABATEMENT OF APPEAL, No. 2, 84 P.R. 1918.

(485) O. XLI, r. 4. See No. 267, *supra*.

(486) O. XLI, r. 5—*Order of stay of execution by appellate Court—When takes effect regarding execution proceedings in lower Court.* **Kasariabada Yenkatahelapatirao v. Maddipatla Kameswaramma**, 22 M.L.T. 330=33 M.L.J. 515=(1917) M.W.N. 785=6 L.W. 617=41 M. 151=43 Ind. Cas. 214 (F.B.). See Final Part, 1917, Col. 288.

(487) O. XLI, rr. 5 and 6—*Application for stay of sale of immovable property ordered by lower Court—Appellate Court's power to entertain application.* See APPELLATE COURT, No. 2, 34 M.L.J. 470.

(498) O. XLI, r. 5 (3). See No. 87, *supra*.

(489) O. XLI, r. 6. See No. 487, *supra*.

(490) O. XLI, r. 10—*Jurisdiction of Court to re-admit dismissed appeal—Application for re-admission—Limitation—Act IX of 1908, Sch. I, Art. 168.*

A Judge has jurisdiction to re-admit an appeal after having dismissed it by an order under cl. (2), r. 10, O. XLI. But the opposite party would not be bound by the order of re-admission if it is made without notice to him.

If Art. 168, Sch. I of the Limitation Act does not apply to an application for the restoration of an appeal dismissed under r. 10, O. XLI, such an application ought to be made within a reasonable time; and by analogy an application made after thirty days would ordinarily be an application unduly delayed. **Goljan Bibi v. Selkh Nafar Ali**, 40 Ind. Cas. 234=28 O.L.J. 163.

RICHARDSON and WALMSLEY, JJ.

(491) O. XLI, r. 10—*Application for security for cost, when to be made.* See SECURITY FOR COSTS, 20 P.L.R. 1918.

(492) O. XLI, r. 10; O. XXX, r. 11—*Appeal in forma pauperis—Security for costs from the appellant.* **Khemraj Shrikrishnadas v. Kisanlala Surajmal**, 19 Bom. L.R. 771=41 B. 5. See Final Part, 1917, Col. 289.

(493) O. XLI, r. 11 (1). See No. 204, *supra*.

(494) O. XLI, r. 17. See No. 204, *supra*.

(494-a) O. XLI, rr. 17 and 19—*Appeal dismissed for default—Restoration, Application for, Dismissal of, Appeal from—Sufficient*

Civ. Pro. Code (1908)—(Continued).

cause for restoration. See APPEAL (GENERAL), No. 23-a, 46 Ind. Cas. 381.

(495) O. XLI, r. 19—“*Sufficient cause*,” meaning of—*Failure to give notice of transfer of case—Whether sufficient to excuse non-appearance.*

Where a case is transferred from one Court to another the order of transfer should be communicated to the parties or their pleaders. Failure to do this is held to be a very good excuse for not appearing when the case was called on and the appeal, which is dismissed for default, ought to be restored to the list and tried. *Ram Sakul Pathak v. Kesho Prasad Singh*, 43 Ind. Cas. 925=4 Pat. L.W. 75=3 Pat. L.J. 218 (F.B.).

DAWSON MILLER, C.J., CHAPMAN and ATKINSON, JJ.

(496) O. XLI, r. 19—Appeal transferred before fixed date to Subordinate Judge—Transfer order not communicated to parties—Dismissal of appeal for default on fixed date—Restoration of appeal—Sufficient cause. See APPEAL (GENERAL), No. 31, 3 Pat. L.J. 218.

(496-a) O. XLI, r. 19. See No. 491-a, *supra*.

(497) O. XLI, r. 21; O. XLVII, r. 1—Application to set aside *ex parte* decrees passed by lower appellate Court—Filing of second appeal against *ex parte* decree—*Ex parte* decree set aside before hearing of second appeal—Second appeal, maintainability of. See APPEAL (SECOND APPEAL), No. 12, 14 N.L.R. 30.

(498) O. XLI, r. 22—Cross objection against co-respondent when may be entertained—*Mortgage-deed—Executants—Two females and four males.*

Plaintiffs sued for sale on the basis of a mortgage-deed. The bond was held to be proved against the male executants, but not against the females. Against the decree, the male executants preferred an appeal, and the plaintiffs preferred cross-objections against the female executants, who had been arrayed on the same side with them as respondents, and contended that the deed had been proved against the females too:—*Held* that the plaintiffs were entitled to file cross-objections against their co-respondents. *Musleha Bibi v. Ram Narain*, 16 A.L.J. 587=40 A. 636.

PIGGOTT and WALSH, JJ.

References:—28 A. 95; 26 C. 114; 30 C. 655; 16 C.W.N. 612; 37 B. 511; 39 M. 705, R.

(499) O. XLI, rr. 22, 23—Cross-objection against co-respondent—Test to be applied in such case. See APPEAL (GENERAL), No. 9, 28 C.L.J. 123.

(500) O. XLI, r. 22—Death of respondent after filing objections—Default by appellant to bring on record deceased legal representative—Appearance *suo motu* by representative for prosecuting objections—Appearance if enures for appeal generally. See APPEAL (GENERAL), No. 23, 7 L.W. 614.

Civ. Pro. Code (1908)—(Continued).

(501) O. XLI, r. 22—Respondent's right to file objections in appeal against decision in insolvency—Appeal out of time—File of objections. See PROVINCIAL INSOLVENCY ACT, No. 33, 35 M.L.J. 236.

(502) O. XLI, rr. 22, 23—Memorandum of objections if should be confined to subject-matter of appeal. See LAND ACQUISITION ACT, No. 19, 35 M.L.J. 83.

(503) O. XLI, r. 22. See No. 521, *infra*.

(504) O. XLI, r. 23—*Remand order—Local enquiry to be made during pendency of appeal—Validity.*

Where plaintiffs refrained from applying to hold a local enquiry to determine the nature of the land in dispute and to ascertain the boundary line, held that the appellate Court was not justified in remanding, under O. XLI, r. 23, the suit to make the necessary local enquiry. *Kenaram Mandal v. Asimaddi Mallakarikar*, 43 Ind. Cas. 815.

TEJNON and NEWBOULD, JJ.

(505) O. XLI, r. 23—*Principle of procedure—Appellate Court not entitled to remand case on new points not raised in original Court—Order liable to appeal.*

It is an elementary rule that determination of causes depends on the allegations and the proof. An appellate Court is not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of questions which had never occurred to the parties previously.

An order of remand made whether regularly or irregularly by an appellate Court under r. 23 of O. XLI, is liable to be appealed against. *Baseemati Devi v. Tarit Benani Dasul*, 44 Ind. Cas. 416.

RICHARDSON and REACHCROFT, JJ.

(505-a) O. XLI, r. 23—*Remand by Chief Court—Further enquiry by original Court by order of lower appellate Court.*

On second appeal the case was remanded for further enquiry to lower appellate Court. A preliminary objection was taken on return of the case that the further enquiry should have been made by the lower appellate Court itself and that it had no authority to remand the case to the first Court. The Chief Court overruled the objection on the ground that it was not the intention of the Court that the lower appellate Court should be precluded from directing the first Court to record additional evidence if necessary (a). *Partap Singh v. Must. Partap*, 147 P.L.R. 1917=44 Ind. Cas. 907.

LE-ROSSIGNOL, J.

Reference:—(a) 105 P.R. 1913=242 P.L.R. 1913, R.

(506) O. XLI, r. 23—Appeal against preliminary decree—Remand—Right to certificate of refund of Court-fees—Scope of r. 23—Suit must be disposed of on preliminary point. See COURT FEES ACT (1870), No. 21, 3 Pat. L.J. 116.

Civ. Pro. Code (1908)—(Continued).

(506 a) O. XLI, r. 23—Appeal from an order of remand—Second appeal—Question of fact, if can be gone into—Sub-divisions of a village, existence of, a question of fact. See QUESTION OF FACT, 109 P.R. 1918.

(507) O. XLI, r. 23—Obtaining of copies of records entailing heavy expenses and causing considerable delay—Trial Court neglecting to consider such matter—Proper case for remand. See REMAND, No. 1, 43 Ind. Cas. 57.

(508) O. XLI, rr. 23, 25—First Court's judgment on preliminary point reversed—Appellate Court if bound to remand case for re-decision. See REVISION, No. 25 58 P.L.R. 1918.

(509) O. XLI, rr. 23, 25, 28—Whole evidence produced on point in dispute—Decision not preliminary point—Trial on point in dispute, without express issue thereon—Remand if proper. See REMAND, No. 5, 177 P.W.R. 1918.

(510) O. XLI, rr. 23, 27—Lower Court's refusal to record evidence—Appellate Court, Power of—Remand, Order of, if valid.

When an appellate Court is of opinion that certain evidence refused to be recorded by the lower Court should have been recorded, it cannot remand the suit for re-hearing *ab initio* under O. XLI, r. 23, Civ. Pro. Code, but can direct any additional evidence to be recorded, under O. XLI, r. 27. *Fida Abbas v. Rahim Bakhsh*, 45 Ind. Cas. 832=5 O.L.J. 159.

STUART, A.J.C.

(511) O. XLI, r. 23. See Nos. 148, 149 a, 168 and 499, *supra*.

(512) O. XLI, r. 25. See Nos. 508 and 509, *supra*.

(513) O. XLI, r. 27—Court of first appeal allowing document as evidence on behalf of defendant and refusing permission to plaintiff to adduce rebutting evidence—Validity.

Where a Court of first appeal allowed a document to be filed as evidence on behalf of defendant, and refused plaintiff permission to adduce evidence to rebut the effect of the document, held that the refusal was improper and that plaintiff should be given an opportunity of adducing evidence in order to do away with the effect of the document filed. *Muhammad Sadiq v. Malik Walzul Huq*, 43 Ind. Cas. 320.

CHAPMAN and ATKINSON, JJ.

(514) O. XLI, r. 27—Provisions mandatory—Power of appellate Court to admit and consider additional documentary evidence, in contravention of these provisions. See APPEAL (GENERAL), No. 37, 150 P.W.R. 1918.

(515) O. XLI, r. 27. See Nos. 33 a, 158 and 510, *supra*.

(516) O. XLI, r. 27 (b)—Meaning of—Powers of the appellate Court.

O. XLI, r. 27 (b), Civ. Pro. Code, 1908, does not mean that, in order to enable the

Civ. Pro. Code (1908)—(Continued).

appellate Court to pronounce judgment in favour of a particular party, additional evidence should be admitted in appeal; it means only that, where it is impossible to pronounce judgment at all on the evidence, the Court may call for a document.

Where plaintiff took no steps to search for a material record in the case and produce it in time for use during the adjudication of his claim, held that the appellate Court exercised a very sound discretion in refusing to regard the pure laziness of the plaintiff in the lower Court as sufficient cause for giving him a peculiar license to produce the document in appeal. *Kalika Dutt Mandar v. Tulsi Mandar*, 44 Ind. Cas. 670=3 Pat. L.W. 385.

ROE and JWALA PRASAD, JJ.

(517) O. XLI, r. 28. See Nos. 509 and 509-a, *supra*.

(518) O. XLI, r. 31—Contents of judgment of appellate Court—Requirements of law. See JUDGMENT, No. 1, 20 Bom. L.R. 461.

(519) O. XLI, r. 33—Appellate Court, whether can vary decree in regard to person not a party to appeal.

An appellate Court is not competent to vary the decrees of the first Court in regard to parties who are not parties to the appeal.

O. XLI, r. 33, Civ. Pro. Code, does not apply to a person who is not a party to the appeal. *Haridas Dey v. Kallash Chandra Bose*, 44 Ind. Cas. 480.

FLETCHER and SHAMSUL HUDA, JJ.

(520) O. XLI, r. 33—Scope and object of right of defendant to ask for non-appealing plaintiff what latter did not.

R. 33, O. XLI, Civ. Pro. Code, 1908, gives the appellate Court power to pass any decrees and make any order which ought to have been passed or made, the object being manifestly to enable the Court to do complete justice between the parties. The provision was not intended to enable a defendant to obtain for a plaintiff not a party to the appeal, a relief the latter never asked for. *Vinayaka Row v. Laxman*, 14 N.L.R. 56=44 Ind. Cas. 51.

DRAKE-BROCKMAN, J.C.

Reference:—34 A. 32, B.

(521) O. XLI, rr. 33, 22—Decision of appeal partially in favour of appellant—Reversal in same appeal of portion of lower Court's decree in favour of appellant—No cross-objection filed by respondent—Reversal if valid. See APPEAL (GENERAL), No. 12, 22 C.W.N. 526.

(522) O. XLI, r. 33. See Nos. 34, 141, 267 and 502, *supra*.

(523) O. XLIII. See Nos. 4 and 86, *supra*.

(523-a) O. XLIII, r. 1 (c); O. IX, r. 9—Suit dismissed for default, Petition for restoration, Dismissal of, Appeal if lies from. See APPEAL (GENERAL), No. 17, 43 Ind. Cas. 54.

Civ. Pro. Code (1908)—(Continued).

(524) O. XLIII, r. 1—Order returning memorandum of appeal to be presented to proper Court—Appeal against order, if lies. See APPEAL (GENERAL), No. 5, 16 A.L.J. 630.

(525) O. XLIII, r. 1. See No. 245, *supra*, and No. 542, *infra*.

(526) O. XLIII, r. 1 (d). See No. 268, *supra*.

(527) O. XLIII, r. 1, (j). See Nos. 78-a and 139, *supra*.

(528) O. XLIII, r. 1 (m). See No. 403, *supra*.

(529) O. XLIII, r. 1 (t)—Dismissal of appeal for default—Refusal of application to rehear appeal—Appeal if lies from order of refusal to rehear—Appeal under S. 109-A (2) in suit under S. 106, Bengal Tenancy Act. See APPEAL (GENERAL), No. 1, 45 C. 638.

(530) O. XLIII, r. 23. See No. 200, *supra*.

(531) O. XLIII, r. 25. See No. 200, *supra*.

(532) O. XLIV, r. 1. See Nos. 146 and 177, *supra*.

(533) O. XLV—Order-in-Council on appeal from Calcutta High Court—Execution of—Jurisdiction of Patna High Court. Lalji Sahu v. Ral Bahadur Baljnath Goenka, 2 Pat. L.J. 684=4 Pat. L.W. 193=43 Ind. Cas. 457. See Final Part, 1917, Col. 296.

(533-a) O. XLV, r. 4. See No. 201-a, *supra*.

(534) O. XLV, r. 5. See No. 151, *supra*.

(534-a) O. XLVII. See No. 89, *supra*.

(535) O. XLVII, r. 1—Review—When not to grant it—Mistake of law arising out of conduct of petitioners—Whether review may be granted.

Unless a Court is satisfied that a real mistake was made, it ought not to exercise the discretion that it has in any case to review the judgment.

A mere mistake of law, where the mistake had arisen from the conduct of the petitioners who pray for review, is not in itself a sufficient mistake or error apparent on the face of the record for the High Court to interfere by way of review. Hazra Sardar v. Kunja Behari Nag Choudhury, 44 Ind. Cas. 161.

FLETCHER and SMITHER, JJ.

(536) O. XLVII, r. 1. See Nos. 158 and 497, *supra*.

(537) O. XLVII, r. 2—Rent suit of later date, decision of—Prior rent suit between same parties, decision of, by High Court after decision of later rent suit with valuable observations—Decision of High Court if affords new matter under r. 2. See REVIEW, No. 7, 3 Pat. L.J. 372.

(538) O. XLVII, r. 4 (2) (b)—Discovery of new matter—Strict proof of absence of negligence—Sufficient cause for filing application beyond time. See LIMITATION ACT (1908), No. 21, 30 Bom. L.R. 434.

Civ. Pro. Code (1908)—(Continued).

(539) O. XLVII, r. 4 (2), proviso (b)—Strict proof, Meaning of—Sufficient cause for extension of time, what is. See REVIEW, No. 2, 27 O.L.J. 540.

(540) O. XLVII, r. 5—Appeal decided by a Bench of two Judges—One Judge absent—Review application heard and dismissed by other Judge—Jurisdiction to so hear review—Appeal against order of dismissal of review, See REVIEW, No. 4, 22 O.W.N. 550.

(541) O. XLVII, r. 7—Review of judgment—Appeal against order granting review—Interference limited to specific grounds. Khurshed Alam Khan v. Rahmat-ullah Khan, 15 A.L.J. 899=40 A. 68=43 Ind. Cas. 490. See Final Part, 1917, Col. 298.

(542) O. XLVII, r. 7; O. XLIII, r. 1—Right of appeal from review given by O. XLIII, r. 1—Right if unrestricted or limited to grounds specified in O. XLVII, r. 7. See REVIEW, No. 9, U.B.R. (1918), 3rd Qr., 104.

(543) O. XLVII, r. 8—Decree of Division Bench of High Court of two Judges found erroneous, giving plaintiff more than he claimed—Application for amendment before one of them—Jurisdiction of single Judge to amend decree—Court in granting application for review if bound to re-hear whole case—Re-hearing of case by single Judge without authority from Chief Justice—Jurisdiction. Gour Sundar Bhowmik v. Rakhal Raj Bhowmik, 20 C.W.N. 1165=34 Ind. Cas. 692=27 C.L.J. 326. See Final Part, 1916, Col. 471.

(544) Sch. II, Ss. 12, 14 (3)—Period for application to remit award for reconsideration of arbitrators—Limitation. See AWARD, No. 8, 24 M.L.T. 102.

(545) Sch. II, S. 14 (c)—Scope of, discussed. See AWARD, No. 6, 34 M.L.J. 323.

(546) Sch. II, cl. 20. See No. 423, *supra*.

(547) Sch. II, r. 1. See No. 7, *supra*.

(548) Sch. II, rr. 14, 15, 21—Minor, absence of any one to protect—Award, validity of—"Otherwise invalid," meaning of—Misconduct.

The partition of property of a joint family consisting of two brothers A and B and B's minor son was referred to arbitration out of Court. The next day B improperly purported to revoke the submission and never afterwards appeared in the proceedings either on his own behalf or as guardian of his minor son. A having brought a suit against B and his son for having the award filed and made a decree of Court.

Held the award having been made in the absence of any one to represent and protect the interests of B's minor son and B's absence not being shown to have been due to any consideration of the merits of his son's case or because there was no contention worth advancing on behalf of the son, the award was invalid as against the son (a).

Civ. Pro. Code (1908)—(Continued).

Per *Abdur Rahim, J.*—The invalidity of an award for an objection like the above falls within the words "being otherwise invalid" in r. 15 (c) of the 2nd schedule to the Civ. Pro. Code, and may be urged by way of defence to an application to file the award (b). *Lakshminarayana Tantri v. Ramachandra Tantri*, 23 M.L.T. 89=34 M.L.J. 71=45 Ind. Cas. 763

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 22 C. 8; 19 C. 394, R.; 14 C.L.J. 188, *Appr.* (b) 36 A. 69 (74), R.

(549) Sch. II, r. 15. See No. 548, *supra*.

(549-a) Sch. II, paras 17 and 20—Award delivered by majority only of arbitrators, and not by all, if valid. See *ARBITRATION*, No. 11, 47 Ind. Cas. 360.

(549 b) Sch. II, para. 20. See No. 549-a, *supra*.

(550) Sch. II, r. 21. See No. 548, *supra*.

(551) Sch. II, Ss. 18, 19—*Arbitration out of Court—Agreement to refer disputes to arbitration—Actual reference in pursuance of agreement—Notice of revocation of reference by one party to the arbitrators—Subsequent filing of suit in Court on the same subject-matter—Award passed pending suit—Validity of award—Decree, if can be passed in terms of such award—Right of parties to resort to Courts of the Realm—Application for stay under S. 18, nature of—Adjournment, if amounts to stay.* *Appavu Rowther v. Seeni Rowther*, 33 M.L.J. 177=6 L.W. 243=41 M. 115. See *Final Part*, 1917, Col 301.

(552) Sch. II, para. 1—Arbitrators, if can decide question of costs, when order of reference is in general terms. See *ARBITRATION*, No. 6, 46 Ind. Cas. 184.

(553) Sch. II, paras 4, 5—*Arbitrator refusing to act—Appointment of new arbitrator—Procedure Arbitration Act (IX of 1889), S. 8.*

The provisions of paragraph 5 of the Second Schedule to the Civ. Pro. Code relating to the appointment of an arbitrator by a party in the event of the arbitrator previously appointed refusing to act must be read with the provisions embodied in paragraph 2 of the same Schedule so that both parties must concur in appointing an arbitrator in place of the one who has refused to act, and the appointment does not rest solely with the party who has been served with a written notice by his opponent. *Chara Ram v. Sajan Mal*, 39 P.L.R. 1918=112 P.R. 1918.

SHAH DIN, J.

(554) Sch. II, para. 3—*Arbitration—Award, fixing of date for filing—Award made before date fixed but filed later—Court, competency of, to receive.* See *AWARD*, No. 4, 46 Ind. Cas. 324.

(555) Sch. II, para. 5. See No. 553, *supra*.

Civ. Pro. Code (1908)—(Concluded).

(556) Sch. II, para. 14 (c)—*Arbitration without aid of Court—Deliberation only by some of the six arbitrators appointed—Award invalid.* See *ARBITRATION*, No. 1, 16 A.L.J. 807.

(556-a) Sch. II, paras 15, 16—*Award, Judgment in accordance with—Appeal if lies from.* See *APPEAL (GENERAL)*, No. 29-a, 46 Ind. Cas. 785.

(556 b) Sch. II, para. 16. See Nos. 401-a and 556-a, *supra*.

(557) Sch. II, paras. 17, 20, 21—*Scope of.* See *AWARD*, No. 13, 90 P.W.R. 1918.

(558) Sch. II, para. 20—*Dispute about partition of agricultural joint property—Private reference to arbitration—Award settling, not partitioning, shares, Application to file.* See *AWARD*, No. 12, 79 P.L.R. 1918.

(559) Sch. II, para. 20. See No. 557, *supra*.

(560) Sch. II, para. 21. See No. 557, *supra*.

(561) Sch. III, para. 11 (=Civ. Pro. Code, 1882, S. 325-A)—*Meaning of words "incompetent to mortgage," etc., in section—Execution of decree against immoveable property by Collector—Restriction on judgment-debtor's power of mortgage, Extent of—Restriction absolute.*

The statutory declaration contained in S. 325-A of the Civ. Pro. Code of 1882, corresponding to paragraph 11 of the 3rd Schedule of the Code of 1908, that a judgment-debtor shall be incompetent to mortgage his property is to be read in the exact and plain sense of the words and a mortgage created by the judgment-debtor in contravention of this provision is void. *Gaurishanker Balmukund v. Chinnumlya*, 14 N.L.R. 181=16 A.L.J. 993=35 M.L.J. 733 (P.C.).

LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI and SIR WALTER PHILLIMORE.

References:—36 B. 510, *overruled*; 3 N.L.R. 172; 13 N.L.R. 130, *Appr.*

(562) Sch. III, paras. 17 and 19—*Death of some arbitrators before application to file agreement to refer in Court—Agreement void.* See *ARBITRATION*, No. 9, 71 P.R. 1918.

(563) Sch. III, para 19. See No. 562, *supra*.

Civil Proceedings.

Application to Collector to take action under Bombay Hereditary Offices Act—Civil Proceedings. See *LIMITATION ACT (1908)*, No. 52, 20 Bom. L.R. 918.

Claims.

Suit by leading Mirasdar in respect of common forest land—Declaration, injunction, damages and scheme prayed for—Combination of claims, validity of. See *CIV. PRO. CODE (1908)*, No. 204-a, 8 L.W. 160.

Claim to Attached Property.

- (1) *Civ. Pro. Code (Act V of 1908), O. XXI, r. 63 and O. XXXVIII, r. 8—Attachment before judgment—Claim preferred—Order on claim—Finally under O. XXI, r. 63—Whether applies.*

O. XXI, r. 63, Civ. Pro. Code, applies also to orders on claims preferred to property attached before judgment. *Srlmanth Raja Yarlagadda Malligajuna Prasada Naidu v. Matlapalli Yirayya*, 8 L.W. 197=35 M.L.J. 231=24 M.L.T. 184=(1918) M.W.N. 699=41 M. 849=47 Ind. Cas. 1000.

WALLIS, C.J., OLDFIELD and SESHAGIRI AIYAR, JJ.

References:—41 M. 23=5 L.W. 704, overruled; 17 C. 436 (P.C.), R.

- (2) Suit under Civ. Pro. Code, O. XXI, r. 63, by unsuccessful claimant—Burden of proof on claimant. See BURDEN OF PROOF, No. 6, 34 M.L.J. 295.

- (3) Rejection of claim to attached property—No investigation—Suit to establish right—Limitation for suit. See CIV. PRO. CODE (1908), No. 327, 45 C. 785.

- (4) Dismissal of claim for default—Application under O. IX, r. 9, for re-hearing—Procedure in suits if applies to claims. See CIV. PRO. CODE (1908), No. 199, 3 Pat. L.J. 250.

- (5) Claim petition filed after delay of ten months—Order thereon to notify claim to bidders, if amounts to order under r. 58, O. XXI—Applicability of r. 63. See LIMITATION ACT (1908), No. 112, (1918) M.W.N. 598.

- (6) Sale by Official Receiver in insolvency—Application by purchaser at sale for removal of obstruction to possession by third party—Jurisdiction of District Court to remove obstruction—Suit to set aside order directing removal of obstruction. See PROVINCIAL INSOLVENCY ACT, No. 16, 8 L.W. 136.

- (7) Property ordered to be sold under mortgage decree—Claim to such property if can be preferred or entertained. See REVISION, No. 23, 58 P.R. 1918.

- (8) Suit for declaration of right to attached property and for invalidity of attachment if barred by S. 42, Specific Relief Act. See SPECIFIC RELIEF ACT, No. 23, 3 Pat. L.J. 182.

Clog on Redemption.

Stipulation in usufructuary mortgage for discharge of debt by appropriation of usufruct—Provision for redemption on earlier date—Original stipulation to continue in default—Clog on redemption if arises. See MORTGAGE (REDEMPTION), No. 15, 35 M.L.J. 287.

Co-defendants.

- (1) *Suit for joint trespass against—Defendants acting in concert—Title in one of, if can be relied on by others.*

A defendant who is sued as a trespasser can rely upon the title of his co-defendant, if both

Co-defendants—(Concluded).

are alleged to have been acting in concert, even though his own derivative title is not proved. *Bhaosingh v. Mahipat*, 47 Ind. Cas. 550.

MITTRA, A J C.

- (2) Finding in prior suit on question raised *inter se* between—Decree in spite of finding. Finding if operates as *res judicata* or estoppel. Civ. Pro. Code (1908), S. 11—Evidence Act (1972), S. 115. See RES JUDICATA, No. 23-a, 33 M.L.J. 740=43 Ind. Cas. 860.

Coercion.

Threat by husband to commit suicide—Indian Contract Act (IX of 1872), S. 15—Act forbidden by the Indian Penal Code. *Chikkam Ammiraju v. Chikkam Seehamma*, 32 M.L.J. 494=5 L.W. 735=(1917) M.W.N. 423=41 M. 83. See Final Part, 1917. Col. 302.

Collector.

- (1) Execution of decrees by Collector by virtue of delegation under Civ. Pro. Code—Civ. Pro. Code, 1908, Sch. III, para 11, mortgage by judgment-debtor against prohibition contained in—Validity of mortgages. See CIV. PRO. CODE (1908), No. 561, 14 N.L.R. 181 (P.C.).

- (2) Execution proceedings, Transfer of, to Collector—Application for leave to bid at auction sale to be to Collector and not to Court—Set-off, if either Collector or Court can allow. See EXECUTION OF DECREE, No. 6, 20 Bom. L.R. 708.

Colourable Transactions.

Two documents executed on same day—Usufructuary mortgage of sir land with covenant that mortgagors will not set up expropriatory rights—Deed of relinquishment of sir—Actual possession of such land given to mortgagors—One transaction under colour of two deeds—Evasion of law—Covenants void. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 3, 16 A.L.J. 329.

Commission.

Hindu lady appearing in public, right of, to be examined in—Costs of commission. See PARDANASHIN WOMAN, No. 2, 22 G.W.N. 147.

Commission Agent.

C.I.F. contract—Purchase of goods under, from a Commission Agent—Agent, if a C.I.F. vendor—Agency, whether still subsists—Goods purchased on principal's behalf and at his risk—Outbreak of war while goods are in transit in an enemy ship—Loss, whether to be borne by the agent or by the principal—Indian Contract Act (IX of 1872), S. 232—Agency between vendor and vendee—Effect of, on C.I.F. contract. See PRINCIPAL AND AGENT, No. 7, 35 M.L.J. 184.

Commissioner.

- (1) *Commissioner—Report—Examination.*

It is within the discretion of a Judge to accept the report of a commissioner.

Commissioner—(Concluded).

A Court is bound to see some real ground for examining a gentleman who had undertaken the duty of the commissioner. It has a discretion in such matter to permit or refuse a party to examine the commissioner. *Chowdhury Jadavendra Nandan Das Mahapatra v. Gajendra Narain Das Mahapatra*, 28 C.L.J. 203=47 Ind. Cas. 650.

FLETCHER and PANTON, JJ.

- (2) *Remuneration to commissioner for making local investigation—Suit pending before Subordinate Judge—District Judge not empowered to disallow remuneration.*

Where a commissioner claimed remuneration for making local investigation, the matter of a suit pending before a Subordinate Judge, a District Judge has no power to disallow a portion of the remuneration. The matter should be dealt with only by the Subordinate Judge. *Panchanan Sen v. Madhu Sudan Mallik*, 44 Ind. Cas. 496.

TEUNON and NEWBOULD, JJ.

Reference:—34 Ind. Cas. 855, *Appr.*

- (3) *Report of, how to be used. See MAD, ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS), No. 1, 35 M.L.J. 219.*

(4) *Date fixed for appointing commissioner—Failure of defendant to appear—Procedure. See APPEARANCE, No. 1, 42 Ind. Cas. 597.*

Common Carrier.

- (1) *Right of consignee to insist on carrier weighing goods before delivery—Refusal to re-weigh, if refusal to deliver—Right of consignee to weigh and charge for shortage.*

Defendant Steamer Company who were common carriers used to allow consignees of goods by their boats to inspect them before granting receipt in the delivery book and have them re-weighed (if so demanded) in case of suspicion of short weight and enter the short weight in the delivery book. The plaintiff's agent without making any such inspection paid the freight, signed the Bill of Lading and gave a clear receipt in the delivery book of the Company, but did not take actual delivery as he found some of the bags damaged. He then asked the Company's servant to re-weigh the goods and this being refused did not take delivery. The plaintiff thereupon sued the Company for the price of the goods.

Held—That the suit must fail as refusal to re-weigh did not amount to a refusal to deliver the goods.

The mere fact of the plaintiff's agent accepting delivery and granting a clear receipt would not have taken away his right to compensation for proved loss of any portion of the consignment in transit or in the custody of the Company, the position of the latter being that of an insurer. He might weigh the goods himself and claim the price of the shortage in

Common Carrier—(Continued).

weight. Ramjash Agrawalla v. India General Navigation and Railway Co., Ltd., 22 C.W.N. 310.

N. R. CHATTERJEE and NEWBOULD, JJ.

References:—15 C.L.J. 211; 39 C. 311, R.

- (2) *Claim for compensation for damage done to goods—English law—Right of common carriers to limit liability by express terms—Bill of lading—Period of limitation for suits filed under special law, whether subject to the general provisions of the Limitation Act, 1908—Karachi Port Trust Act, S. 87.*

In a suit for compensation for damage caused to a cargo by common carriers by sea and where the parties agreed by a clause in the Bill of lading that the English Law should be applied in the case, *held* that under the English Law it would be open to a firm of common carriers to limit their liability by a writing such as a Bill of lading.

For a suit claiming compensation for damage done to a cargo against the Karachi Port Trust, the period of limitation should be calculated under S. 87, Karachi Port Trust Act, 1886 and the Easter Holidays and Vacation should not be excluded from the computation under S. 4 of the Indian Limitation Act, 1908, as the general provisions of the Limitation Act are intended only to apply to suits falling within the schedule of the Act. *Moosaji Ahmed and Co. v. The Asiatic Steam Navigation Co.*, 45 Ind. Cas. 168.

HAYWARD, A.J.C.

References:—16 C.W.N. 721; 19 W.R. 5; 18 C. 368; 18 M. 99; 34 M. 505; 38 M. 92; 34 A. 496, *Appr.*; 39 M. 599; 33 B. 116, R.

- (3) *Suit for recovery of price of goods lost by ferry licensee through collision—Ferry licensee if bailee or carrier—Liability of common carrier not dealt with in Contract Act—Contract Act, S. 151, if protects ferry licensee—Principles of carrier's liability—Carriers Act (III of 1865), Ss. 2 and 6.*

The plaintiff sued a ferry licensee to recover a certain sum of money, being the price of goods made over to the defendant to be ferried across a river. The goods were lost by the sinking of the boat containing them which was stationary, when it was struck by a steamer.

Held that the defendant was in the position of common carriers, i.e., persons holding themselves out as carrying on the business of carrying the goods of all and sundry from place to place, and that he was not a bailee who could take refuge under S. 151, Contract Act.

The duties and liabilities of a common carrier in India are governed by the principles of the English Common Law, in conjunction with the provisions of the Carriers Act, and notwithstanding some general expressions in the chapter on "bailments," the responsibility of a common carrier is not within the Contract Act, while a common carrier unless he is protected by a special contract or by statute, is

Common Carrier—(Concluded).

liable as the insurer of goods, that is he is responsible for every injury to the goods occasioned by any means whatever, except only by the act of God and the King's enemies. *Maung Po Taw v. Haramdi Missay, U.B.R. (1918), 4th Cr., 120=50 Ind. Cas. 562.*

SAUNDERS, J.C.

References:—18 C. 620, *F.*; 27 C.L.J. 615; 1 C.W.N. 329, *Dist.*

Computation of Rent.

(1) Elements for consideration in determining computation—Courts to consider plea of tenant that rents actually levied during decennial period exceeded what was legally due. See *MAD. ACT I OF 1908 (ESTATES LAND)*, No. 12, 35 M.L.J. 547.

(2) Order made with jurisdiction by Revenue Court for—Propriety of such order if questionable by Civil Court—Duty of Civil Court to see if such order is passed with jurisdiction. See *JURISDICTION (GENERAL)*, No. 1, 45 C. 769.

Co-mortgagee.

Payment by mortgagor to one co-mortgagee if valid discharge. See *MORTGAGE (GENERAL)*, No. 4, 22 C.W.N. 1021.

Companies Act (VI of 1882).

(1) *Ss. 38, 39—Dividend—Suit by shareholder for same—Limitation—Indian Limitation Act (IX of 1908), Art. 116—Registered, meaning of—General Clauses Act (X of 1897), S. 3, cl. 45.*

A suit by a shareholder to recover the amount of dividend duly declared as payable to him is a suit for compensation for the breach of a contract in writing registered and is governed by Art. 116 of the Limitation Act.

The dividend is due to him under the terms of the memorandum and the special Articles of Association, if any, and if there are no special Articles of Association and in so far as they are not inconsistent with them, the provisions in Table A appended to the Indian Companies Act and the Memorandum and the Articles of Association as are by law required to be registered under S. 38 of the Companies Act, the provisions of Table A to the Act in so far as they are applicable are deemed to be part of the Articles of Association.

The term "Registered" in the Limitation Act must be read as defined in the General Clauses Act of 1897 and it means registered under any law, general or special. *Ripon Press and Sugar Mill Co., Ltd. v. Venkatarama Chetty, 8 L.W. 354=35 M.L.J. 256=24 M.L.T. 246.*

WALLIS, C.J. and SESHAGIRI Aiyar, J.

(2) S. 39. See No. 1, *supra*.

(3) S. 169—*Appeal—Order in winding up proceedings under that Act—Order passed after new Act came in force—Order directing preferential payment.*

An order directing a preferential payment to be made to a creditor is one which relates to

Companies Act (1882)—(Concluded).

and is an incident of, the winding up, and the right of appeal is an incident of the winding.

When the liquidation of a company began under the Act of 1882 but the order complained of was passed after the Act of 1913 was passed, held notwithstanding, that S. 169 of the Act of 1882 would govern the right of appeal and consequently no appeal lay. *The People's Industrial Bank, Ltd. v. Har Kishen Lal, 16 A.L.J. 70=43 Ind. Cas. 642.*

RICHARDS, C.J. and BANERJI, J.

Companies Act (VII of 1913).

(1) S. 104 (1) (b)—*Debenture-deed—Share allotted under provisions of deed—Allotment as fully paid up share otherwise than in cash.* *Messrs. Huson and Robbison v. The Registrar and Asst. Registrar of Joint Stock Companies, Madras, 33 M.L.J. 474=6 L.W. 706=(1917) M.W.N. 776=41 M. 307. See Final Part, 1917, Col. 305.*

(2) S. 171—*Liquidation of company during pendency of suit—Application to continue suit if can be granted—Question not satisfactorily determinable in winding up proceedings.*

Under S. 171, Companies Act, leave to proceed with a suit against a Company, after the company has gone into liquidation, should, as a general rule, be given only where some question arises that cannot be satisfactorily determined in the winding up proceedings. *Jawahir Singh Sundar Singh v. Spinning and Weaving Mill Co., Ltd., Shahdara, 93 P.R. 1918=101 P.L.R. 1918=170 P.W.R. 1918=47 Ind. Cas. 1005.*

BROADWAY, J.

References:—*Wilson v. Natal Investment Co., 36 L.J. Ch. 312; Life Assurance of England, 34 L.J. Ch. 64; Pool Firebrick Co., 17 Eq. 268, R.*

(3) S. 171—*Appeal—Revision—Leave of Court not necessary.*

Held, by the Full Bench, that an appeal on an application for revision arising out of a suit, in which a company was the plaintiff, does not come within the purview of S. 171 of the Indian Companies Act (VII of 1913) and that it can be instituted or prosecuted without the leave of the Court's (3). *Chaudhri Kishen Singh v. Industrial Bank of India in Liquidation, 32 P.L.R. 1913 (F.B.)=62 P.R. 1918=47 Ind. Cas. 392.*

CHEVVIS and SHADI LAL, JJ.

References:—(2) 91 P.R. 1916, *overruled*.

(4) *Ss. 186, 200, 201—Order of payment under S. 186—Court to which application for its execution should be made.* See *EXECUTION OF DECREE*, No. 28, 92 P.R. 1918.

(5) S. 200. See No. 4, *supra*.

(6) S. 201. See No. 4, *supra*.

(7) S. 235—*Company voluntarily wound up—Secretary's denial of liability for monies in his hands on demand therefor by liquidator.*

Companies Act (1913) - (Concluded).

Secretary whether agent or trustee—Liability to pay interest on sum—Liability of legal representative of Secretary. **Ganessa Seturam v. Ramaswami Servai**, 33 M.L.J. 468=6 L.W. 590=(1918) M.W.N. 1. See Final Part, 1917, Col. 309.

Company.

(1) *Winding up—Contributory—Application for shares—Absolute or conditional.* **L. B. Powell v. F. Sen**, 15 A.L.J. 893=40 A. 45=43 Ind. Cas. 131. See Final Part, 1917, Col. 311.

(2) *Shares—Sales of shares by share-holder through Company—Manager of Company representing that shares had been sold—Payment of purchase money—Share holder—Manager not selling shares but keeping them with blank transfer—Liquidation of Company's affairs—Share-holder placed as contributory—Liability to pay call money—Misrepresentation by Manager.* **Narotam Morarji Gokuldas v. Indian Specie Bank**, 19 Bom. L.R. 186=38 Ind. Cas. 717=42 B. 264. See Final Part, 1917, Col. 311.

(3) *Liquidation of company—Payment of call as contributory by pledge of shares—Pledgee not entitled to recover call money from pledgor.* **Birdichand Jivraj v. Standard Bank**, 19 Bom. L.R. 341=40 Ind. Cas. 167=42 B. 159. See Final Part, 1917, Col. 310.

(4) *Liability to pay income-tax—Preference of share holders Ordinary share-holders—Income Tax Act (II of 1936), Ss. 4, 11, 12, Sch II, part II—Income-Tax (Amendment) Act (V of 1916).* **Purusshotamdas Harkinsondas v. The Central India Spinning, Weaving and Mfg. Co., Ltd.**, 19 Bom. L.R. 665=41 Ind. Cas. 963=42 B. 579. See Final Part, 1917, Col. 309.

(b) *Winding up of—Call on contributories, order of Court for—Application to Court for order to be by proper petition—Notice, Necessity of service of.*

The foundation for making an order for a general call on contributories is that a petition should be presented to the Court under r. 53 (of the rules framed under the Companies Act), which requires notice in Form 34 to be served four clear days before the date of hearing on each contributory, unless the Judge directs that the personal service be dispensed with and advertisement in Form 35 be substituted therefor. If an advertisement has to be made, it should be published sufficiently early so as to enable non-resident contributories to attend the Court in response to the general notice and to show cause on the fixed date **Raj Kumar Girja Nandan Singh v National Insurance and Banking Company, Ltd.**, 1 P.W.R. 1918=41 Ind. Cas. 139.

SHADI LAL, J.

(3) *In liquidation—Fixed deposit in favour of five persons—Not payable to either or*

Company—(Concluded).

survivor—Liquidator if bound to pay dividend without obtaining discharge from all depositors.

Where a fixed deposit receipt was in favour of five persons, and was not payable to "either or survivor," held that a liquidator was not liable to pay dividends to any one or more of the joint holders of the fixed deposit receipt without obtaining a discharge from all of the said holders or their representatives. **Gokal v. Official Liquidator**, 28 P.R. 1918=47 P.W.R. 1918=44 Ind. Cas. 848.

BROADWAY, J.

(7) *Liquidation—Share-holder's right to be removed from the list of contributories, principles governing—Liability as contributory how far affected by fraud or misrepresentation—Share-holder when can have his contract to take shares set aside—Repudiation.* See CONTRIBUTORY, No. 2, 42 P.R. 1918.

(8) *Purchase by father of share, in name of son—Liquidation—Father personally liable to contribute.* See CONTRIBUTORY, No. 3, 51 P.R. 1918.

(9) *Liquidating Court, refusal by, to give priority to particular debt—Regular suit for declaration of priority if lies after such refusal—Review.* See LIQUIDATION, 40 P.R. 1918.

(10) *Right, through liquidator, to apply for leave to sue as pauper.* See PAUPER SUIT, No. 2, 34 M.L.J. 421.

(11) *Company in liquidation—Pro-note taken by liquidator for money due towards shares—Suit on pro-note, Dismissal of, on merits—Liquidator's right to fall back on original cause of action—Incompetency of Liquidation Court to reconsider question—Merger of original contract into pro-note and novation of contract.* See RES JUDICATA, No. 42, 87 P.W.R. 1918.

Compensation.

(1) *Trespasser dispossessing actual cultivator—Compensation—Principle of calculation of mesne profits.*

It is not open to a trespasser to dispossess an actual cultivator, and then to sub-let the land to a third person and subsequently claim to compensate the rightful occupant only to the extent of what he may have by the sub-letting.

Where the person dispossessed by a trespasser is himself a cultivator of the land in dispute, the profits to which he is entitled are those that the wrongful holder might have obtained by actual cultivation with due diligence. **Goviad Madho v. Dhasu**, 43 Ind. Cas. 59.

STANYON, A.J.C.

(2) *Collection of rain water—Damage to adjoining wall—Liability to compensate the owner.* See ACT OF GOD, No. 1, 41 O.O. 295.

(3) *Land Acquisition Act, S. 123—Compensation to be paid for acquiring stone quarry—Mode of calculation.* See LAND ACQUISITION ACT I OF 1894, No. 11, 44 Ind. Cas. 1.

Compensation—(Concluded).

(4) Compulsory purchase—Compensation, its meaning and determination. See BOM. ACT III OF 1901 (DISTRICT MUNICIPALITIES), No. 2, 44 Ind. Cas. 363.

(5) Improvement by tenant—Compensation claimed by tenant, amount of. See OUDH ACT XXII OF 1886 (RENT), No. 1, 45 Ind. Cas. 227.

(6) Suit by dispossessed tenant for compensation against landlord after more than one year from dispossession having obtained decree from possession—Suit if cognisable by Civil or Revenue Court. See JURISDICTION (REVENUE COURTS), No. 8, 90 P.R. 1918 (F.B.).

(7) Ownership of land in proprietor—Tenant, a licensee to occupy *abadi* land—Apportionment of compensation awarded under Land Acquisition Act. See (LAND ACQUISITION), ACT I OF 1894 No. 1, 45 Ind. Cas. 554.

(8) Suit for compensation for injury to goods in the possession of Railway Company as carriers—Limitation. See LIMITATION ACT, No. 117, 45 Ind. Cas. 173.

(9) Purchase of property from limited owner—Improvements effected—Whether purchaser can claim compensation. See TRANSFER OF PROPERTY ACT, No. 15, 45 Ind. Cas. 212.

Composition-deed.

Money suit on hatchitta — Compromise petition in, creating charge on immoveable property — Registration, Necessity of — Registration Act (XVI of 1908), S. 17—Meaning of.

The compromise petition in a suit to recover money on a *hatchitta*, provided that a decree should be passed in favour of the plaintiff and to secure the payment of the decretal amount the defendant also hypothecated certain immoveable properties.

Held, that the mortgage was altogether outside the scope of the money suit and was given not by any judicial decision of the Court, but by the defendant, and that the document required registration under the provisions of the Registration Act.

A composition deed does not mean a deed composing differences; it is a deed by which a debtor compounds with his creditors. *Gosta Behari De v. Gosta Behari Lumanta*, 46 Ind. Cas. 243.

FLETCHER and SHAMSUL HUDA, JJ.

Compound Interest.

(1) Mortgage—Covenant in, to pay, with six monthly rests if amount not paid within a year, if penal. See MORTGAGE (SUIT), No. 2, 47 Ind. Cas. 649.

(2) Lender securing for himself compound interest after long delay and neglect by borrower to pay debt or interest, if unconscionable—When claim to compound interest may become oppressive. See UNCONSCIONABLE BARGAIN, No. 1, 16 A.L.J. 905 (P.C.).

(3). See INTEREST.

Compromise.

(1) *Compromise of a claim—Consideration—Claim must be bona fide—Mimanshapatra obtained from guardian of infant by setting up false will.*

A died in 1902 leaving an adopted son, B, and a daughter, P, who was married to one G. B died in 1906, leaving as his heir P's son K, then an infant, only two or three months old. About this time certain agnates of A set up a will by A under which they claimed A's estate as from the death of B and G and they purported to settle the dispute by a *mimanshapatra* whereby G, on his son's behalf, gave certain portions of the estate left by B to the other party. On the validity of the *mimanshapatra* being challenged by P on behalf of her son K, in a suit for partition brought by her against the other party to the deed:

Held, that, though the latter could not be expected and were not obliged to prove the will in solemn form in the present litigation, it was necessary for them to show that there was a will and that upon that will they had a claim which was made honestly and in good faith (a).

Held, on the evidence, that there was no will, and the claim put forward on its basis was not honest or *bona fide*, but merely a sham claim with a view to inducing G to give some of the infant's property in their favour: and that upon the question of the validity of the *mimanshapatra*, the position of the infant was different from what would have been G's position had he executed the deed for himself. *Krishna Chandra Datta Roy v. Hemaja Sankar Nandhi Masumdar*, 23 C.W.N. 463—45 Ind. Cas. 477.

CHITTY and BEACHCROFT, JJ.

References:—(a) Miles v. New Zealand Alford Estate Co., L.R. 32 Ch. D. 466 (1886); Cook v. Wright, 1 B. and S. 559 (1861), R.

(2) *Decree embodying a compromise, which goes beyond the land in dispute—Whether successor Munsif has jurisdiction to set aside the decree.*

Where a decree embodies a compromise which went beyond the land in dispute in the suit, *held* that the successor Munsif had no jurisdiction to set aside the decree passed by his predecessor.

*Semble:—*It may be that the Munsif who tried a suit, should not incorporate in his decree portions of a compromise which did not relate to lands in dispute before him. *Mahadeo Pahan v. Bhaswar Ram*, 43 Ind. Cas. 772.

CHAMIER, C.J. and SHARFUDDIN, J.

(3) *Compromise going beyond questions in dispute—Whether admissible in evidence in subsequent suit as admissions.*

Where a compromise went beyond the questions in dispute between the parties in the case, *held* that the compromise is admissible in evidence, in a subsequent suit, for the purpose of proving that parties in the previous suit admitted the facts embodied in the compromise. *Mahadeo Ursan v. Etwarla*, 43 Ind. Cas. 775.

CHAMIER, C.J. and SHARFUDDIN, J.

Compromise—(Continued).

(4) *Compromise—Whether can bind persons not parties to it—Jurisdiction of Court to pass order affecting persons not parties to compromise.*

No one can be bound by a compromise to which he was not a party.

A landlord obtained an execution sale of a *raiyat* holding and recovered his decree amount and the balance of the sale-proceeds was taken by one of the judgment-debtors as the representative of the rest. Then, a mortgagee who had previously purchased the holding in execution of his mortgage decree applied to have the sale set aside under O. XXI, r. 90, Civ. Pro. Code. The mortgagee and the auction-purchaser entered into a compromise to have the sale set aside on payment of some money by the mortgagee to the auction-purchaser. The terms of the compromise cannot be enforced against judgment debtors who are not parties to the compromise. The Court has no jurisdiction to make an order on the compromise petition affecting the judgment-debtors, nor can such an order of the Court be enforced against them as they were no parties to the compromise. *Abdul Karim v. Meherunessa*, 45 Ind. Cas. 33.

RICHARDSON and BEACHCROFT, JJ.

(5) *Court, Power of, to record—Repudiation by one of the parties—Power of Court to enquire into and give effect to—Bengal Tenancy Act (VIII of 1885), S. 147-A, cl. 2.*

Courts are empowered to enquire into and give effect to a lawful compromise, adjustment or satisfaction of a suit by the parties even where one of the parties repudiated and receded from it afterwards in Court.

S. 147 A, cl. 2 of the Bengal Tenancy Act clearly empowers the Court to give effect to a compromise and pass a decree accordingly even if the parties subsequently retract from it. *Uttam Sahu v. Arzani*, 46 Ind. Cas. 229.

MILLER, C.J. and JWALA PRASAD, J.

(6) *Civ. Pro. Code, Applicability of, to Courts constituted under the Land Revenue Act—Compromise in mutation proceedings on behalf of minor entered into without leave of Court, Validity of—Revenue Courts.*

Held, that the provisions of the Code of Civil Procedure do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act.

A minor was represented in certain mutation proceedings by his elder brother, who *bona fide* entered into a compromise with the other party. The leave of the Court, as required by O XXXII, r. 7 of the Civ. Pro. Code, was, however, not obtained for his settlement. *Held* that the compromise was not bad merely for want of such leave. *Harpal Singh v. Sukhrani*, 21 O.C. 220.

LINDSAY, J.C.

(7) *Calculated to dismember recognized subdivision of bhag—Validity.* See BOM. ACT V OF 1862 (BHAGDARI AND NARVADARI), 20 Bom. L.R. 342.

Compromise—(Concluded).

(8) *Separate petitions by plaintiff and defendants of a suit for passing decree—Court not taking the separate petitions as lawful compromise—Effect on appeal.* See CIV. PRO. CODE (1908), No. 400, 44 Ind. Cas. 145.

(8 a) *Advance of money to finance litigation—Agreement to share in property on success—Default by lender to pay full amount—Lien in respect of money advanced—Lien on amount of compromise in a particular manner—Compromise in a different manner, Lien how affected by.* See CONTRACT, No. 8, 47 Ind. Cas. 563.

(9) *Defamatory statements made in pleadings in civil suit—Compromise of suit—Subsequent suit for damages—Maintainability.* See DEFAMATION, No. 2, 21 O.C. 321.

(9-a) *Of bona fide claim—Hindu widow, By, Validity of—Burden of proof in case of allegation of collusion.* See HINDU LAW (WIDOW), No. 11 d, 47 Ind. Cas. 697.

(10) *Compromise or settlement, when binding—Ignorant abandonment of right, not sufficient.* See MAHOMEDAN LAW (GIFT), No. 1, 28 C.L.J. 306.

(11) *Part dealing with matters outside suit—Incorporation of compromise in decree—Admissibility in evidence without registration.* See REGISTRATION ACT, No. 11, 3 Pat. L.J. 255.

(12) *Petition of, addressed to Court requesting dismissal of suit on ground of adjustment out of Court—Not registrable under Registration Act (1906), S. 17 (2).* See WITHDRAWAL OF SUIT, No. 1, 45 Ind. Cas. 913.

(13) *Compromise petition restraining powers of alienation of Hindu widow, Construction of.* See JUDICIAL PROCEEDING, 47 Ind. Cas. 710.

Compromise-decree

(1) *Compromise, decree on—Plaintiff to execute decree on payment or deposit of sums of money—Money remitted by money-order—No deposit as required by decree—Mortgage made by defendant as preliminary to sale of property provided in compromise—Whether decree executable.*

In a suit for dower a decree was made in terms of the compromise entered into in the suit. The terms were (1) that the defendant would sell to the plaintiff property worth Rs. 12,000, (2) that the plaintiff was to pay a deposit in Court the price of the stamp, the registration-fee and another sum of Rs. 15 and if he did not do so his claim would stand dismissed with costs except for the sum of Rs. 700 due to a creditor, and (3) that an agreement was to be executed within three months from its date containing the terms of the compromise. The agreement was in fact executed and it contained a hypothetical sale of the very property which was to be sold to the plaintiff by the defendant. The plaintiff, however, remitted the price of the stamp, the registration-fee and the sum of Rs. 15 by money-order to the defendant which

Compromise-decree—(Concluded).

was refused by the latter. The plaintiff then applied for the execution of the decree and he asked for the sale of property. The defendant objected that the price of the stamp, the registration-fee not having been paid or deposited, the plaintiff lost his right and that the plaintiff could not apply for sale but must bring a suit for sale on the mortgage; held (1) that the mortgage was a collateral security and the plaintiff could sell the property to realise his claim as a money decree; (2) that the remittance by money-order was not a "payment," under the compromise. *Isayat-ullah Khan v. Hashmat-ullah Khan*, 16 A.L.J. 472=46 Ind. Cas. 193.

RICHARDS, O.J. and BANERJI, J.

* (2) *When appealable Vakalat containing power to compromise, construction of.* *Thenam mal v. Sokammal*, 22 M.L.C. 149=41 M. 233. See Final Part, 1917, Col. 313.

(3) *Higher interest in compromise decree—If recoverable—Penalty—Contract Act*, S. 74. *Gauri Dutt v. Dohan Thakur*, 2 Pat. L.J. 673=4 Pat. L.W. 203=43 Ind. Cas. 459. See Final Part, 1917, Col. 314.

(4) *Failure by defendant to endorse promissory notes—Execution of terms of decree—Procedure if by suit or in execution proceedings.* See CIV. PRO. CODE (1908), No. 80, (1913) M.W.N. 333.

(5) *Consent decree, what is—Decree based on compromise if—Appeal if lies from such decree—Civ. Pro. Code (1908), S. 96 (3), O. XXIII, r. 3* See CONSENT DECREE, No. 1, 46 Ind. Cas. 776.

(6) *Reversioners if bound by award or compromise decree against widow.* See HINDU LAW (WIDOW), No. 7, 20 Bom. L.R. 947.

(7) *Registration of, if necessary—Proof of illegality of, Onus of.* See MALABAR LAW, No. 6, 35 M.L.J. 51.

Conditional Decree.

Sale of land—Promissory note as part consideration—Dispute regarding title of land in question—Suit on pro-note—Conditional decree—Validity. See PROMISSORY-NOTE, No. 1, 43 Ind. Cas. 551.

Consent.

(1) *Sale of Hindu joint family property—Long silence of members of family entitled to object to sale—Silence if amounts to consent to sale.* See HINDU LAW (ALIENATION), No. 13, 21 O.C. 166.

(2) *Of parties, it can confer jurisdiction.* See JURISDICTION (GENERAL), No. 6, 45 Ind. Cas. 920.

Consent Decree.

(1) *What is—Decree based on compromise if—Appeal if lies—Civ. Pro. Code (V of 1908), S. 96 (3), O. XXIII, r. 3.*

Every decree which has incorporated an agreement, compromise or satisfaction ordered

Consent Decree—(Concluded).

to be recorded under O. XXIII, r. 3, of the Civ. Pro. Code, is not *ipso facto* "a decree passed by the Court with the consent of parties" within the meaning of S. 96 (3) of the Code. It may deal only with a part of the subject-matter of the suit or it may be a contested agreement, compromise or satisfaction which has been the subject of an issue, trial and decision by the Court.

The right of appeal generally given against all decrees by S. 96, sub-Ss. 1 and 2, Civ. Pro. Code, is only withheld by sub-S. (3) in the case of decrees passed with the consent of parties. Sub-S. (3) is limited to the case where the parties invite the Court to pass a particular decree and the Court acts accordingly.

A decree based on a finding arrived at by the Court against the consent of one party, to the effect that the matter in dispute has been compromised, could not be described as a decree passed with the consent of parties and S. 96 (3) has, therefore, no application to it.

An alleged compromise said to have been fully acted on by the defendant was pleaded in bar of the suit and the plea was held established and the suit dismissed. Such a decree cannot properly be described as one made under O. XXIII, r. (3) of the Civ. Pro. Code. *Renuka v. Onkar*, 46 Ind. Cas. 776.

STANYON, A.J.C.

(2) *Cancellation of, by parties without aid of Court.* See AWARD, No. 10, (1918) M.W.N. 595.

Consequential Relief.

Suit for declaration and Court-fee payable in respect of. See REVENUE SALE, No. 7, 3 Pat. L.J. 448.

Consideration.

(1) *Adequacy of—Contract Act (IX of 1872), Ss. 11, 23, 25, Expl. 2—Suit on bond—Executant under Court of Wards—Subsequent bond by son, whether for consideration—Liability of son.*

Plaintiff sued to recover money due on a bond executed by R and his son on 13th August, 1906, when R's estate was under the management of the Court of Wards. It appeared that a part of the consideration was a previous bond, executed by R alone, and it was contended that as R could not then incur any liability, his estate, being under the management of the Court of Wards, there was no liability that the son could take over: Held, (1) that, when R borrowed money from the plaintiff, debts came into existence, even though R was not liable, and that the son rendered himself liable for the debts when he signed the bond, which was the basis of the suit;

(2) that the bond amounted to a fresh contract and not merely to a ratification of a former void contract;

(3) that there was consideration for this fresh contract and the question whether it was

Consideration—(Concluded).

sufficiently adequate or not was immaterial. *Rajmal Shah v. Tika Baldev Singh*, 142 P.W.R. 1218=46 Ind. Cas. 974.

CHEVIS and LESLIE-JONES, JJ.

(1-a) Legal consideration, what is—Enhancement of rent, Agreement to pay, for garden crops raised by ryots with aid of their own wells, Enforceability of—Nature of consideration necessary for—Landlord's forbearance from raising hopeless and groundless dispute not a valid consideration for abandonment of tenant's rights. See *MAD. ACT VIII OF 1865 (RENT RECOVERY)*, (1918) M.W.N. 732 (P.C.).

(2) Past and future services—Promise to pay annuity—Enforceability of. See *CONTRACT ACT*, No. 2, 46 Ind. Cas. 282.

(3) Agreement to convey land—Withdrawal of prosecution for criminal breach of trust stipulated as part of consideration. See *CONTRACT ACT*, No. 17, 20 Bom. L.R. 331.

(4) Promisor, if may be lawful when it does not benefit the. See *CONTRACT ACT*, No. 1-a, 22 C.W.N. 129=41 Ind. Cas. 673=45 C. 774.

(5) Indian Law, definition of, wider than that of English Law. See *CONTRACT ACT*, No. 1, (1918) M.W.N. 173.

(6) Agreement to bring about marriage between plaintiff and defendant's relative—Agreement if legal consideration—Suit for recovery of price of marriage—Such agreement if may be pleaded in avoidance of claim for money. See *CONTRACT ACT*, No. 13, U.B.R. (1918), 4th Cr., 119.

(7) Intention to pass right to property on sale—Consideration not paid—Transfer deed if rendered fictitious. See *SALE*, No. 1, 16 A. L.J. 454.

(8) Presumption that contract is imported if applies to India. See *TRANSFER OF PROPERTY ACT*, No. 10, 20 Com. L.R. 177.

(9) Agreement opposed to—Money paid under such agreement—Suit for refund of such money—Suit—Security bond, Enforceability of. See *VOID AGREEMENT* No. 1, 27 C.J.J. 459.

Consignor and Consignee.

(1) Bill of lading—Stipulation disallowing claim for short delivery after one month—If unreasonable—Landing agent's—Position of—Whether agent of consignee also—Continuous carriers—Liability inter se and with respect to consignors discussed—Limitation Act (IX of 1908), Art. 31—Whether applies to a landing agent—Carrier, meaning of—Article, if applicable to carriers not common carriers.

Per Sir John Wallis, C.J.—A stipulation in a bill of lading that no claim for short delivery will be entertained unless made within one month after the delivery of any portion of the

Consignor and Consignee—(Continued).

goods entered in the bill of lading is not unreasonable (a).

Per Curiam.—Landing agents are agents of the shipowners to retain the goods, receive freight, and give delivery. They are also agents of the consignees to land the goods and privity of contract between the landing agents and consignees is readily inferred from the well-known course of business according to which they are paid by the consignees (b).

Per Kumaraswami Sastri, J.—In the case of continuous carriers when goods have to be carried through different transport agencies to arrive at the destination:

(1) The carrier at one end is, in the absence of a contract limiting his liability to his own transport system, liable for the loss or destruction beyond his own system, or in consequence of acts or default of persons other than his own servants (c).

(2) In the absence of a contract to the contrary, the consignor could not hold the company with whom he did not contract liable for damages in cases of mere non-feasance though the company may be liable in tort.

(3) When, however, there is an agreement between the two companies the effect of which is to constitute one company the agent of the other and the traffic is carried on for the joint benefit of both companies, either company may be sued at the option of the consignor (d).

Where goods had to be carried from Rangoon to Negapatam by two companies, one a steamship company carrying to Negapatam roads and the other landing agency carrying it from there to the beachside and the Bill of Lading limited the Steamship Company's liability to the stage when the goods were free of the ship's tackle.

Held (in a suit against both for non-delivery)

(1) that the Steamship Company's liability ceased as soon as the goods passed from the ship to the landing agent;

(2) that they together constituted continuous carriers with a limit as to the liability of one of them;

(3) that they were both carriers; and

(4) that Art. 31 of the Indian Limitation Act, 1908, applied equally to a suit against the landing agent as to a suit against the Steamship Company (e).

Per Kumaraswami Sastri, J.—(1) A carrier in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire.

(2) For the application of Art. 31 of the Limitation Act, it is enough if the defendant is the carrier within the meaning of the definition in (1) above and it is not necessary that he should also be a common carrier within the meaning of the Carriers Act, 1865. *Mylappa Chettiar v. The British India Steam Navigation Company, Ltd.*, 34 M.L.J. 563=8 L.W. 46=24 M.L.T. 175=45 Ind. Cas. 485.

WALLIS, C.J. and KUMARASWAMI SASTRI, J.

References—(a) 3 M. 107, F. (b) 8 Q.B. 186; 5 B. 371; 99 M. 1 (F.B.), R. (c) 3 M.

Consignor and Consignee—(Concluded).

and W. 421; 7 H.L.O. 194; 5 O.P.D. 157; 15 C.B.N.S. 582, R. (d) 5 B. 371; 8 Q.B. 186, R. (e) 39 M. 1 (F.B.), F.

(2) Right of consignee to insist on carrier weighing goods before delivery—Refusal to reweigh, if refusal to deliver—Right of consignee to weigh and charge for shortage. See COMMON CARRIERS, No. 1, 22 C.W.N. 310.

(3) Consignor of goods covered by risk-note if entitled to claim damages for loss—Burden of proving how consignment lost. See RAILWAYS ACT, No. 1, 22 C.W.N. 622.

(4) Delivery of goods by Railway without asking for railway receipt pledged with Bank—Receipts obtained from Bank by consignee after making delivery—Subsequent endorsement by consignee of receipts to third party for value—Railway if liable to third party for not calling in receipts after delivery of goods. See RAILWAYS ACT, No. 5, 35 M.L.J. 35.

(5) Goods delivered to G. I. P. Ry. for delivery at station of E. I. Ry.—Risk-note—Loss of goods—Conditions of liability of Railway. See RAILWAYS ACT, No. 6, 14 N.L.R. 122.

(6) Liability of Railway Company for misdelivery of parcel. See RAILWAYS ACT, No. 3, 20 Bom. L.R. 591.

Consolidation (Of Appeals).

Land Acquisition Act, Ss. 12 and 18—Single notice under S. 12 (2)—Single objection under S. 18—Single award—Splitting up of awards by lower Court not known to parties—Awards may be treated as one—Consolidation of appeals—Appellate Court, Power of—Duty of Court before consolidation—Plea for consideration—Inherent power—Civ. Pro. Code (1908), S. 151.

A Court has inherent power to consolidate appeals and the provisions of S. 151, Civ. Pro. Code, may be invoked for that purpose (a)

It is the duty of Courts to consider whether a particular case is a fit one for consolidation, because, if it is allowed, the public revenues will be deprived of a portion of the Court-fees payable by the appellants.

Where only one notice was sent under S. 12 (2), Land Acquisition Act, and only one objection under S. 18, there would *prima facie* be only one award; and the fact that in the arbitration proceedings before the District Court, the award was split up and amalgamated with other awards, which had reference to other claimants, ought not to be allowed to prejudice the right of the appellants to treat their award as one, and in such a case they would be equitably entitled to consolidation.

Where the splitting up of the awards by the referring officer or by the Court was not even known to the parties or where there was no occasion for the claimants to take any objection at the hearing in the Court below there would only be one award and they would be entitled

Consolidation (Of Appeals)—(Concluded).

to appeal against it in one appeal (b). *Yengu Naidu v. Deputy Collector of Madura Division*, 34 M.L.J. 279—45 Ind. Cas. 468.

PHILLIPS, J.

References:—(a) 15 W.R. 395; 29 C. 140; 34 C. 599; 10 Bom. L.R. 675; 22 C. 511; 16 M.L.J. 411, R. (b) 15 C.W.N. 994; 43 C. 95, *Dist.*; 31 M.L.J. 324, R.

Construction of Acts.

(1) Section, Construction of, Principle as to, See CONTRACT, No. 8, 47 Ind. Cas. 563.

(2) Stamp Act (II of 1899). See CONVEYANCE, 151 P.L.R. 1917.

Construction of Decree.

Co-sharer, Suit by, for khas possession—Decree in, Construction of—Joint possession—Exclusive possession, Remedy for, Partition suit.

A decree passed on appeal in a suit to recover khas possession of a plot of land as an eight anna co-sharer declared the plaintiff's right to an eight anna share in the land and directed him to take khas possession thereof.

Held that the proper construction of that decree was that a decree for joint possession of an eight annas share was given to the plaintiff. Having got joint possession, he was not entitled to evict the persons in actual possession. His only course was, if he wanted exclusive possession of his share, to ask for a partition. *Mohendra Nath Pal v. Nasiruddin Mahamad*, 45 Ind. Cas. 587.

FLETCHER and SHAMSUL HUDA, JJ.

Construction of Deed.

Perpetual lease—Whether confers rights of transfer.

In construing a deed the terms of which are clear and which purport to be nothing more than a deed of lease, it is not permissible to attribute to the lessor an intention to confer rights of transfer, unless there are express words to that effect or unless such an intention is necessarily implied in the language of the grant. *Kalka Singh v. Saraj Ball Lak*, 45 Ind. Cas. 208.

LINDSAY, J.C.

References:—3 O.C. 108; 5 O.C. 187; 6 Q.C. 94, R.

Construction of Document.

(1) *Construction of documents—Principle.*

In the matter of the construction of documents, the well-established principle of law is that the deed must be construed by what appears within the four corners of the document itself and the Court cannot go outside the deed for the purpose of showing the intention of the maker. *Chulhal v. Bala Bugh Seth*, 45 Ind. Cas. 380.

MULLICK and ATKINSON, JJ.

Reference:—10 C.W.N. 570, *Dist.*

Construction of Document—(Concluded).

(2) Question of law, Second appeal lies—Mortgage with possession—Mortgaged property, lease of, to mortgagor—Construction of the two documents—Mortgagee, Right of, to evict mortgagor. See APPEAL (SECOND APPEAL), No. 25, 161 P.W.R. 1918.

(3) Contract for sale of rice milled by seven firms—Provision in, for break-down in mill—Delivery of rice from a different mill—Election—Break-down of the mill—Seller, if absolved from liability—Contract, Construction of—Breach of contract, if failure amounts to. See CONTRACT, No. 7, 47 Ind. Cas. 541.

(4) Advance of money to finance litigation—Agreement to share in property on success, Construction of, Transaction if a loan—Lender entitled to refund of money actually advanced, though full amount not paid. See CONTRACT, No. 8, 47 Ind. Cas. 563.

(5) Permanent and heritable lease, Grant of—Alienation, Restraint on. See LANDLORD AND TENANT, No. 46, 46 Ind. Cas. 73.

(6) Principle as to—Document to be considered as a whole and intention to be gathered from all facts. See REGISTRATION ACT (1908), No. 33 a, 157 P.L.R. 1917.

Construction of Grant.

Maintenance grant, Of—Perpetual or otherwise, Presumption as to. See GRANT, No. 1-a, 46 Ind. Cas. 913.

Construction of Statutes.

(1) Sections Illustrations to, Value of, in.

It is the duty of a Court of law to accept, if that can be done, the illustrations given under the sections of a statute as being both of relevance and value in the construction of the text and they should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. *R K Janoo and Co v. Joseph Heap and Sons, Ltd*, 46 Ind. Cas. 497.

YOUNG, J.

(2) Where the words of a previous statute are re-enacted. See BEN. ACT VI OF 1904 (BHOTA NAGPUR TENANCY), No. 5, 44 Ind. Cas. 462.

(3) Applicability of special provisions of law to special cases. See OUDH ACT XXII OF 1886 (RENT), No. 3, 44 Ind. Cas. 644.

(4) Statutes of Limitation, Construction of. See ALIEN ENEMY, 47 Ind. Cas. 122.

Construction of Words.

"Company's Sica Rupees" used in *Kabuliyat*, Meaning of.

The expression Company's Sica Rupees used in a *Kabuliyat* of 1850 by which a *patni taluq* was created was held to be ambiguous inasmuch as the Calcutta Sica Rupee, coined by the company had never become known as the Company's Sica Rupee. To ascertain the

Construction of Words—(Concluded).

true intention of the parties the surrounding circumstances must be looked to.

The history and origin of the term "Sica Rupee" discussed. *Maharaj Bahadur Singh v. Jadab Chandra Ghose*, 47 Ind. Cas. 109.

TEUNON and RICHARDSON, JJ.

Constructive Notice.

(1) Mortgage of property by son in whose name property was purchased—Possession and enjoyment of property by father—Constructive notice of purchase being *benami*. See BENAMI TRANSACTION, No. 6, 46 P.R. 1918—45 P.L.R. 1918.

(2) Estoppel of party pleading, Effect of. See ESTOPPEL, No. 3, 46 Ind. Cas. 228.

Contempt of Court.

Disobedience to orders of Court—Single act. See CIV. PRO. CODE (1908), No. 130, 7 L.W. 328.

Contentious Proceeding.

Partition proceedings under C.P. Land Revenue Act when become contentious. See LAMBARDAR, No. 1, 14 N.L.R. 18.

Contingent Remainder.

Bequest of remainder of gift to wife and then to niece and to children of niece is bequest of contingent, not vested, remainder. See WILLS, No. 15, 3 Pat. L.J. 199.

Continuation of Suit.

Liquidation of company during suit—Leave to continue suit when claimable. See COMPANIES ACT (1913), No. 2, 93 P.R. 1918.

Continuing Wrong.

Interference with right of irrigation if a. See REMAND, No. 5, 177 P.W.R. 1918.

Contract.

(1) C I F C I. contract—Bill of Exchange presented with shipping documents—Acceptance of the bill—Outbreak of war—Goods shipped on enemy ship—Arrest of the ship as prize—Non-payment of bill at maturity—Goods delivered later at destination—Liability to pay amount of bill with interest—Bill presented without shipping documents—Acceptance after outbreak of war—Acceptance not supported by consideration—Non-liability to pay the bill. *Marshall & Co v. Naginchand*, 18 Bom. L.R. 915—42 B. 473. See Final Part, 1916, Col. 516.

(2) Contract, construction of—Contract to supply by agent of enemy firm—Declaration of hostilities before arrival of vessels—Capture of vessel—Condemnation by Prize Court—Effect of subsequent release—Commercial intercourse with enemies—Ordinance VI of 1914—Breach of contract—Liability for damages—Contract Act, S. 56, ill. (d). *Banghy Abdul Bazaar Sahib v. Khandi Rao*, 40 Ind. Cas. 851—41 M. 225.. See Final Part, 1917, Col. 828.

(8) Annuity, Promise to pay—Consideration past and future services—Enforceability of

Contract—(Continued).**—Agreement, Part of, Void, Effect of—Contract Act (IX of 1872), S. 25.**

A promise to grant an annuity to a person as a reward for possible future services is enforceable in law, on the promisee proving that there was some contract for future services on his part which might have been enforced by the promisor, if the recipient omitted to perform it.

In a suit on an ekranama executed by the defendant binding himself to pay a certain annuity to the plaintiff in consideration of past services and possible future services :

Held, that the agreement or promise to pay for future services was without consideration and void under S. 25 of the Contract Act, since there was no binding contract on the part of the plaintiff to perform services in the future, and that the agreement was one and indivisible, and therefore unenforceable. *Basanta Kumar Chowdhury v. Madan Mohun Chowdhury*, 46 Ind. Cas. 282.

RICHARDSON and BEACHROFT, JJ.

(4) Performance, Offer of, Essentials for validity of—Performance, Place of—Necessity of offer to be at place required—Contract Act (IX of 1872), Ss. 37, 38.

For an offer of performance to be valid, it must be complete and must satisfy all the requirements of the contract as to delivery : it must, where the contract requires delivery at a particular place, be an attempt to deliver at that place.

In a contract to deliver a certain amount of paddy at the defendant's mill, the plaintiff informed the defendant that the paddy was lying at another mill and asked if he was willing to take delivery after examining the paddy, when he would bring it to his mill at once.

Held, that, inasmuch as the paddy was not tendered at the mill contracted for, there was no valid offer of performance within the meaning of S. 38 of the Contract Act. *K. K. Janoo & Co. v. Joseph Heap & Sons, Ltd.*, 46 Ind. Cas. 497.

YOUNG, J.

(5) Auction, Agreement not to bid at—If illegal or against public policy—Wagering contract, money paid under, to a stakeholder, Recoverability of—Stakeholder, Authority given to a, to pay over money, Revocation of—Contract Act (IX of 1872), S. 23.

An agreement between two persons not to bid against each other at an auction is not necessarily illegal or against public policy.

If two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract and the money

Contract—(Continued).

cannot be reclaimed, but if the event has not happened, the money may be recovered.

Authority given to a stakeholder to pay over money in respect of an unlawful transaction may be revoked at any time before it has been actually paid, even if it has been credited in account. *Ah Foke v. P. M. A. Nagappa Chetty*, 46 Ind. Cas. 755.

YOUNG, J.

(6) Minor, Agreement by, Validity of—Ratification of, on attaining majority—Mortgage by minor on attaining majority—Consideration, fresh advances and old minority debts—Validity of mortgage.

In India an agreement by a minor is void, not merely voidable and as such it does not admit of ratification on attaining majority.

A mortgage executed by a minor on attaining majority in favour of a creditor who had lent him various sums during his minority, the consideration for the mortgage being the debts incurred during minority and fresh advances at the time of mortgage, was held to be enforceable only to the amount of the fresh advance actually made, though the entire amount stated in the bond was handed over by the mortgagee, who then received back the old minority debts. *Narendra Lal Khan v. Hrishikesh Mukherjee*, 46 Ind. Cas. 765.

CHATTERJEA and WALMSLEY, JJ.

(7) For sale of rice milled by seven firms—Provision in contract for breakdown of mill—Supply of rice milled by a different firm—Election—Breakdown of that mill—If provision applicable—Construction of contract—Breach of contract, if non-delivery amounts to.

In a contract for sale of rice, the seller had been given the option to deliver rice milled by seven specified firms and was also to be absolved from liability in case of accidents to machinery, etc. After delivery of certain quantity of rice from a different mill, which the purchaser had also accepted, the mill was burnt down before the delivery could be completed. In a suit brought by the purchaser for damages for non-delivery of the balance :

Held, (1) that the option given to the seller to deliver rice milled by any of the seven firms was meant only for the benefit of the seller and it cannot be construed to have imposed on him an obligation to deliver from all the mills ;

(2) that, on account of the mill having been burnt down, the seller was absolved from all liability to deliver the balance of rice due under the contract, since the provision was intended to refer to the mill from which delivery was being taken or was to be taken and since the purchaser had also agreed to take delivery from this mill, though it was not one of the seven. *Arracua Co., Ltd. v. Hamadanee & Co.*, 47 Ind. Cas. 541.

TWOMEY, C.J. and ORMOND, J.

(8) To finance litigation by lending money—Agreement to share in property in case of success—Transaction is a loan—Refund

Contract—(Continued).

of money actually advanced, lender if entitled to, though full amount not advanced—Contract Act (1872), S. 64—ChamPERTY—Contract with another, Benefit derived from, liability in case of—Future property, Assignment of, Validity of—Transfer of Property Act, S. 6—Section, Construction of—S. 58, 'specific immoveable property.' Meaning of, in—Loan charged on property—Default by lender to pay full amount—Lien in respect of money advanced—Lien on amount of compromise in a particular manner—Compromise in a different manner, Lien how affected by—Charge on both moveable and immoveable property—Document not registered—Rights over moveable property not affected.

A person who promises to finance a litigation by advancing moneys from time to time up to a certain limit is nevertheless entitled under S. 64 of the Contract Act, to a refund of the amount actually advanced by him, even though he does not perform the whole of his part of the contract (a).

Whether or not a transaction is a loan has to be ascertained from a construction of the terms of the document.

A transaction, the avowed object of which is to finance a litigation against a person in possession of a zamindari and in favour of persons who are themselves unable to find the necessary funds for the purpose, which provides for the lender getting, in the event of success of the litigation, a share of the property, without any corresponding provision for refund of the amount advanced in case of a dismissal of the suit cannot be treated as a loan. The transaction is on the face of it champertuous, although that would not prevent the promises from recovering what he has advanced in case the litigation proved successful.

A party cannot be charged with liability merely on the ground that he had benefited by a contract entered into by another.

There can be a valid assignment of future property in India. S. 6 of the Transfer of Property Act must be construed as an exception to the general rule in favour of transfers of property, present and future, and not as containing a total prohibition against the assignment of all future property.

Portions of the same section should be construed *ejusdem generis* with the rest of the section.

There is a clear indication in the words 'of a like nature' in cl. (a) of S. 6 that the 'possibility' must belong to the same category as the chance of an heir-apparent or the chance of a relation obtaining a legacy.

As regards the expression 'specific immoveable property' in S. 58 of the Transfer of Property Act, a property can be specific so long as it is identifiable, though it may not be in existence on the date of the transfer. Therefore a transfer, if otherwise valid, is not rendered inofficious by reason of the subject-matter not having been in existence on the date of the agreement.

Contract—(Continued).

In case of a loan charged on a property, a mere default of the lender to pay the full amount of the charge would not deprive him of his lien in respect of the money actually advanced. There will be a lien *pro tanto*, notwithstanding the default.

The theory that a lien on specific property would attach itself to the substituted property is not applicable to the case of a loan advanced with the object of financing a litigation, where the loan was to be a charge on property to be secured by a compromise of a suit in a particular manner, where the compromise is effected in a different manner, and especially where, before the compromise was effected, the parties had broken off relations.

Where there is blend of moveable and immoveable properties in respect of which a charge is created, if the document creating the charge is not registered, it would only deprive the promisee of his right in the immoveable property and would not affect his rights in the moveable property (b). *Punapati Venkatapathiraju Garu v. Yatsavaya Yenkata Subhadrayamma*, 47 Ind. Cas. 563.

AYLING and SESHAGIRI AIYAR, JJ.

References:—(a) 17 Ind. Cas. 894=23 M.L.J. 680=12 M.L.T. 594=(1912) M.W.N. 1212; *H. Dakin and Co. v. Lee*, (1916) 1 K. B. 566=84 L.J.K.B. 2031, F.; *Underwood v. Lewis*, (1894) 2 Q.B. 306=64 L.J.Q.B. 60=9 R. 440=70 L.T. 833=42 W.R. 517 and *Sumpter v. Hedges*, (1898) 1 Q.B. 673=67 L.J.Q.B. 545; 78 L.T. 378=46 W.R. 454, *Dist.* (b) 1 Ind. Cas. 1=32 M. 410=19 M.L.J. 584, F.

(9) *Maps and specifications given in—If implied terms can be spell out of them—Construction.*

Where a contract for a supply of labour by loading and unloading waggons of sand for purpose of reclamation in the foreshore was accompanied by maps and specification, it was sought to be imported into the contract an implied term that the defendants were to provide for adequate protection to the filling up by sand of a temporary rubble during reclamation. The plan showed a low rubble construction shown in section and was designated "temporary rubble toe to protect filling during reclamation."

Held, that assuming that the contract had an implied condition, the condition was only to execute the protection as shown in the plan. It is impossible to spell out of the plans and sections an obligation to do more than what is there shown. *The Karachi Port Trust v. J. Mackenzie Davidson*, (1918) M.W.N. 611=23 C.W.N. 961=8 L.W. 324 (P.G.).

LORDS BURN, DUNEDIN, SUMNER and PARMOOR.

(10) *Implied—Meaning of term—Legal consideration, what is.* See *MAD. ACT VIII OF 1865 (RENT RECOVERY)*, No. 1, (1918) M.W.N. 732 (P.G.).

Contract—(Concluded).

(11) Construction of — Oral evidence if admissible to prove intention. See EVIDENCE ACT, No. 31, 22 C.W.N. 416.

(12) Contract between Government and landlord — Condition of maintaining rights of recorded tenure-holders imposed on landlord by Government—Tenant if can take advantage of such condition—Right of landlord to sue for declaration against certain tenant that he obtained entry in Record fraudulently — Contract relating to land—Third party having beneficiary interest in its purpose if can take benefit of contract. See LANDLORD AND TENANT, No. 73, 3 Pat. L.J. 394.

(13) Meaning of term as used in S. 51, Village Chaukidari Act. See LIMITATION ACT (1908), No. 155, 16 A.L.J. 984 (P.G.).

Contract Act (1872).

(1) S. 2—"Consideration"—What includes—Definition of "consideration" in Contract Act is wider and more comprehensive than in the English Law.

Any detriment suffered by the defendant on the faith of the promise of the plaintiff will be sufficient "consideration" to make the plaintiff's promise enforceable (a). *Maharajah Mudalliar v. Sendanatha Mudalliar*, (1918) M.W.N. 173=44 Ind. Cas. 479.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 14 C. 64; 36 A. 268, F.; *Carlill v. Carbolic Smoke Ball Co., Ltd.*, (1893) 1 Q.B. 256, R.

(1-a) S. 2, cl. (d)—Consideration—Mortgage—Transaction if binding on all where some only of the mortgagors benefited thereby.

A consideration may be lawful even if it does not benefit the promisor and a mortgage is binding on all the mortgagors equally even if some of them may not be benefited thereby. *Fauindra Narain Raj v. Kacheman Bibi*, 22 C.W.N. 188=41 Ind. Cas. 673=45 O. 774.

MOOKERJEE and WALMSLEY, JJ.

(2) Ss. 2, 45—Promises, meaning of—Bond in the name of manager of a Hindu family—Money advanced out of family funds—Other co-parceners of the family, if co-promises—Payment to one of several co-heirs of a promisee—If a discharge of the liability—Money due on bond to manager of joint Hindu family—Payment to a junior member—If an effective discharge.

Prima facie, the word "promises" under a document means the person in whose name it has been executed and every person who has an interest in bonds or securities standing in the name of another person is not a co-promisee even though that other may be the manager of a Hindu family of which he is a co-parcener and though the amount secured by the bonds may have been advanced by the manager from family funds. Such a co-parcener is in the position of a co-heir along with the other persons likewise interested in the said bonds.

Contract Act (1872)—(Continued).

Payment to one of the co-heirs of the promisee under a bond would not discharge the promisor from his liability to pay thereunder and similarly a payment made to a junior member of a Hindu family during the lifetime of its manager in whose favour a bond was executed would not constitute an effective discharge on the bond (a). *Ankalamma v. Bellam Chenchayya*, 7 L.W. 221=34 M.L.J. 815=23 M.L.T. 215=41 M. 697=45 Ind. Cas. 419.

SESHAGIRI AIYAR and NAPIER, JJ.

Reference:—(a) 29 Ind. Cas. 586, F.

(3) Ss. 11, 23, 25, Expl. 2—Suit on bond—Executant under Court of Wards—Subsequent bond by son, whether for consideration—Liability of son. See CONSIDERATION, No. 1, 142 P.W.R. 1918.

(4) S. 15 — Coercion — Refusal to convey equity of redemption—Costs—Solicitor.

A refusal to convey the equity of redemption except on certain terms, is not an unlawful detaining or threatening to detain property to the prejudice of a person, within the meaning of S. 15 of the Contract Act.

The discretion of a Court upon the question of costs has to be exercised judicially, and the ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other.

A solicitor bringing or defending an action in person is entitled to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting directly rendered unnecessary (a). *Bengal Stone Co., Ltd. v. Joseph Isaac Joseph Hyam*, 27 C.L.J. 78=45 Ind. Cas. 738.

SANDERSON, C.J. and MOOKERJEE, J.

References:—(a) *London, Scottish Benefit Society v. Oorley*, (1884) 13 Q.B.D. 872, and *Tolpitt & Co. v. Mole*, (1911) 1 K.B. 886, R.

(5) S. 16—Undue influence, Allegation of exercise of, in money lending transactions—Burden of proof—When such transactions become unconscionable—Illustrations to section are part of Act. See UNCONSCIONABLE BARGAIN, No. 1, 16 A.L.J. 905 (P.G.).

(5-a) S. 16—Gift by Burmese lady to her nephew—Nephew also acting as agent of lady—Fiduciary relationship—Undue influence, Presumption of, if can be drawn. See UNDUE INFLUENCE, No. 1, 46 Ind. Cas. 738.

(6) Ss. 16, 23—Sanction to prosecute, application for, Agreement to withdraw, Void as against public policy—Undue influence, if mere fear of punishment is. See AGREEMENT, 46 Ind. Cas. 424.

(7) Ss. 16, 74—Interest, High rate of—Undue influence or penalty, Plea of. See MORTGAGE (GENERAL), No. 9, 45 Ind. Cas. 778.

Contract Act (1872)—(Continued).

(8) Ss. 19, 19-A, 61—Sale by woman under uncle's protection to such uncle for inadequate price—Suit for cancellation of sale-deed—Relief. See TRUSTS ACT, No. 5, 20 Bom. L.R. 911.

(9) S. 19-A. See No. 8, *supra*.

(10) S. 23—Assignment of debt—Suit by assignee—Objection of want of consideration by adverse party—Validity—Agreement of the nature of speculation and purchasing litigation—Whether enforceable.

Held that, although as a general rule where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, the rule is not invariable and it would not apply where the transferor pleaded that it was fictitious and without consideration.

Held that agreements of the nature of purchasing litigation ought to be carefully watched and when found to be extortionate and unconscionable and not made with the *bona fide* object of assisting a just claim, effect ought not to be given to them. **Mangal Prasad v. Nabl Bakhsh**, 43 Ind. Cas. 74.

KNOX, J.

References: 2 C. 332, F.; 23 A. 626, Appl.; 35 C. 420, Dist.

(11) S. 23—Promise to abstain from bidding at *cave* auction—Not against public policy.

Where the consideration for the promissory note is the plaintiff's promise to abstain from bidding at an *cave* auction, the plaintiff is entitled to a decree for the amount due on the promissory note. Such a consideration is not against public policy within the meaning of S. 23. **Contract Act, Mahadeo v. Kewalram**, 44 Ind. Cas. 223.

BATTEN, A. J. C.

References:—18 B. 342; 16 C. 194; 13 C.L. R. 1; 1 C.L.J. 85, Appr.; 6 O.I.J. 111, F.; U. B. R. (1897—1901), Vol. 11, 217, Diss.

(11-a) S. 23—Void and voidable transfers—Vendor liable to damages for breach of agreement.

The view which has been taken regarding the prohibition of transfers of occupancy and ordinary tenant rights is that such transfers are voidable in the manner and to the extent provided for by the Contract Act. It has never been held that such transfers are unlawful within the meaning of S. 23 of the Contract Act. The transfers are not absolutely void.

Where a vendor sells land as belonging to him, he is liable to damages for breach of agreement, whether the vendee knows of the defect in the title or not. **Shaligram Sadasheo Pande v. Narain**, 45 Ind. Cas. 669.

MITTRA, A. J. C.

References:—33 B. 636; 30 M. 284, Dist.; 40 M. 389, Appr.

(12) S. 23—Agreement by litigant to pay money to *vakil's* clerk to give special attention

Contract Act (1872)—(Continued).

to case—Public policy. **Tenjerla Suryanarayana v. Prabhala Subbayya**, 33 M. L. J. 724—22 M.L.T. 552—7 D.W. 58—(1918) M.W. N. 54—41 M. 471 (F.B.). See Final Part, 1917, Col. 333.

(13) S. 23—Suit for recovery of money being price of mare sold—Defence based on subsequent agreement to forego money on bringing about marriage—Marriage brokerage contract—Public policy—Void contract.

In a suit for the recovery of the price of a mare sold to the defendant, the latter pleaded that he was not liable alleging subsequent agreement under which the plaintiff was to forego his claim in consideration of the defendant's persuading his sister-in-law to marry the plaintiff. *Held* that, under S. 23, Contract Act, the agreement being in the nature of a marriage brokerage contract, it was opposed to public policy, its consideration was not lawful and it was not enforceable at law. **Maung Pyo v. Maung Po Gyi**, U.B.R. (1918), 4th Qr., 119=50 Ind. Cas. 551.

SAUNDERS, J. C.

References:—23 A. 495; 13 B. 131; 17 M. 9, F.

(13-a) S. 23—Arbitration, Agreement to refer to, of a non-compoundable Criminal case—Public policy, If against—Award, Enforceability of. See **AWARD**, No. 5-a, 47 Ind. Cas. 506.

(13 b) S. 23—Auction, Agreement not to bid at, if illegal or against public policy—Wagering contract, money paid under, to a stakeholder, Recoverability of—Stakeholder, Authority given to a, to pay over money, Revocation of. See **CONTRACT**, No. 5, 46 Ind. Cas. 755.

(13-c) S. 23—Public policy—Dancing and singing boy, Contract to hire a, if against. See **PUBLIC POLICY**, 47 Ind. Cas. 138.

(13-d) Ss. 23, 32, 55, 64, 65—Contract to finance litigation by advancing money—Agreement to share in property in case of success—Transaction if a loan—Refund of money actually advanced, Lender if entitled to, though full amount not paid—ChamPERTY—Contract with a third person, Benefit derived from, Liability in case of—Loan charged on property—Default to pay full amount, Lien for money actually paid how affected—Lien on amount of compromise to be effected in a particular manner—Compromise in a different manner, Lien how affected by. See **CONTRACT**, No. 8, 47 Ind. Cas. 563.

(14) Ss. 23 and 65—Marriage brokerage contract—Suit for recovery of bridegroom price paid—Contract found broken by plaintiff himself—Plaintiff, if entitled to restoration under S. 65—Contract known to be void ab initio—S. 65, whether applies to. **Greenirasa Aiyar v. Sesha Aiyar**, 3 L.W. 42—41 M. 197. See Final Part, 1917, Col. 338.

Contract Act (1872)—(Continued).

(15) Ss. 23, 65—*Legality of claims to refund of money paid under contracts of marriage brokerage.* See **MARRIAGE BROCCAGE CONTRACT**, 34 M.L.J. 282.

(16) S. 23. See Nos. 3 and 6, *supra*.

(17) S. 24—*Void contract—Unlawful consideration—Stifling of criminal prosecution.*

The defendant's husband agreed to convey to the plaintiff certain lands for a consideration of Rs. 160, the contract being subject to the condition that it was not to be enforced if the plaintiff did not withdraw a criminal prosecution for criminal breach of trust which she had launched against the defendant's husband. The plaintiff having sued for specific performance of the contract:

Held, dismissing the suit, that if the concluding term had been complied with, part of the consideration was void on the ground of being opposed to public policy; and if it had not been complied with, the whole contract became equally unenforceable for failure of an essential condition. **Bani Ramchandra Sairi v. Jayawanti Govind Pandit**, 20 Bom. L.R. 331=42 B. 339=45 Ind. Cas. 566.

HEAMAN and HEATON, JJ.

(17-a) S. 24—*Engagement by labourer to work without any remuneration—Conditions of contract making discharge of debt impossible till redemption by other capitalist—Slavery—Void contract—Interest—Limitation for suit on bond containing agreement to labour—Limitation Act (1908), Art. 75.*

A bond for a principal sum of Rs 10 with interest at Rs. 37½ per cent. per annum, in which one of the executors also promised to work for the plaintiff without pay for a period of two years from the date of the bond, i.e., from 8-9-1911 to 2-9-1913, on which latter date the bond was to become payable, further recited that, if the said executant should be absent from duty at any time during the period, the plaintiff should be competent to recover the principal with double the interest agreed upon. It was admitted that the second executant had not worked for the plaintiff for a single day. In the suit brought on 2-9-1916 to recover the principal with interest at the enhanced rate: *Held* that the bond was what was locally known as a slavery bond, that the part of the contract relating to interest on money lent was not divisible from the illegal part and that the whole contract was void under S. 24, Contract Act. *Held*, also, that the condition of the bond being an agreement to labour, time began to run against the plaintiff on the first day of the default to labour, the general principle that time begins to run from the earliest date, applicable to cases of instalment bonds under Art. 75, Limitation Act, being also applicable to cases of contracts which are subject to a condition. **Satish Chandra Ghosh v. Kashi Sahu**, 3 Pat. L.J. 412=46 Ind. Cas. 418.

MULLICK and THORNHILL, JJ.

* *Reference* :—19 C.W.N. 1118, R.

Contract Act (1872)—(Continued).

(18 and 19) S. 25—*Annuity, Promise to pay—Consideration—Past and future services—Enforceability of—Agreement, Part of, void—Effect.* See **CONTRACT**, No. 3, 46 Ind. Cas. 282.

(20) S. 25. See No. 3, *supra*.

(21) S. 30—*Bom. Act III of 1865 (Wagers), S. 1—Lottery—Contract to purchase ticket in lottery authorised by Government—Validity of.* **Sir Dorabji Jamshedji Tata v. Edward B. Lance**, 19 Bom. L.R. 697=41 Ind. Cas. 869=42 B. 676. See Final Part, 1917, Col. 335.

(22) Ss. 30, 65—*Wagering contract—Money paid as security for performance—Whether recoverable.*

Money deposited by the plaintiff with the defendant as security for the performance of his part of a contract is recoverable, though the contract is a wagering one, provided there is no fraud or moral delinquency on the part of the plaintiff (a);

But S. 65 of the Indian Contract Act has no application in such a case (b). **Srikakolapu Venkataraju v. Gudlurda Ramanujam**, 23 M.L.T. 84=(1918) M.W.N. 230=7 L.W. 518=34 M.L.J. 561=44 Ind. Cas. 319.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 33 B. 411; 38 B. 249, F. (b) 43 C. 116; 41 B. 546, F.

(22 a) S. 32. See No. 13-d, *supra*.

(23 and 24) Ss. 37, 38—*Performance of, Offer of, Essentials for validity of—Place of performance—Offer to perform at place fixed in contract, Necessity of.* See **CONTRACT**, No. 4, 46 Ind. Cas. 497.

(25 and 26) S. 38. See No. 23, *supra*.

(27) Ss. 39, 64, 73, 75—*Agreement to cut and take timber for railway sleepers from defendant's forest for royalty, during fixed term—Rights of parties under contract.* See **AGENCY RULES (GANJAM)**, No. 1, (1918) M.W.N. 772.

(38) S. 43—*Suit for rent against co-tenants—No substitution of heirs of deceased co-tenant—Decree whether good money decree against survivors—Liability, if joint or joint and several—Right of co-tenant to insist on all co-tenants being impleaded.*

Where in a suit for rent the landlord purported to make all the persons who had entered into the contract of tenancy parties defendants and obtained an *ex parte* decree, but some of the tenants having died before the suit, those surviving opposed execution on the ground that the decree was not validly obtained.

Held That the decree passed in such circumstances was a good and valid money decree enforceable against the tenants who were alive at the date of the decree of their representatives.

If the landlord desires to obtain a decree good against the land, under the Bengal Tenancy Act, he must ordinarily (apart from any question of representation) implead all the

Contract Act (1872) — (Continued).

co-tenants including the heirs or legal representatives of a deceased co-tenant. But for the purposes of a money decree (in the absence of express agreement to the contrary) he is free, under S. 43 of the Contract Act, to sue any or all of the tenants.

Per *N. R. Chatterjee, J.* (*Richardson, J.*, reserving his opinion) — When the contract is with a single person as tenant and he dies, the liability of his heirs is a joint liability.

Per *Richardson, J.* — Liability is joint, if on the death of one of the joint promisors the liability becomes the liability of the surviving promisors and no liability devolves upon the heirs or legal representatives of the deceased promisor.

There being no survivorship amongst co-tenants in India and co-tenants not having under S. 43 the right to be sued together, *prima facie* the liability is joint and several.

Authorities reviewed. *Krishna Das Roy v. Kail Tara Chowdhuran*, 22 O.W.N. 289 = 44 Ind. Cas. 80.

N.R. CHATTERJEE and RICHARDSON, JJ.

(39) S. 43 — Rent, Suit for, against one of several heirs of deceased tenant — Applicability of section to. See *RENT*, No. 1. 45 Ind. Cas. 782.

(30) Ss. 45, 241, 263. See *PARTNERSHIP*, No. 3, 34 M.L.J. 41.

(31) S. 45. See No. 2, *supra*.

(91-a) S. 55. See No. 13-d, *supra*.

(32) Ss. 63, 73 — Place of performance changed by subsequent agreement — If fresh consideration necessary under S. 62 — Objection to jurisdiction if can be allowed in appellate Court — Ss. 21, 99, Civ. Pro. Code — Claim for interest, if can be allowed by way of damages under S. 73, *Contract Act*. *Yasudeva Mudalliar v. M. A. Velappa Nadar*, (1917) M.W.N. 779 = 22 M.L.T. 512 = 6 L.W. 717 = 45 Ind. Cas. 401. See Final Part, 1917, Col. 339.

(33) S. 63 — Applicability of the section. See *EVIDENCE ACT*, No. 44, 43 Ind. Cas. 913.

(34) S. 64 — Sale by guardian of minor's property for purchasing fresh property — Fresh property actually purchased not in same transaction and not originally intended to be made — Such fresh property, if benefit under S. 64, *Contract Act*. See *VENDOR AND PURCHASER*, No. 7, 35 M.L.J. 652.

(85) S. 64. See Nos. 9, 13-d, and 27, *supra*.

(36) S. 65, applicability of mortgage deed not properly attested — Money decree in a suit on a mortgage — *Transfer of Property Act*, S. 68. *Ganga Prasad v. Ram Samujh*, 20 O.C. 306 = 48 Ind. Cas. 266. See Final Part, 1917, Col. 339.

(87) S. 65 — Contracts not in accordance with statutory requirements, Validity of. See *MORTGAGE (BY CONDITIONAL SALE)*, No. 2, 46 Ind. Cas. 346.

Contract Act (1872) — (Continued).

(38 and 39) S. 65. See Nos. 13-d, 14, 22, *supra*.

(40) S. 68 — Minor sisters of Burmese married living with married sister — Property of father of sisters managed by husband of married sister — Sale by brother-in-law of property of minor's sisters-in-law as their guardian altogether void — S. 68, inapplicable to such sale. See *POSSESSION, SUIT FOR*, No. 2, 9 L.B.R. 186.

(41) S. 69, application of — Property sold subject to mortgage — Money left with vendee to pay it off — Suit for pre-emption — Pre-emptor directed under decree to pay full price — Money withdrawn by vendee — Mortgage not discharged by him — Suit by mortgagee decreed against pre-emptor — Pre-emptor discharges decree to save property — Suit to recover from vendee money so paid — Vendee not liable.

Certain property was sold subject to a mortgage. The vendor left money in the hands of the vendee sufficient to discharge the mortgage. A suit was brought to pre-empt the sale but the decree made the pre-emptors liable to the vendees for the entire money and not for the amount actually paid by the latter. The pre-emptors paid the whole of the sale consideration as directed in the decree and got possession. The vendees did not pay off the mortgage but withdrew from Court the money deposited by the pre-emptor. The mortgagee brought a suit for sale which was decreed and the pre-emptors in order to save the property from sale paid off the amount due to the mortgagee. They then brought a suit to recover from the vendees the money so paid by him.

Held that the plaintiffs were not entitled to recover inasmuch as there was no contractual liability between the plaintiffs and the defendants nor was there that liability which the law implies under circumstances where one man is compelled to pay money for which another is legally liable. *Ram Richcha Prasad Tewari v. Raghunath Prasad Tewari*, 16 A.L.J. 581 = 46 Ind. Cas. 83.

RICHARDS, C.J. and BANERJI, J.

(42) S. 69 — Reimbursement of person paying money due by another in payment of which he is interested — Payment of judgment — Obligation undertaken by donor of lands. *Soma Shastri Vichwanathshastri Kashikar v. Swamirao Kashinath Nadgir*, 19 Bom. L.R. 989 = 42 B. 98 = 43 Ind. Cas. 482. See Final Part, 1917, Col. 340.

(43) S. 69 — Owner of building in Calcutta interested in payment of the consolidated rate — His right to be reimbursed. See *BEN. ACT III OF 1899 (CALCUTTA MUNICIPAL)*, No. 6, 44 Ind. Cas. 669.

(43-a) Ss. 69, 70 — Suit for contribution — "Person interested in the payment," meaning of — Subrogation.

A mortgage decree against the plaintiffs and the defendants was satisfied by the plaintiffs who had been made parties to the mortgage.

Contract Act (1872)—(Continued).

suit on the allegation that they were some of the representatives of the deceased mortgagor. The first Court found that the plaintiffs had an interest in the equity of redemption but the lower appellate Court held otherwise. The plaintiff sued to recover two-thirds of the money paid by him from the defendants.

Held, that the plaintiffs were persons interested in the payment of the money which the defendants were bound by law to pay and were entitled to succeed under S. 69 of the Contract Act.

That even if S. 69 were not applicable the case would be covered by S. 70 of the Contract Act. *Sarat Ali v. Sheikh Israr Ali*, 22 C.W.N. 347 = 42 Ind. Cas. 30.

MOOKERJEE and WALMSLEY, JJ.

(44) Ss. 69, 70—Suits for contribution how far governed by sections. See CONTRIBUTION, No. 1. 45 C. 691.

(45) S. 70—Sale—Money left with vendees for payment to mortgagees—Property mortgaged to secure the sum due different from property sold—Vendees paying interest to mortgagees owing to delay on the part of vendors to get sale-deed registered—Suit for unpaid purchase money—Vendees claiming set-off in respect of the interest paid—Gratuitous payment.

Certain immoveable property was sold and the vendors left a portion of the consideration in the hands of the vendees for payment to certain of their (vendors) creditors who held a mortgage over property other than that sold. Owing to delay in the registration of the sale-deed which was due to action on the part of the vendors, the vendees did not pay the money to the creditors. When, however, the sale-deed was registered and the vendees tendered the money left with them to the creditors, the latter refused to accept it without the interest which had accrued in the meantime. The vendees paid the interest also. In a suit brought by the vendors for recovery of the unpaid portion of the purchase-money the vendees claimed a set-off in respect of the money they had to pay to the vendors' creditors as interest:—**Held** that the vendees were not entitled to recover the amount claimed inasmuch as the money paid as interest was a gratuitous payment, the property mortgaged to secure the sum due to the creditors being no part of the property sold, and the fact that the vendors benefited by the payment was immaterial. *Suraj Bhan v. Hashim Begam*, 16 A.L.J. 581 = 40 A. 555 = 47 Ind. Cas. 903.

RICHARDS, C.J. and BANERJI, J.

(46) S. 70—Caste property sold in execution of decrees—Sale set aside on payment of money—*Olv. Pro. Code*, O. XXI, r. 89—Member of caste paying money entitled to compensation out of caste property. *Shlocoobai v. Hariba Raghujl*, 19 Bom. L.R. 650 = 42 B. 556. See Final Part, 1917, Col. 348.

Contract Act (1872)—(Continued).

(47) S. 70, Scope of—Transfer of Property Act, S. 51—Trespasser making improvement in good faith—Liability of owner to pay value of improvements.

The defendant acting in good faith encroached upon and cleared the lands of the plaintiff in the belief that the property was included in his share, plaintiff being unaware of the encroachment.

Held that the defendant was not entitled to a charge on the land for the value of the improvements under S. 51 of the Transfer of Property Act, as it has not been established that plaintiff had knowledge of the encroachment or improvements, but that the case is governed by S. 70 of the Contract Act, as what was done by defendant for the improvement of the land was done by him lawfully, without intending to do so gratuitously and the plaintiff has enjoyed the benefit thereof and the defendant was entitled to be compensated for the improvements made by him.

S. 70 of the Contract Act is not limited to cases where the person lawfully doing the thing for another person knows who the other person is. *Bhupendra Kumar Chakravarty v. Pyari Mohan Roy*, 40 Ind. Cas. 464.

FLETCHER and NEWBOULD, JJ.

Reference:—(1866) 1 Hd. 129, R.

(48) S. 70 — Applicability of — Irrigation channel, Cost of repairs to—Repair benefitting repairer and third party—Contribution, Claim for—Charge, if enforceable as—Limitation Act (1908), Sec. I, Arts. 61, 120. See CONTRIBUTION, No. 3, 45 Ind. Cas. 786.

(49) S. 70. See Nos. 43-a and 44, *supra*.

(50) S. 73, ill. (a)—Sale of goods—Measure of damages for non-delivery—Goods, no market for—Market price, computation of—C.I.F. contract — War risk insurance, liability for.

On a breach of contract of sale of goods by non-delivery it is not necessary in order to entitle the buyer to damages that he should prove actual pecuniary loss as a consequence of the non delivery. Illustration (a) to S. 73 of the Indian Contract Act contains an authoritative interpretation of the section for such a case and it shows that the buyer is entitled as damages to the difference between the contract price and the price for which he might have obtained like goods at the time when they ought to have been delivered.

The same rules apply as to goods for which there is no market at the place of delivery. In computing the price for which such goods could have been obtained it is not the nearest market that always governs, but the place, where, having regard to all the facts of a particular case, the plaintiff would, without any material inconvenience to himself, procure the goods in a manner that would throw the least amount of hardship on the other party (a).

Where therefore the defendant failed to ship under a c. i. f. contract Java Molasses for

Contract Act (1872)—(Continued).

delivery at Madras where the goods could not be bought in the market and it appeared that Molasses was produced at and exported from Java to Calcutta and Madras, and the time for transport to both those places was practically the same.

Held the mode of computing the price at which the plaintiff might have obtained Molasses in Madras was not the price at which it could be obtained at Calcutta plus the cost of carriage to Madras but the amount for which an exporter would have shipped the goods from Java so as to reach Madras on the date when they ought to have been delivered under the contract.

Sadasiva Aiyar, J.—Where there are absolutely no materials put forward by the plaintiff to indicate what it would have cost him to obtain similar goods in the cheapest manner, only nominal damages would be allowed. But where there are some materials the Court should as a jury try to arrive at the cost at which the plaintiff could have got other similar goods and give him the difference, if any, between that and the contracted price.

Held also the buyer in a c. i. f. contract entered into before the war is not bound to pay the increased amount paid by the seller for war risk insurance. S. 70 of the Indian Contract Act does not apply to such a payment (b). *Hajee Ismail Salt v. Wilson*, 23 M.L.T. 330 = (1918) M.W.N. 399 = 41 M. 709 = 45 Ind. Cas. 942.

WALLIS, C.J. and SADASIVA AIYAR, J.

References:—(a) *Sally Wertheim v. Chicoutimi Pulp Company*, (1911) A.C. 301 at 316, R. (b) 40 B. 11, F.

(61) S. 75. See Nos. 27 and 32, *supra*.

(59) S. 74—Penalty—Agreement to pay a larger sum in return for a loan of a smaller sum—If illegal.

The word 'penal' or 'penalty' has any bearing, only when there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract. Nothing can be brought under the operation of S. 74, Contract Act, which is a term and stipulation of the main contract between the parties. The term 'penalty' is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment. The consequences of the fulfilment of a contract may be oppressive, but they are not penal within the meaning of the Contract Act and the decided cases (a).

In the absence of a Money Lenders Act, an agreement in return for a loan of a smaller sum to repay a larger one on a given day, representing the original principal and interest is not contrary to law (b).

The defendant executed a promissory note for Rs. 10,000, in favour of plaintiff, promising to repay the same on demand with interest at

Contract Act (1872)—(Continued).

24 per cent. per annum and deposited the title-deeds of one of his properties as security for the repayment thereof. For the repayment of the said sum, he executed 20 hundis of Rs. 500 each and authorised plaintiff to cash each hundi every month on the due date and credit the sum so realised towards the promissory note and agreed that, if the amount of the said hundi was not paid, the plaintiff was to be at liberty to proceed against him for the recovery of the said hundis and credit the same on footing of the said promissory note. On the date of the promissory note, only Rs. 4,500 was paid in cash and a balance of Rs. 1,500, outstanding on an old promissory note of 1914 was wiped out, and Rs. 4,000 was treated as payment of interest for 20 months in respect of the promissory note of Rs. 10,000: **Held** that the transaction was a repayment of Rs. 10,000 spread over a certain period in return for a loan of Rs. 6,000, that there is no illegality in such a contract according to the law of this country and that the plaintiff was entitled to a decree for the amount claimed by him *Sukku Lal Sowcar v. Tirumala Row Sahib*, 24 M.L.T. 420.

COUTTS-TROTTER, J

References:—(a) 36 B. 164, doubted; 35 Ind. Cas. 111, F. (b) *Wallisford v. Mutual Society*, (1880) 5 A.C. 685, F.

(53) S. 74—Interest payable in paddy—Penal rate of interest—Enforceability of. See INTEREST, No. 4, 46 Ind. Cas. 384.

(54) S. 74. See LANDLORD AND TENANT, No. 61, (1918) M.W.N. 197.

(54-a) S. 74—Mortgage—Interest, Stipulation for payment of—Stipulation to take less than specified rate of payment punctually made, how far a penalty. See PARDANASHIN LADY, 22 C.W.N. 226

(55) S. 74—Rent, agreement to pay enhanced rate of—After expiration of term of tenancy, if penalty under. See RENT, No. 2, 45 Ind. Cas. 901.

(56) S. 74. See No. 7, *supra*.

(57) S. 75. See No. 27, *supra*.

(58) Ss. 102, 108 and 178—Delivery order—Document of title—Negotiability—Transfer of Property Act (IV of 1882), S. 137, explanation—Evidence Act (I of 1872), S. 93, Provision 5. *Khoo E. Khwet v. Nanigram Jammadas and Co.*, 10 Bur. L.T. 92 = 9 L.B.R. 148. See Final Part, 1917, Col. 346.

(59) S. 108—Applicability of Excep. 1 to section—Failure of hirer to pay rent according to term of agreement—Owner, right of, to recover full amount from hirer as well as guarantor—Vendee from hirer, if acquires good title. See HIRE PURCHASE, No. 1, 144 P. W.R. 1918.

(60) S. 108—Hypothecation of moveable property, Validity of. See HYPOTHECATION, No. 1, 35 M.L.J. 450.

Contract Act (1872)—(Continued).

(61) S. 108—"Goods" in section includes all moveable property. See *SHARE CERTIFICATES*, No. 1, 42 C.W.N. 1016.

(62) S. 108—Share certificates with blank transfer deeds—*Bona fide* purchase for value—Juridical possession. See *SHARE CERTIFICATES*, No. 2, 42 C.W.N. 1042.

(63) S. 108. See No. 68, *supra*.

(64) S. 113—*Purchase of goods by sample or after inspection—Implied warranty of commercial quality—English Sale of Goods Act, S. 14 (2)—English and Indian Law, Difference between.*

Under S. 113 of the Indian Contract Act, when goods are sold by sample and by description, there is the same warranty that the goods are of a merchantable quality as is provided in Ss. 14 and 15 of the English Sale of Goods Act of 1893.

English and Indian Law compared.

Where bales of yarn of Hanuman quality were sold and the inspection of the bales was confined to their exterior, but after delivery the yarn was found to have been eaten by white ants and as such unfit for ordinary use.

Held there was a breach of warranty under S. 113 of the Contract Act. *Peer Mahomed Rowther v. Dalcoram Jayanarain*, 35 M.L.J. 180=(1918) M.W.N. 658=8 L.W. 192=24 M.L.T. 227=47 Ind. Cas. 555.

WALLIS, C.J. and SPENCER, J.

References:—4 Camp. 144; L.R. 3 Q.B. 109; L.R. 4 Exch. 49, R.

(65) Ss. 124, 126, 132—Suretyship and indemnity, Contracts of, distinguished. See *HINDU LAW (DEBT)*, No. 12, 3 Pat. L.J. 396.

(66) Ss. 126, 128—*Contract of guarantee—Guarantee given at a time when claim against principal time barred—Surety not liable to pay.*

The trustees of a temple deposited, in 1883, a sum of money with MM. The trustees demanded, but MM refused payment of the money once in 1889 and again in 1897, but on the second occasion MB orally consented to stand as a surety for the payment. In 1900, the trustees sued both MM and MB for the money; the first Court passed the decree against both; MM alone appealed with the result that the appellate Court held that the claim to demand payment had become barred in 1895 and dismissed the suit as against MM. The decree against MB, who had not appealed, remained in force. The trustees executed the decree against MB and recovered payment of the amount on the 20th May 1912. MB having died, his sons sued MM, on the 20th May 1915, to recover the amount from him:

Held, dismissing the suit, that there was no consideration for the alleged contract of suretyship, inasmuch as the foundation for the contract was wanting, there not having been any enforceable liability in the third person "(a).

Per Batchelor, Ag. O.J.—"The word 'liability' in Ss. 126 and 128 of the Indian Contract

Contract Act (1872)—(Continued):

Act, means a liability which is enforceable at law, and, if that liability does not exist, there cannot be a contract of guarantee." *Manju Mahadev Shetti v. Shivappa Manju Shetti*, 20 Bom. L.R. 447=42 B. 444=46 Ind. Cas. 122.

BATCHELOR, AG. O.J. and KEMP, J.

References:—(a) 5 B. 647, D.; 33 M. 808, R.

(67) S. 126. See No. 65, *supra*.

(68) S. 128. See No. 66, *supra*.

(69) S. 132. See No. 65, *supra*.

(70) S. 151—Loss of goods entrusted to ferry licensee for being ferried across river—Ferry licensee if bailee entitled to benefit of S. 151—Carrier's liability if treated in act. See *COMMON CARRIER*, No. 3, U.B.R. 1918, 4th Qr. 120.

(71) Ss. 151 and 152—*Shipping—Delivery to be taken at wharf—Consignee delaying taking delivery—Position of ship-owner—Bailee—Negligence—Onus—Evidence Act (I of 1872), S. 106—Extreme peril—Standard of conduct.*

Where delivery has to be taken at the wharf, the contract of carriage is terminated by the arrival of the flat at the wharf. The shipper thereafter is in the position of a bailee and his liability is to be determined with reference to Ss. 151 and 152 of the Indian Contract Act to take such care as a man of ordinary prudence would take of his own goods.

The ship-owner had moored the vessel by a wharf, and goods had been lost by a fire caught from a neighbouring vessel. In an action for negligence against the carrying company, though the defendant company, as the facts and circumstances were more within their knowledge, were bound to call the material witnesses on the spot at the time of the fire, this did not discharge the plaintiff from proving the want of diligence or negligence on the part of the defendant and their servants.

In a moment of extreme peril and danger, perfect presence of mind, accurate judgment and promptitude cannot be expected.

Where a man is suddenly put in an extremely difficult position and he gives a wrong order, it should not be attributed to want of nerve and skill as to amount to negligence. If a man does what he under the circumstances reasonably thinks is proper, he is not to be held guilty of negligence, because upon a review of the facts, it can be seen that the course adopted was wrong and not in fact the best. *Dwarkanath Nath Raimohan Chaudhury v. The Rivers Steam Navigation Company (Limited)*, 8 L.W. 4=20 Bom. L.R. 735=23 M.L.T. 376=(1918) M.W.N. 435 (P.G.).

VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE, MR. AMER ALI and SIR WALTER PHILLIMORE.

Reference:—*The Bywell Castle*, L.R. 4 P.D. 219, R.

Contract Act (1872)—(Continued).

(72) S. 152. See No. 71, *supra*.

(73 and 74) S. 172—Hypothecation of goods to another as security if prohibited under section. See MORTGAGE (EQUITABLE MORTGAGE), No. 1, 22 O.W.N. 768.

(75) Ss. 172 to 176—'Pledge' of goods—Nature of transaction—How effected—Necessity for endorsement in case of Government securities—Rights of pawnee. *Lala Joyti Prakash Nande v. Lala Muti Prakash Nande*, 33 Ind. Cas. 891=22 O.W.N. 297. See Final Part, 1916, Col. 552.

(76) S. 173. See No. 75, *supra*.

(77) S. 174. See No. 75, *supra*.

(78) S. 175. See No. 75, *supra*.

(79) Ss. 176, 177—Money advanced on pledge of ornaments—Sale by pawnee—Reasonable notice of sale to pawnor, meaning of.

S. 176, Contract Act, does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The expression 'reasonable notice of the sale' means an intimation of an intention to sell and it does not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor: all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right is analogous to that of a seller's right to re-sell the goods sold and the two rights must be exercised in more or less the same method.

A pawnee gave to the pawnor a notice that, unless the articles pledged were redeemed within a fortnight, he would sell them without further reference, but omitted to specify the actual date, time and place of the sale. He then sold the articles but the debt was not fully paid off. In a suit for the balance, the pawnor contended that the notice was not reasonable, because of the omission to specify the actual date, time and place of the sale: Held that the notice was reasonable, *Kunj Behari Lal v. The Bhargava Commercial Bank*, 16 A.L.J. 390=40 A. 522=45 Ind. Cas. 462.

TUDBALL and ABDUL RAOF, JJ.

(80) S. 176. See No. 75, *supra*.

(81) S. 177. See No. 79, *supra*.

(82) Ss. 178, 179—Pledge by a person in possession—The pawnor having limited interest in the goods pledged—The principal of the pawnor knowing of the pledge and receiving money raised by the pledge—Pledges entitled to claim payment. *Lakhamsey Ladha & Co. v. Lakmichand*, 19 Bom. L.R. 835=40 Ind. Cas. 143=42 B. 205. See Final Part, 1917, Col. 849.

(83) S. 178. See No. 58, *supra*.

(84) S. 179. See No. 82, *supra*.

Contract Act (1872)—(Continued).

(85) Ss. 182, 188, 190, 192, 250—Principal—Agent—Sub-agent—Agent employing a sub-agent is liable to the principal for the sub-agent's fraudulent act committed within the course of employment. *Mensukhdas Shrivaraen v. Birdichand Amraj*, 19 Bom. L.R. 948=43 Ind. Cas. 692. See Final Part, 1917, Col. 849.

(86) Ss. 184, 211—Responsibility of minor agent—Tort arising out of negligence of minor's guardian—Minor's liability—Certificate holder of Jagir—Responsibility.

Having regard to the provisions of S. 184, Contract Act, the responsibility, which ordinarily attaches to an agent who conducts business for others, does not attach to a minor agent, for any loss caused by the negligence of the minor's guardian.

A minor cannot be made liable for a tort arising out of a contract when the contract is not binding upon him and when the so-called tort consists merely of negligence on the part of his guardian.

The certificate-holder of a Jaghir is the person with whom the Government makes the settlement. But this in itself carries no liability to his co-sharers. *Gopal Rao Waman Rao Deshmukh v. Dinkar Rao Vyankat Rao Deshmukh*, 43 Ind. Cas. 923.

MITTRA, A.J.C.

References:—41 Ind. Cas. 848; 10 O.P.L.R. 98, R.

(87) Ss. 184, 248—Minor member of firm—Whether such member can act as agent—Firm's liability. See MINOR, No. 6, 17 P.L.R. 1918.

(88) S. 188. See No. 85, *supra*.

(89) S. 190. See No. 85, *supra*.

(90) S. 192. See No. 85, *supra*.

(91) S. 202—Successors in title of original equitable mortgage in possession with mortgagor's consent—Authority from mortgagor to manage lands and receive rents and profits in lieu of interest—Loan as consideration for such authority—Termination of authority before repayment of loan. See MORTGAGE (EQUITABLE MORTGAGE), No. 3, 9 L.B.R. 172.

(92) S. 211. See No. 86, *supra*.

(93) S. 222—C.I.F. contract—Purchase of goods under, from the commission agent—Agent, if a C.I.F. vendor—Agency, whether still subsists—Goods purchased on principal's behalf and his risk—Outbreak of war while goods are in transit in an enemy ship—Loss whether to be borne by the agent or by the principal—Agency between vendor and vendee—Effect of, on C.I.F. contract. See PRINCIPAL AND AGENT, No. 7, 85 M.L.J. 184.

(94) S. 222—Relationship of principal and agent, Termination of. See REVISION, No. 26, 59 P.L.R. 1918.

Contract Act (1872)—(Continued).

(95) S. 240—Combination of persons for business purposes—Agreement to share profits and losses equally—Money advanced by one partner—Agreement outside scope of section. See *FRAUD*, No. 2, U.B.R. (1918), 1st Cr., 69.

(96) S. 241. See No. 80, *supra*.

(97) S. 247—Property of joint Hindu family if asset of partnership. See *HINDU LAW (DEBT)*, No. 7, (1918) M.W.N. 44.

(98) S. 247—Liability for debts of minor on whose behalf ancestral trade carried on—Analogy to liability under S. 247. See *MINOR*, No. 2, 22 O.W.N. 488.

(99) S. 248—Joint Hindu trading family—Liability of minor members assisting in trade to be declared insolvent. See *INSOLVENCY*, No. 4, 24 M.L.T. 216.

(100) S. 248. See No. 87, *supra*.

(101) S. 250. See No. 85, *supra*.

(102) Ss. 251, 261, 263—Estate of deceased partner—Liability for debts incurred after partner's death.

The separate estate of a deceased partner is not liable for debts newly incurred by the surviving partner subsequent to the death, though the debt was incurred to meet obligations of the firm created before the death. But the surviving partner who incurs the debt and the share of the deceased partner in the partnership assets, are liable.

Per Chief Justice.—The provisions of S. 263 cannot override the express provisions of S. 261 that obligations created by the firm after the death of the deceased partner are not binding on his estate.

Per Seshagiri Aiyar, J.—It seems fairly clear from the language of S. 263 that the deceased partner's estate would be liable for obligations necessitated by the process of winding up the business. Unhampered by authority, it seems to be the plain meaning of the sections referred to. *Seshi Ammal v. Vairavan Chettiar*, 24 M.L.T. 392=8 L.W. 503=35 M.L.J. 669= (1918) M.W.N. 806=47 Ind. Cas. 958.

WALLIS, O J. and SESHAGIRI AIYAR, J.

References:—*Maclean v. Kennard*, 9 Oh. Ap. 334, 336; *Bagel v. Miller*, (1903) 2 K. B. 212, R.

(103) Ss. 252, 253, 254—Partnership—Right to dissolution—How far affected by terms of partnership contract—Power of Court to decree dissolution.

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It is not therefore a contravention of S. 252 of the Indian Contract Act for a partner to seek dissolution, or for the Court to decree it, though the partnership agreement contemplated the

Contract Act (1872)—(Concluded).

continuance of the partnership beyond the date at which the suit was instituted. It is to meet the precise predicament that a partnership is not terminable at will that the Court's power to decree dissolution is conferred in the events enumerated in S. 254. *Rahmat-un-nissa Begum v. Price*, 16 A.L.J. 513=28 M.L.T. 400=22 O.W.N. 601=27 O.L.J. 628=5 Pat. L. W. 25=8 L.W. 59=20 Bom. L.R. 714=35 M. L.J. 262=42 B. 380=45 Ind. Cas. 568 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

(104) S. 253. See No. 103, *supra*.

(105) Ss. 254, 265—Partnership between managing member of joint Hindu family and strangers—Division—Suit for dissolution. *Grandhe Gangayya v. Grandhe Yenkataramiah*, 22 M.L.T. 527=6 L.W. 708=(1917) M.W.N. 805=34 M.L.J. 271=38 Ind. Cas. 111=41 M. 454=43 Ind. Cas. 9. See Final Part, 1917, Col. 351.

(106) S. 254. See No. 103, *supra*.

(107) S. 261. See No. 103, *supra*.

(108) S. 263. See Nos. 30 and 102, *supra*.

(109) S. 265. See No. 105, *supra*.

Contractor.

Injury to person using municipal road under repair owing to negligence in keeping it—Municipality how far exempt from liability by reason of employing independent contractor to do repair. See *TORT*, No. 1, 41 M. 538.

Contribution.

(1) *Suit for—Principles governing suit—Contract Act, Ss. 69, 70—Subrogation.*

X, a mortgagee, sued A, B and C as representatives in interest of his mortgagor and obtained a decree, which A thereafter satisfied in full. In a suit by A to recover from B and C their share of the money paid by him, they denied that A had any interest in the mortgaged property and urged that the payment made by A must consequently be deemed voluntary. The first Court upheld the suit finding on the evidence that A had an interest in the mortgaged property, but the lower appellate Court dismissed it holding that A had no such interest.

Held that A was bound to succeed, whether S. 69 or S. 70 of the Contract Act applied; because, under S. 69, the money paid by A was money which B and C were bound by law to pay (a) and the decree of X bound the mortgaged properties wherein B and C were undoubtedly interested and to which A also *bona fide* claimed an equal interest (b); and because a payment in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made lawfully within the meaning of S. 70 (c).

Quære:—Whether A might not have successfully invoked the aid of the doctrine of subrogation to support the line of reasoning that A is one of the joint judgment-debtors, that he has

Contribution—(Continued).

satisfied the mortgage decree whereby he was bound along with B and C, and that he has accordingly been subrogated to the rights of the mortgagee decree-holder (*d*). *Sarafat Ali v. Issan Ali*, 45 C. 691.

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 4 C. 369; 8 C. 113; 6 B. 244; 6 C.W.N. 903; 32 C. 643; 13 C.L.J. 646; 16 C.L.J. 148; 16 C.L.J. 186; 20 C.L.J. 196 (300); 19 C.L.J. 72, R. (b) 26 C. 305; 26 C. 826, R.; 4 B. 643; 13 C.L.J. 646, *Dist.* (c) 2 C.L.J. 811; 25 C.L.J. 325, R. (d) 1 C.W.N. 361; 21 C.L.J. 104; 25 M.L.J. 16, R.

(2) *Suit for—Small Cause Court—Jurisdiction.*

Suit for contribution is a suit within the cognizance of a Court of Small Causes. *Bhagwati Prasad Singh v. Muhamad Abdul Hasan Khan*, 45 Ind. Cas. 236.

STUART and KANHAIYA LAL, A.J.CS.

Reference:—1 C.L.J. 244, *Appr.*

(3) *Claim for—Irrigation channel, Cost of repairs to, benefiting repairer and a third party—Refusal by third party to contribute—Contract Act (IX of 1872), S. 70, Applicability of—Charge, if enforceable as—Limitation Act (1908), Sch. I, Arts. 61, 120—Mad. Regulation XXVII of 1802, S. 33—Cost of repairs, collection of, by Collector—Effect of.*

Contract Act, S. 70, is not applicable where a person does an act for his own benefit and that act incidentally benefits his neighbour or any other person. To claim contribution under S. 70, the act must be proved to have been done for the benefit of the defendant and an act cannot be described as done by one person for another, unless it can be shown that, but for the existence of that other's interest, it would not have been done.

Certain repairs were executed by the plaintiffs, the lessees of the Sivaganga Zamindari, to a tank called the Marnad Tank which irrigated the lands of the lessees, of the defendants and also of other persons. The plaintiffs, before commencing the repairs, intimated to the defendants their intention to repair the tank, claiming that they were liable to contribute rateably towards the cost but the defendants denied their liability and in fact said that they did not want any repairs. The plaintiffs proceeded with the repairs and relying on S. 70 of the Contract Act filed a suit for contribution against the defendants. They also prayed that the amount to be decreed be made a charge on the defendant's properties:

Held (1) that since the repairs were executed by the plaintiffs primarily for their own benefit, the defendants were not liable to contribute rateably towards the expenses, under S. 70 of the Contract Act, though they were also incidentally benefited by the repairs:

(2) that, even if the defendants were liable, the plaintiffs were not entitled to a charge on the village: *and*

Contribution—(Continued).

(3) that Art. 120 of the Limitation Act was applicable to the case but not Art. 61, which only applies to cases of money payable to plaintiff for money paid for the defendant.

Per *Oldfield, J.*—Art. 61 is clearly inapplicable. No doubt there are cases in which Art. 61 may be applied to claims under S. 70, such as payments of Government revenue or decrees amounts, where the benefit to the defendants is immediate. Where the benefit will only arise at a subsequent stage and the plaintiff's cause of action will not be complete until that stage is reached, no other article but Art. 120 is applicable.

Per *Abdur Rahim, J.*—S. 32 of Regulation XXVII of 1802 would have no application to a claim under S. 70 of the Contract Act. The fact of a portion of the expenses of repairs were levied from the defendants by the Collector under S. 32 will not effect their non-liability. *Yiswanandha Vijlakumara Bangaroo v. G. R. Orr*, 45 Ind. Cas. 786.

ABDUR RAHIM and OLDFIELD, JJ.

Reference:—26 M. 686, *Dist.*

(4) *Suit for—Co-mortgagor, payment by—Charge, if created—Co-mortgagor—Natural guardian not appointed by Court, payment by, if can create charge—Transfer of Property Act (IV of 1882), S. 95—Evidence Act (I of 1872), S. 8—Res gestae, Admissibility of.*

All that S. 95 of the Transfer of Property Act requires is that one of several co-mortgagors should redeem the mortgaged property in order to obtain a charge on the share of the other co-mortgagor. It is not essential that the redemption should take place in Court. If the money is paid out of Court and the decree-holder accepts it and certifies the payment, the requirements of the section are fulfilled.

Plaintiff having paid off the whole amount of a mortgage decree passed jointly against him and the defendant filed a suit for contribution and claimed a charge on the defendant's share in the mortgaged property for half the amount paid for the defendant. The defence was that the payment made by the plaintiff's mother was an officious payment by a person not authorised to act on behalf of her minor son, the plaintiff, and that therefore no suit for contribution lies. She was originally named as the guardian *ad litem* of the plaintiff in the mortgage suit but was removed from the guardianship and the defendant appointed in her place.

Held, that though the payment by the plaintiff's mother without her being formally appointed guardian *ad litem* was an irregular payment, the acceptance of the decree-holder amounted to a certificate that the payment had been duly made and had the effect of curing the irregularity and that the plaintiff, therefore, acquired a valid charge over the defendant's share in the mortgaged property.

Under S. 8 of the Evidence Act statements accompanying conduct and explaining such

Contribution—(Concluded).

conduct are relevant. *Tukaram v. Arjuna*, 45 Ind. Cas. 904.

MITRA, A.J.C.

(5) Suit for—"Persons interested in the payment," in S. 69, Contract Act (1872), meaning of—Subrogation. See CONTRACT ACT, No. 42-a, 22 C.W.N. 347.

(6) Joint decree for costs against defendants claiming under separate titles—Defendants found to be independent wrong-doers—Suit for contribution if lies by one from whom all costs collected. See COSTS, No. 1, 16 A.L.J. 689.

(7) Liability to pay debt due on simple mortgage lies on whom as between mortgagor and his subsequent mortgagee or lessee—Payment of debt by mortgagor or his heir if entitles mortgagor to contribution from his mortgagee or lessee—Rights of heir or mortgagor. See MORTGAGE (GENERAL), No. 15, 21 O.C. 360.

(8) Creditor obtaining decree on a pro-note executed by principal and sureties—Subsequently he recovered decree amount from the estate of principal—Sureties not liable to contribute. See PRINCIPAL AND SURETY, No. 1, 44 Ind. Cas. 231.

(9) Suit for, arising out of satisfaction of joint debt—Jurisdiction. See PROVINCIAL SMALL CAUSES COURTS ACT, No. 5, 16 A.L.J. 787.

Contributory.

(1) *Company—Liquidation—Agreement to take preference shares on condition that the applicant was to be given an appointment under the Company—Shares allotted but no appointment given—No calls paid by the applicant—Applicant not to be treated as contributory for the preference shares—Valid allotment of shares.*

The applicant agreed with an agent of the defendant company to take up 400 preference shares of the Company on condition that the Company would appoint him as their cashier in the new branch they then contemplated opening in Lucknow. He also paid at the time Rs. 500, being the application deposit for 100 shares only. The shares were duly allotted to the applicant on the 5th December 1910 by the Directors of the Company who were fully aware of the agreement entered into between the applicant and the agent. As the post of cashier was not given to the applicant, he did not pay the allotment money, which was Rs. 15 per share, nor did he pay the further calls, which were payable in three monthly instalments of Rs. 10 each. Later, on the 3rd May 1911, the applicant wrote to the Directors of the Company repudiating all liability for the 100 shares and demanding back his application deposit. The Directors wrote back on the 8th July 1911 informing the applicant that all the arrangements were to be deemed cancelled. On the 7th July 1911, however, the applicant paid in another Rs. 500 to the Company,

Contributory—(Continued).

which were to be taken as the application and allotment money for 100 ordinary shares. The shares were allotted on the 7th August 1911; The Company having gone into liquidation, the applicant was put down as a contributory with respect to the 100 preference shares as well as the 100 ordinary shares and was called upon to pay calls on those shares;

Held, (1) that, as regards the preference shares, the applicant was entitled to be struck off the register of preference share-holders and could not be called upon as a contributory on that account, inasmuch as he did not intend to agree to become a member of the Company in *present* as from the 5th December 1910;

(2) that, in respect of the ordinary shares, the applicant was rightly placed on the list of ordinary share-holders and was liable to be called upon as a contributory, since the whole transaction was complete and the allotment was made on the 7th August 1911. *Ramanbhai v. Shashiram*, 20 Bom. L.R. 692=42 B. 595=46 Ind. Cas. 672.

BEAMAN and HEATON, JJ.

References:—*Rogers' case*, (1868) L.R. 3 Oh. 633; *Fisher's case*, (1885) 31 Oh. D. 120; *Elkington's case*, (1867) L.R. 2 Oh. 511, R.

(2) *Company—Liquidation—Share-holder's right to be removed from the list of contributories, Principles governing—Liability as contributory how far affected by fraud or misrepresentation—Share-holder when can have his contract to take shares set aside—Repudiation*

A share-holder originally applied for ten shares and ninety shares on the 27th May 1911 and 31st August 1912 respectively. The shares were duly allotted to him. He applied to be appointed a director of the company, acted as a director and was re-appointed after resigning the office once. He attended the meetings of the board of directors and also the general meeting of the share-holders, was a signatory to the report issued by the directors on the 17th June 1913 to the effect that the company was a profitable concern and lastly he acted for a short period as the manager of the company. *Held*, upon these facts, that there could not be the slightest doubt that, even if the contract to take shares was voidable upon the ground of fraud or misrepresentation, he ratified the contract and was consequently precluded from denying his liability as a contributory. He was already a share holder of the Company and had the means of discovering the truth about its financial position, and even if his consent was caused by alleged misrepresentation or fraud, there can be no doubt that the contract entered into by him was not voidable, *vide* the exception to S. 19, Contract Act. *Held*, also, that after the commencement of the winding-up proceedings a share-holder cannot have his contract to take shares set aside on the ground of fraud or misrepresentation, unless he has not only repudiated his shares, but has also taken proceedings to have his name removed or asserted his right to repudiate them in an action.

Contributory—(Concluded).

by the Company to enforce calls upon him before the commencement of the liquidation. **Hakim Rai v. Kharak Singh**, 42 P.R. 1918=46 Ind. Cas. 21.

SHADI LAL, J.

(3) *Application by father for allotment of shares in name of minor son with himself as guardian—Liability of father to contribute—Liquidation of company.*

Held that a father purchasing shares in a company in the name of his minor son is the holder of the shares and is personally liable as a contributory to the extent of the amount remaining due on the shares, the Court having plenary powers to rectify the list of the contributories by substituting the father's name for the son's. **Behari Lal v. Official Liquidator, Amritsar Bank**, 51 P.R. 1918=46 Ind. Cas. 432.

SHADI LAL, J.

References:—(1875) 19 Eq. 588; (1872) 13 Eq. 566, *F.*; (1870) 5 Ch. App. 614, *R.*; (1907) 1 Ch. 582; (1881) 18 Ch. D. 581, *Dist.*

Contributory Negligence.

Prior suit to remove obstruction in irrigation channel—Decree to remove—Failure to execute decree—Whether amounts to contributory negligence in subsequent suit for damages. See **DAMAGES**, No. 1, 43 Ind. Cas. 374.

Conveyance.

(1) *Stamp—Letter containing admission of previous sale and receipt of consideration not a conveyance—Letter when conveyance—Stamp Act (II of 1899), Ss. 2 (10), 57, Art. 23.*

Held, that:—

(1) A "conveyance" is an instrument which transfers property from one person to another.

(2) A letter as the following reciting an earlier sale and an earlier receipt of the consideration for that sale is not a conveyance within the meaning of S. 2 (10) of the Stamp Act II of 1899 and is not liable to be charged with stamp duty as such.

Lahore, 4th November 1914.

FROM

BETH J. RUSTOMJI,

TO

ROCHUBAI JEHangIR RUSTOMJI DOJI,

JEHangIR RUSTOMJI DOJI, .

KAIKHUSRU JEHangIR RUSTOMJI DOJI,

(The sole present trustees of a trust-deed dated 24th February, 1913, and registered as No. 678 in Book No. J, Vol. 874, pages 147 to 193.)

Madam and Sirs,

I am enclosing herewith the original sale-deed dated 22nd October, 1904, in respect of the land measuring 38 Kanals, 18 Marlas *Khasra* No. 5868 in *Mauza* situated on Jail Road, Lahore, which I have sold to you for the

Conveyance—(Concluded).

sum of (Rs. 1,000) Rupees one thousand and in respect of which I have already received the purchase-money from you.

Yours faithfully,
(Sd.) J. Rustomji.

(3) It is at the most a receipt for the consideration money and an admission of the sale.

(4) A letter saying "I hereby sell," &c., can fall within the said term.

(5) The Stamp Act is a fiscal enactment and must be rigorously construed in favour of the public whenever any ambiguity arises. **Seth Rustomji v. Crown**, 151 P.L.R. 1917=1 P.W.R. 1918=115 P.R. 1918=44 Ind. Cas. 261.

RATTIGAN, LE ROSSIGNOL and LESLIE,
JONES, JJ.

(2) Instrument relinquishing right in immoveable property—Intention to pass title at once—A conveyance, not an agreement to convey. See **REGISTRATION ACT (1908)**, No. 33 a, 157 P.L.R. 1917.

Co-operation.

Organization to plate capital at disposal of members in turn on payment of monthly subscriptions—Right of subscriber to claim refund of part subscription. See **SUBSCRIPTION**, No. 1, 77 P.R. 1918.

Co-operative Societies Act.

See ACT II OF 1912.

Co-owners.

(1) *Lessees of, catching fish in a bil—Fishery, rights of, of other co-owners.*

Where the defendants, the lessees from some co-owners of a "bil" caught fish from that bil and made a profit by the sale thereof, the plaintiffs, the other co-owners, are not entitled to recover by way of damages a portion of the value realized by the defendants by the sale of the fish caught, unless on proof of either having been prevented from fishing by those lessees or of not getting ample fish in the "bil" to satisfy their right of fishery. **Rudra Nath Roy v. Joy Chand Kalbartna Das**, 46 Ind. Cas. 280.

FLETCHER and SHAMSUL HUDA, JJ.

(2) *Collection of rent by one co-owner—Basis of accountability to the other co-owners.*

When one of several co-owners of lands leased at a rent payable to all, receives the whole or a portion of the rent, he is accountable to the others for anything in excess of his share of the amount received less expenses incurred in the collection. He is not entitled to retain the amount collected by him to the extent of his share of the total rent receivable.

Where there is no risk, no question of adventure or enterprise, no question of the employment of the real and appreciable labour, or skill or capital or industry in the obtaining of pecuniary profits from the common property by one co-sharer, the above is the rule to be applied between the several co-owners.

Co-owners—(Concluded).

The position of co-owners and the cases relating thereto examined. *Sivanarasa Reddi v. Dorasami Reddi*, 8 L.W. 91=95 M.L.J. 272=24 M.L.T. 247=(1918) M.W.N. 614=41 M. 861=45 Ind. Cas. 463.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—31 C. 767; 35 C. 331, R; 27 M. 465; 32 C. 837, Dist.; *Kennedy v. De Trafford*, (1897) A.C. 180; *Henderson v. Eason*, 17 Q.B. 701, R.

(8) *Right of maintaining Civil suit—En croachment on village shamilat by some owners—Incompetency of a few to maintain an action for removal without special damage—Meaning of special damage—Whole proprietary body need not prove special damage—When proof of special damage is not required in case of removing obstruction to a highway.*

Held, that without proof of special damage one or a few of the proprietary body cannot maintain a suit against certain others for removal of a building erected by them on the shamilat ground not exceeding their share which is likely to fall to them on partition, even if the building has lessened the area of the village *sath* or narrowed the entrance to it(a).

Held, also, that special damage means damage experienced by one or more persons in particular.

Held, further, that in such a case the whole proprietary body can maintain an action against the trespassers without proving special damage. So too in the case of highway open to all the world there would be no need of showing special damage if all the world can be joined in the claim against the obstructor. *Lekhu v. Hanwanta*, 176 P.W.R. 1918=114 P.R. 1918.

SHAH DIN and CHEVIS, JJ.

References:—33 R.R. 1901; 29 P.R. 1918=114 P.W.R. 1918, R.; 73 P.R. 1883; 74 P.R. 1885; 9 A. 434, Dist.; 84 P.W.R. 1911=9 P.R. 1912, *Disappr.*

(4) *Partition suit—Possession of one co-owner is possession of other co-owners. See PARTITION SUIT, No. 1, 44 Ind. Cas. 216.*

(5) *Applicability of S. 9, Specific Relief Act to cases of possession among. See SPECIFIC RELIEF ACT, No. 5, 44 Ind. Cas. 557.*

Co-parcenary.

(1) *Debt by Hindu father, Son if bound to pay during father's life-time—Co-parcener, Separate debt of—Co-parcenary interest, Sale of, Validity of. See HINDU LAW (DEBT), No. 4-a, 47 Ind. Cas. 679.*

(2) *Filing of plaint for partition if operates a severance of. See HINDU LAW (JOINT FAMILY), No. 6, 38 M.L.J. 759.*

Copy.

Will proved in French Court and kept with notary if deposit within S. 5, Probate and Administration Act—Copy given by notary if authenticated copy. See PROBATE AND ADMINISTRATION ACT, No. 2, 22 C.W.N. 713.

Corrupt Practices.

Election—Calcutta Municipal Act (III B.C. of 1899), S. 56—Impersonation—Coercion—Intimidation—Free election—Interference by the candidate or his agent.

The election of a candidate as a Municipal Commissioner was challenged under S. 56 of the Calcutta Municipal Act, 1899, on the following grounds, *vis.*:—(1) That five persons were impersonated, four of them being dead and one absent from Calcutta. (2) That a voter was coerced to vote for the elected candidate. (3) That certain grog-shop owners have been dissuaded by Hem Chandra Lahiry, Inspector of Police, and did not vote through fear. (4) That the said Inspector of Police interfered with the election, intimidated voters and freely canvassed for the elected candidate:

Held—That the election must stand, inasmuch as the charges were not substantiated.

The Calcutta Municipal Act, 1899, contains no provision regarding corrupt practices in elections.

Mens rea is an essential ingredient to constitute impersonation. In this case there was nothing to show that the elected candidate or his agent fraudulently and wrongfully caused improper personation and so that charge of impersonation could not stand.

In order to avoid an election on the ground of intimidation and undue influence it must be shown either that (1) the rioting or violence was instigated by the candidate or his agents, for whom he is responsible, or that (2) it prevailed to such an extent as to prevent the election from being an entirely free election (a). *Monoranjan Mukerjee v. Brojo Gopal Goswari*, 22 C.W.N. 678=45 Ind. Cas. 729.

CHAUDHURI, J.

References:—*Thornbury's case*, 4 O'M. and H. 66 and *Staleybridge's case*, 1 O'M and H. 66, R.

Co-sharers.

(1) *Rent suit—Co-sharer landlord—Plaint—Bengal Tenancy Act (VIII of 1885), S. 148-A—Decree, nature of.*

Co-sharer landlords, who, by arrangement with the tenants, collect their shares separately, and have in previous years brought separate suits for recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together, without the consent of the tenants. But if a plaintiff seeks to avail himself of the special provisions of S. 148-A of the Bengal Tenancy Act, he must in his plaint seek to recover the entire amount due to himself and his co-sharers.

The nature of a decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that share of the rent separately from his co-sharers, the decree will be a money-decree; if, on the other hand, it is a decree in a suit properly

Co-sharers—(Continued).

framed under S. 148-A, the decree will operate as rent decree, capable of execution under the special procedure prescribed by the Bengal Tenancy Act.

Where the plaintiff throughout the plaint proceeded on the allegation that he had previously collected his share of the rent separately, and, in the first prayer clause, actually sought to recover that share, and in a second alternative clause stated that, if it was found that the tenant had not paid the rent due to his co-sharer, he might be granted leave to amend the plaint so as to secure a decree for the entire sum:

Held, that this was not a plaint in a rent suit of the character contemplated by S. 148-A of the Bengal Tenancy Act (a). *Rai Balkantha Nath Sen Bahadur v. Ramapati Chatterjee*, 37 C.L.J. 101—45 Ind. Cas. 767.

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 14 C.L.J. 373; 35 C. 381, R.; 15 C.W.N. 930; 19 C. 735, *Dist.*

(2) *A co-sharer's right to sue, for joint possession, his co-sharer who claims exclusive possession and denies plaintiff's title.*

A co-sharer plaintiff is entitled to sue for joint possession his co-sharer defendant who by his written statement in effect admitted that his possession of the lands in dispute had been possession in exclusion of the plaintiff and in denial of plaintiff's title. *Sasheharewar Rey Bahadur v. Hemanglal Debi*, 44 Ind. Cas. 689.

RICHARDSON and BEACHCROFT, JJ.

(3) *Tenancy lands, Surrender of, by tenants to one co-sharer—Other co-sharers, Notice by, to vacate their share—Possession, Suit for—Delay in bringing suit—Delay, unreasonable, Effect of.*

The ordinary tenancy lands in suit were at first held by the first defendant as sub-tenant. He subsequently got a surrender from the tenants and the fields were held by him as Khudkast. The plaintiffs, the co-sharers in the village, gave a notice to the first defendant calling on him to vacate their shares in the land, the notice contained no offer to contribute the plaintiffs' share of the cost of acquisition. Hence the present suit for joint or exclusive possession of their share of the fields about 2 years after the notice and nearly 4 years after the entry in the khasra about the surrender.

Held, (1) that there was unreasonable delay in bringing this suit;

(2) that, since the notice was of a threatening nature it described the possession of the defendant as wrongful and it made no offer to contribute towards the cost of acquisition, and since the defendant had been in occupation of the fields as sub-tenant for many years, it was not a case in which the plaintiffs should get a decree for joint physical possession. The remedy of the plaintiffs was to have a partition effected. *Bapu v. Sitti*, 45 Ind. Cas. 902,

BATTEN, A.J.C.

Co-sharers—(Continued).

(4) *Relationship of, of a village inter se—Partition by Revenue Court, effect of, on co-partnership.*

The relationship of the sharers of a village inter se does not cease till a Revenue Court partition took effect, that is, till a proclamation is issued and the date from which the partition is to take effect arrives. *Kheri Slugh v. Deo Kunwar*, 46 Ind. Cas. 839.

STUART and KANHAIYA LAL, A.J.Cs.

(5) *Joint property, Erection of shed on portion of, by one—Joint possession, Suit for, by other co-sharers, maintainability of.*

In a suit by one co-sharer for joint possession of a piece of land built upon by another co-sharer, it having been found that no objection was ever taken by the plaintiff or any other co-sharers to the construction of the shed and that the defendant never denied the plaintiff's title:

Held, that the plaintiff was entitled only to a declaration of his title as a co-sharer in the site in question but not to a decree for joint possession. *Harl Das Banak v. Radha Charan Poddar*, 46 Ind. Cas. 496.

TEUNON and RICHARDSON, JJ.

(6) *Suit by co-sharers of common land for ejectment of lessee from some of the co-sharers—Permanent lease—Lease if binds non-consenting co-sharers.*

In a suit by a few co-sharers of common lands for ejectment against one of themselves, who obtained a permanent lease of such lands from the other co-sharers, **held** that, in the absence of a custom authorising the majority of the co-sharers to impose their will on the minority, such a perpetual lease of common property save in exceptional circumstances was not binding on the plaintiffs and that they should be decreed possession for themselves and on behalf of the other co-sharers. *Raghavacharyulu v. Govindasarl*, 35 M.L.J. 402—41 M. 1068.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References:—40 M. 709 (P.C.), R.; 18 C. 10 (P.C.); 19 C. 253 (P.C.); 28 C. 223; 19 C.L.J. 113, *Dist.*

(7) *Estate owned by each co-owner—Right of co-owner to exclusive enjoyment of particular parcel before partition—Court if will interfere with such enjoyment—Purchaser of undivided share bound by arrangements between co-owners as to common enjoyment.*

In law, each joint or common owner of an estate is regarded as having a joint or common proprietary right in the whole estate, and no co-owner can set up a claim to any parcel as his exclusive property during the common ownership. But it is also a practice among co-owners, not living in a state of absolute jointness as one family, to take up exclusive possession and enjoyment of different parcels of the joint or common property without any such definition or severance of interests as would amount to partition. Where this has been done the Courts will not interfere with the arrangement

Co-sharers—(Concluded).

at the instance of any one co-owner during the tenure in common, and will only do so on partition so far as may be necessary to make an equitable division of the property.

The purchaser of an undivided half-share of an estate owned jointly by co-owners must, until partition, accept and abide by the arrangement for joint or common enjoyment settled with or accepted by his vendors. *Jagannath v. Ramprasad*, 14 N.L.R. 101—46 Ind. Cas. 372.

STANYON, A.J.C.

References:—18 C. 10; 28 C 229; 11 C.W.N. 143; 27 A. 88; 4 N.L.R. 120, R.

(8) *Joint property, Rule of enjoyment by co-sharers of—Exclusive possession by one co-sharer for a long time, Effect of.*

The general rule, as regards the enjoyment of joint property by the co-sharers, is that one co-sharer has no right to appropriate to himself a specific portion of the common land and to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But, where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee, or to disturb his possession or enjoyment, otherwise than by seeking partition, and he is entitled to continue in such possession so long as such user does not interfere with the use by other co-sharers of what is in their possession. *Ram Piyare Lal v. Nageshwar*, 21 O.C. 214.

LINDSAY, J.C.

Reference:—4 O. & A.L.R. 349, R.

(9) *Plaintiff not recorded as co-sharer—Suit for profits—Procedure.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 29, 16 A.L.J. 504.

(10) *Rent suit by, Maintainability of—Special contract, Existence of, Proof of—Private partition, if takes case out of U. P. Act II of 1901 (Agra Tenancy).* See RENT SUIT, No. 2, 46 Ind. Cas. 662.

(11) *Long occupation of joint estate by one co-sharer—Exclusion of other co-sharers if proved thereby.* See ADVERSE POSSESSION, No. 5, 64 P.R. 1918 (P.C.).

(12) *Suit by, for khas possession—Decree in, Construction of—Joint possession—Exclusive possession, Remedy for, Partition suit.* See CONSTRUCTION OF DECREE, 46 Ind. Cas. 887.

(13) *Decree for rent obtained by one, landlord—Admissibility of, under S. 13, Evidence Act (1872), to prove holding and rent in a suit for rent by another co-sharer.* See EVIDENCE ACT, No. 3-a, 22 C.W.N. 304.

(14) *Mines worked by one co-sharer landlord—Remedy of other co-sharers—Suit for partition or suit for accounts.* See LEASE, No. 9, 22 C.W.N. 441.

(15) *Land entered in record-of-rights as liable to assessment—Suit by co-sharer landlord to assess rent if lies.* See LIMITATION ACT (1908), No. 170, 22 C.W.N. 685.

Costs.

(1) *Joint decree for costs against defendants claiming under separate titles—Defendants wrong doers—Suit for contribution—Suit not maintainable.*

N got a half share in certain property under a deed of gift executed by J. R got a half share in the same property under a separate deed of gift, also executed by J. B and Z, alleging themselves to be owners, brought a suit against N and R to recover their shares in the property. R did not defend the suit, and N contended that the suit had been brought in collusion with R. The suit was decreed (it being found that N and R each had separately in his possession a share to which B and Z were entitled) and costs were jointly awarded against them. The whole of the costs was realised from N alone. In a suit for contribution by N against R, held that the suit would not lie, N and B being independent wrong-doers, whose interests were in conflict. *Nandlal Singh v. Beni Madho Singh*, 16 A.L.J. 689—40 A. 672—47 Ind. Cas. 980.

TUDBALL and RAOOF, JJ.

Reference:—19 A. 462, R.

(2) *Appeal Court will interfere with the discretion of the lower Court as to costs when there is misapprehension of facts or violation of established principle—Attorneys personally liable for costs incurred in unnecessary printing of the paper-book or in obtaining unnecessary order for amending the memo of appeal.*

The appeal Court will interfere with the exercise of discretion by the lower Court as to costs where there has been misapprehension of facts on the part of the Judge who makes the order of costs and a violation of established principle by throwing upon the plaintiff the costs of the unsuccessful defendant where the plaintiff has been guilty of no misconduct (a).

The Court of appeal ordered the costs occasioned by the unnecessary printing of certain matter in the printed paper-book of appeal, at the instance of defendant's attorneys, to be paid by the defendant's attorneys personally and not by their clients.

Similarly, the Court of appeal ordered the costs of a Judge's order obtained for the amendment of the memorandum of appeal by the addition, at the instance of the plaintiff's attorneys of a very unnecessary paragraph, asking for relief in respect of a matter in which relief had already twice been asked for in the unamended memorandum, to be paid by the plaintiff's attorneys personally. *Laxmibai v. Radhabai*, 20 Bom. L.R. 905—42 B 397—47 Ind. Cas. 762.

SCOTT, C.J. and BATCHELOR, J.

References:—*Cooper v. Whittington*, (1881) 15 Ch. D. 501 (504); 27 M. 341; 16 B. 676 (682), R.

(3) *Appellate Court when should interfere with order of primary Court as to costs.*

Where costs are in the discretion of the Judge the Court of appeal will assume that he has

Costs—(Continued).

exercised his discretion unless it is satisfied that he has not exercised it.

Also, the appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. *Saradindu Mokerjee v. Charu Chandra Dutt*, 22 O.W.N. 372=44 Ind. Cas. 870.

FLETCHER and SMITHER, JJ.

Reference :—2 Bom. L.R. 254, F.

(8-a) High Court, Interference by, in matters relating to.

Unless it is shown that there is some matter of principle on which the lower Court has gone wrong, it is an established rule that the High Court does not interfere in appeal in matters relating to costs. *Midnapore Zemindary Company v. Kristo Prosad Sukul*, 46 Ind. Cas. 544.

FLETCHER and SMITHER, JJ.

(8-b) Personal decree for, in a foreclosure suit, Validity of—Appeal if lies from such a decree.

Where a mortgage-deed contains a personal covenant to pay, a Court is justified in directing that the costs of the foreclosure suit should be recovered personally from the mortgagor (a).

A personal decree for costs in a suit for foreclosure of a mortgage, being a preliminary decree, is appealable. *Shilram v. Raghuram*, 47 Ind. Cas. 542.

PRIDEAUX, A J.C.

Reference :—(a) 13 N.L.R. 97, F.

(4) Case remanded—Order directing costs "to abide and follow the result"—Civ. Pro. Code (V of 1908), S. 35, cl. (2)—"Event"—Withdrawal of suit—Lower Court not dealing with costs—Revision.

At the hearing of an appeal, the case was remanded to the lower Court. The order further directed the costs of the appeal 'to abide and follow the result.' After remand the case was withdrawn.

Held that the withdrawal of the suit was an 'event' within the meaning of that word in S. 35, cl. (2) of the Civ. Pro. Code, and, if the Court did not order costs, it must assign reasons. Where it did not appear that the Court applied its mind as to the costs of the appeal, it was a case for revision by the High Court. *Lakshmi Venkayamma Rao v. Yankatramiah Appa Rao*, 8 L.W. 219=24 M. L.T. 212=(1918) M.W.N. 561=47 Ind. Cas. 862.

OLDFIELD, J.

References :—*Myers v. Defries*, (1879) 4 Ex. D. 176; *Howell v. Derina*, (1915) 1 K.B. 54, Dist.

(5) Higher scale—When allowed—High Court Fees Rules, R. 40. *Gantasala Kupplah Chetty v. Gunavathamma*, 22 M.L.T. 541=44 Ind. Cas. 996. See Final Part, 1917, Col. 887.

Costs—(Continued).

(6) Next friend of minor plaintiff, death of—Next friend's estate, liability of, for costs—Costs of defendants, order for. *Brij Mohan Dayal v. Sarup Narain*, 20 O.C. 300=5 O.L.J. 106=43 Ind. Cas. 257. See Final Part, 1917, Col. 857.

(7) Second appeal for, when maintainable—Court exercising discretion in arbitrary manner.

Held, where a lower appellate Court exercises its discretion as to the award of costs in an arbitrary manner and not according to judicial principle, a second appeal lies from its decree.

Plaintiff, a minor, sued, through her brother as next friend, for a declaration that she was not the lawfully wedded wife of the defendant and obtained a decree with costs, the Court holding that no valid marriage had taken place between the plaintiff and defendant as alleged by the latter and that the plaintiff had never lived with defendant as his wife. On appeal, the District Judge, while agreeing with the lower Court on all points, held that the defendant had been badly treated as the customary reparation for the abduction of his sister by plaintiff's step-brother had been denied to him and that, therefore, the plaintiff's next friend must pay the defendant's costs.

Held, that inasmuch as the defendant's allegations as to the alleged marriage had been found to be false, the District Judge's order as to costs was wholly unjustifiable and must be set aside. *Musammatt Fazal Nur v. Muhammad Husain*, 97 P.W.R. 1918=45 Ind. Cas. 948.

SHAH DIN, J.

References :—15 A. 933=A.W.N. (1898) 110=7 Ind. Cas. 930; 7 O.W.N. 647; 16 B. 676, F.

(8) Order of Divisional Judge under S. 24, Civ. Pro. Code, and S. 15, Upper Burma Civil Courts Regulation—Order embodying direction as to costs if decree—Appeal on point of costs only. *Ma Tu v. Kumar Gangadhar Bagla*, U.B.R. (1917), 4th Qr., 61=44 Ind. Cas. 690. See Final Part, 1917, Col. 857.

(9) Arbitrators, Power of, to decide question of—When order of reference in general terms. See ARBITRATION, No. 6, 46 Ind. Cas. 182.

(10) Private reference to arbitration—Costs ordered in award—Enforceability of award. See AWARD, No. 2, 27 O.L.J. 104.

(11) Dilatory tactics of plaintiff—Defendant's costs to be paid by plaintiff. See CIV. PRO. CODE (1908), No. 286, 66 P.L.B. 1918.

(12) Discretion of Court in re—General rule—Costs of solicitor appearing on his behalf. See CONTRACT ACT (IX OF 1872), No. 4, 27 O.L.J. 78.

(12-c) Appeal in respect of—Court-fee payable. See COURT FEES ACT, No. 19-b, 44 Ind. Cas. 50.

Costs—(Concluded).

(13) Sale of mortgaged property for, after possession given to mortgagee under decree in mortgage suit, validity of. See **EXECUTION PROCEEDINGS**, No. 2, 46 Ind. Cas. 52.

(14) Successful minor defendant, if can be deprived of his costs—Reliance on minority if judicial ground for such deprivation. See **MINOR**, No. 1, 16 A.L.J. 592.

(15) Hindu lady appearing in public, Right of, to be examined in—Costs of commission. See **PABDANASHIN WOMAN**, No. 2, 22 C.W.N. 147.

(16) Pleader's fee, rules as to calculation of—Contested case, meaning of. See **PLEADER'S FEE**, 16 A.L.J. 426.

(17) Pre-emptor entitled to deduct costs from pre-emption price—No need for application therefor under S. 144, Civ. Pro. Code, 1908. See **PRE-EMPTION**, No. 27, 96 P.W.R. 1918.

(18) Pleadings of both parties not clear as to real controversy—No costs to be allowed to either of them. See **RELIGIOUS ENDOWMENTS**, No. 9, 11 P.W.R. 1918.

(19) Appellant following wrong course of appeal—Liability to pay costs of respondent. See **VALUATION OF SUIT**, No. 6, 115 P.W.R. 1918.

Councils Act, 1861 (24 and 25 Vict., c. 67).

S. 22—*High Courts Act*, 1861 (24 and 25 Vict., c. 104), S. 9—*Defence of India (Criminal Law Amendment) Act* (IV of 1915), S. 4—*Governor-General, Power of, to create Courts—Jurisdiction—High Court, Power of, to declare an Act ultra vires*.

S. 22 of the Indian Councils Act, 1861, read with S. 9 of the Indian High Courts Act, 1861, is in terms amply wide to give the Governor-General of India in Council power to create new tribunals such as those contemplated in S. 4 of the Defence of India (Criminal Law Amendment) Act, 1915 (a).

If an enactment of the Indian Legislature is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, the High Court has power in a proper proceeding to declare such an enactment *ultra vires* and of no force and effect, with all the consequences that may result therefrom.

Per **CHAPMAN, J.**—A Court cannot be constituted otherwise than in the name of the sovereign, and, before it can be held that the Indian Legislature can create a Court, it must be clear beyond doubt that the power to create a Court has been properly delegated.

The power conferred on the Governor-General in Council by S. 22 of the Councils Act of 1861 included the power to make laws and regulations for all persons and all Courts of Justice whatever and for all places and things whatever. This delegation of plenary power as designed for the benefit of public interests of the greatest magnitude and whatever may fairly be regarded as incidental to or consequential to the main purpose ought not, unless judicially prohibited, to be held by judicial

Councils Act, 1861 (24 and 25 Vict., c. 67) —(Concluded).

construction to be *ultra vires*. **Parameshwar Ahir v. Emperor**, 44 Ind. Cas. 185.

DAWSON MILLER, C.J., CHAPMAN, MULLICK, ROE and ATKINSON, JJ.

Reference :—(a) 4 O. 172 at p. 180—5 I.A. 178—3 C.L.R. 197—3 Sar. P.O.J. 834—3 Suth. P.O.J. 556—2 Ind. Jur. 618—2 Bhome L.R. 63—2 Ind. Dec. (N. S.) 110 (P.O.), F.

Court.

(1) Scheme for administration of a charitable trust—Competency of, to amend the scheme from time to time. See **CHARITABLE TRUST**, No. 1, 43 Ind. Cas. 772.

(2) Object for which Courts exist. See **OIV. PRO. CODE** (1909), No 288, 16 A.L.J. 64.

(3) Court, Meaning of, in S. 195, Crim. Pro. Code—Tribunal under the Calcutta Improvements Act, 1911, whether a Court. See **CRIM. PRO. CODE**, No. 4, 19 Cr. L.J. 315.

(4) In S. 43 of Provincial Insolvency Act—Appellate and Original Courts if both included. See **PROVINCIAL INSOLVENCY ACT**, No 1, 22 C.W.N. 958.

Court Auction.

Auction sale held by Court—Bid of one person, if can be used by another—Bidder's consent, Effect of.

A person cannot avail himself of the bid made by another at a Court auction and cannot constitute himself the purchaser by depositing the purchase money.

Held, further, that the consent of the last bidder cannot improve his position in this matter. **Shahzadi v. Ahmad Ali Shah**, 21 O. C. 212—47 Ind. Cas. 993.

STUART, J.C.

Court Executing Decree

Transfer of decrees for execution from one Court to another—Competence of such Court to persevere with execution, when first attempt to execute unsuccessful. See **EXECUTION OF DECREE**, No. 25, 21 O.C. 261.

Court-fees.

(1) *Suit to set aside a decree—Court-fees payable by plaintiffs—Revision during interlocutory stage.*

In a suit which seeks to set aside a decree, the plaintiffs are liable to pay Court-fees assessed upon the value of their share in the property in suit.

Where the records of a case have been sent for by the High Court and there appears on the record an obvious error, it is right and proper that the High Court should dispose of the matter even at an interlocutory stage in order to save to the parties to the litigation unnecessary expenses and undue delay. **Banky Behari v. Ram Bahadur**, 44 Ind. Cas. 891—4 Pat. L.W. 281.

CHAPMAN and ATKINSON, JJ.

References :—40 O. 615; 35 O. 303, *Appr.*; 11 C.W.N. 105, *Dist.*; 42 C. 370, F.

Court-fees—(Continued).

- (2) *Mortgage — Redemption or foreclosure, Suit for—Appeal or cross-objection—Court-fee, Calculation of, on amount on date of decree—Future interest, if to be taken into account—Costs, Appeal regarding, Court-fee in—Appellant or respondent, Failure of, to pay sufficient Court-fee, Effect of—Taxing Officer, Powers of—Court Fees Act (1870), Ss. 12 and 17.*

In the case of appeals or cross-objections in suits for redemption or foreclosure, in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account (a).

In all original appeals the Court-fee will be levied on the sum due at the date of the original decree and in all second appeals the Court-fee will be levied on the sum due at the date of the decree of the lower appellate Court.

When the appeal against costs is distinct and separate from other parts of the appeal, Court-fees must be paid *ad valorem* on the costs decreed.

In case of failure of the appellant to pay sufficient fees in the Courts below, the appeal will not be heard till the deficiency is made good and if the respondent is at fault, no decree shall be executed in his favour till then. *T. K. Rowlin v. Lachmi Narain Jha*, 3 Pat. L.J. 443.

ROE, J.

References:—(a) 36 A. 40; 17 B. 41; 29 M. 361, *Ref. to.*

- (3) *Refund of excess, paid on a memorandum of appeal—High Court, Power of, to order—Civ. Pro. Code (1909), S. 151, Inherent power under.*

Under S. 151 of the Civ. Pro. Code (1908), the High Court has inherent power to order refund of excess Court-fee paid on a memorandum of appeal. *Chandradhari Singh v. Tippau Prasad Singh*, 3 Pat. L.J. 452=46 Ind. Cas. 271.

MILLER, C.J. and IMAM, J.

*Reference:—*40 C. 365, *F.*

- (4) *Decree for certain amount against all defendants in suit—Separate appeals preferred by some—Court fee ad valorem to be paid on each appeal.*

Where two, out of a number of defendants against all of whom a decree for a certain sum had been passed, elected to present two entirely distinct and separate appeals, though they were entitled to file a joint appeal, held that there was no provision of law which would exempt the memorandum of appeal filed at the later date from also bearing as the other did the full *ad valorem* amount of Court-fee. *Panna Lal v. Marwar Bank, Ltd., of Hissar*, 91 P.R. 1918.

RATTIGAN, C.J. and SHAH DIN, J.

Court-fees—(Concluded).

- (5) *Mokarrari deed, Possessory suit based on, Payable in respect of such suit. See COURT FEES ACT (VII OF 1870), No. 12, 45 Ind. Cas. 928.*

- (6) *Dismissal of application for order under Civ. Pro. Code, O. XXXIV, r. 6—Appeal from order—Court-fee on appeal to be ad valorem on value of appeal. See DECREE, No. 2, 40 A. 553.*

- (7) *Defendant bound to pay Court-fee on entire claim when pleading limitation in appeal. See MINOR, No. 7, 14 P.W.R. 1918.*

- (8) *Partition suit—Plaintiff in possession and out of possession—Court-fee payable. See PARTITION SUIT, No. 1 44 Ind. Cas. 216.*

- (9) *Suit with leave of Collector to remove Mahant from office and deliver property to the new Mahant—Ad valorem Court-fee on value of property if payable. See PUBLIC CHARITIES, No. 3, 97 P.R. 1918.*

- (10) *Suit to redeem only a share of the mortgaged property—Court-fee payable to be calculated on amount of debt chargeable on share. See RES JUDICATA, No. 20, 45 Ind. Cas. 300.*

Court Fees Act (1870).

- (1) *Suit for possession and mesne profits—Dismissal of suit—Decision reversed by appellate Court and suit remanded for enquiry as to mesne profits—Appeal against this order of appellate Court, Court-fee payable on.*

Where the first Court dismissed a suit for possession and mesne profits, but the appellate Court held that the plaintiff was entitled to get possession and remanded the case for enquiry as to mesne profits, held that the appellate Courts must be considered to have reversed the decree of the first Court and to have passed a decree for possession and that the defendant's appeal against it must be regarded as an appeal against an appellate decree, on which an *ad valorem* Court-fee must be paid. *Raghunath Das v. Jhari Singh*, 3 Pat. L.J. 99=45 Ind. Cas. 100.

CHAMBER, C.J. and ROE, J.

- (2) *Suit for possession and mesne profits—Court-fee paid only on value of immoveable property and not on mesne profits—Decree for possession and mesne profits—Application for ascertainment of mesne profits, Dismissal of—Appeal—Ad valorem Court-fee.*

In a suit for possession and mesne profits, the plaintiff was by mistake allowed to pay Court fee only on the value of the immoveable property claimed, without paying any on the mesne profits claimed. After getting a decree for possession and mesne profits, he applied for ascertainment of the mesne profits, but his application was dismissed. Held that the memorandum of appeal from this order should bear Court-fee *ad valorem* on the amount claimed.

Court Fees Act (1870)—(Continued).

Quare:—Whether an appellate Court has power to allow the valuation of a claim in the Court below to be reduced in order to relieve a party from liability to pay the proper Court-fee. *Narain Prasad v. Sheo Kameswar Prasad Singh*, 3 Pat. L.J. 101—43 Ind. Cas. 489.

CHAMBER, C.J. and JWALA PRASAD, J.

(2-a) Court-fee, Refund of excess, paid on memorandum of appeal—High Court, Power of, to order—Civ. Pro. Code (1908), S. 151, under—No provision in. See COURT-FEES, No. 3, 3 Pat. L.J. 452.

(2-b) S. 4—Court's duty under, not to accept memo of appeal not properly stamped—Filing of such appeal, not in good faith under Limitation Act (1908), S. 2 (7)—Negligence of vakil, not sufficient cause under S. 5.

"Reasonable view," when used with the words "good faith" as defined in the Limitation Act (1908), S. 2 (7), implies that what was done was done with due care and attention. Filing of an appeal for a declaration that a revenue sale was not a *farsi* transaction and that the properties purchased thereat were not liable for the mortgage already imposed on them, on a Court-fee of Rs. 10, when the appeal was valued for purposes of jurisdiction at Rs. 20,000 was not done in good faith within the meaning of the Limitation Act, S. 2 (7).

Under S. 4 of the Court Fees Act, a Court is expressly prohibited from receiving a memorandum of appeal which has not been properly stamped.

Wanton negligence by a vakil in filing a memorandum of appeal with a deficit Court-fee is not a sufficient ground for the exercise of the Court's clemency under S. 5 of the Limitation Act. *Jodhan Prasad Singh v. Nahku Pershad Singh*, 3 Pat. L.J. 484—46 Ind. Cas. 509.

ROSE and COUTTS, J.J.

References:—1 Pat. L.J. 420, *Dist.*; 27 C.L.J. 240, *R.*

(3) S. 4—Payment of insufficient Court-fee on appeal without any excuse—Court if bound to receive appeal and give time to make good deficiency—Difficulty in procuring stamps if sufficient cause for delay in filing appeal. See APPEAL (GENERAL), No. 28, 3 Pat. L.J. 74.

(4) Ss. 5, 12—Appeal from order of Registrar of High Court as taxing officer fixing Court-fee to be paid on appeal—Power of Division Bench to question correctness of Court-fee paid—Suit for possession—Necessity of prior declaration of invalidity of document or decree—Court-fee, Calculation of.

The order of the Registrar of a High Court, as taxing officer, proscribing under S. 5, Court Fees Act, the Court-fee to be paid on a memorandum of appeal, however wrong, is an absolutely final order, and is not open either to appeal or review or revision, and it must be accepted by the party (a).

The only cases in which a Divisional Bench has authority to question the correctness of the

Court Fees Act (1870)—(Continued).

Court-fee paid by the appellant are cases in which there has been no difference of opinion between the appellant and the stamp reporter, and therefore, no reference to the taxing officer (b).

Where, in a suit for possession, it becomes necessary to make a declaration to the effect that a document or decree, which is a bar to the plaintiff's possession is void or inoperative and must be set aside, the Court-fee to be paid must be calculated on the actual value of the property *ad valorem*. *Lagan Bart Kuer v. Khakhan Singh*, 3 Pat. L.J. 92—43 Ind. Cas. 962.

SHARFUDDIN and ROSE, JJ.

References:—(a) 12 A. 129; 32 A. 59, *Rel. on*. (b) 21 M. 269; 37 C. 914, *R.*

(5) S. 7 (i) and (vi)—Suit for pre-emption—Consideration stated in sale deed as Rs. 44,000, plaintiff alleges a smaller consideration—Suit decreed in respect of some property on payment of Rs. 21,000—Court-fee payable on memorandum of appeal—Appeal divisible into two parts.

A suit for pre-emption was brought in respect of five villages, on payment of Rs. 2,500 as consideration. The consideration stated in the sale deed was Rs. 44,000. The suit was dismissed in regard to three of the villages and it was decreed in respect of the other two on payment of Rs. 21,000. It was held that the consideration was Rs. 44,000. The plaintiff preferred an appeal against that decree and paid a Court-fee on five times the Government revenue of all the five villages on his memorandum of appeal: *Held* that the appeal was divisible into two parts; that, in respect of that part in which the question related only to the sale consideration the plaintiff must pay *ad valorem* Court-fee on the difference between the amounts alleged as the sale price on the one side and decreed on the other, and that in regard to the other part in which the right of pre-emption was in dispute he need only pay Court-fees on five times the Government revenue. *Abinash Chandra v. Shekhar Chand*, 16 A.L.J. 174—40 A. 353—44 Ind. Cas. 666.

TUDBALL, J.

Reference:—6 A. 488 (F.B.), *R.*

(6) S. 7, cl. (4)—Injunction relief how to be valued in plaint—Whether conclusive—Proper Court for presentation when additional reliefs also prayed for.

Plaintiff is entitled to value the injunction relief arbitrarily and such valuation is conclusive. If along with the injunction relief, additional consequential relief or reliefs are prayed for they should be valued according to law. The proper Court for the presentation of the plaint would then depend upon the total value of the consequent reliefs. *M. Ayimuddin Sahib v. S. E. S. Kadirsa Rowther*, (1918) M.W.N. 40—43 Ind. Cas. 995.

SADASIVA AIYAR and BAKEWELL, JJ.

References:—(1913) M.W.N. 105; (1914) M.W.N. 767, *R.*

Court Fees Act (1870)—(Continued).

- (7) S. 7, cl. iv (c)—*Ad valorem fee—Suit for sale on mortgage—Defendant sets up prior charge—Court disallows defendant's claim—Appeal by defendant—Court-fees payable on memorandum of appeal.*

A suit for sale was brought upon foot of a mortgage. One of the defendants pleaded that she held a decree for dower against the mortgagor for the payment of which the property had been made a security. The plaintiff paid *ad valorem* Court-fees on the amount of his claim. The Court decided that the plaintiff's mortgage was prior in date. The defendant appealed and in her appeal sought that her security should have priority. She paid the same Court-fees on her memorandum of appeal as the plaintiff had paid on his plaint: *Held* that the defendant must pay *ad valorem* Court-fees on the amount of her mortgage inasmuch as she was seeking a declaration with a consequential relief (a). *Moti Begam v. Har Prasad*, 16 A.L.J. 81=47 Ind. Cas. 311.

TUDBALL, J.

References:—(a) 8 A.L.J. 821; 6 A.L.J. 155; A.W.N. (1905) 40, R.

- (7-a) S. 7 (iv) (c), Sch. II, Art. 17 (1)—*Suit for declaration and consequential relief—Relief for release of property from attachment—Relief for possession against ostensible owner—Court fee payable on plaint—Appeal by attaching creditor—Appeal by ostensible owner—Court-fee payable on memorandum of appeal.*

Where the plaintiff's property is attached at the instance of a creditor of its ostensible owner and the plaintiff asks only for the release of his property from attachment, the Court-fee payable would be Rs. 10 under Sch. II, Art. 17 (1) of the Court Fees Act.

If the ostensible owner is also joined as a party to the suit and a prayer is made against him for recovery of possession, the Court fee payable would be calculated upon the value of the property in accordance with S. 7 (4) (c) of the Act.

If in such a suit the plaintiff is defeated and he prefers an appeal he must pay Court-fees on the value of the property plus Rs. 10 for declaration.

If the plaintiff succeeds in the suit and an appeal is preferred by the defendants, the Court-fee to be paid must be regulated by consideration of the relief sought in appeal.

If the attaching creditor appeals the Court-fee payable would be Rs. 10 only.

If the ostensible owner appeals, the Court fee payable would be the Court-fee calculated upon the value of the property. *Chandradhari Singh v. Tipan Prasad Singh*, 43 Ind. Cas. 371=3 Pat. L.J. 482.

ROE, J.

- (8) S. 7 (iv) (c)—*Court-fee payable where consequential relief is prayed for—Discretion of Court—When to be exercised—Civ. Pro. Code, S. 149.*

Court Fees Act (1870)—(Continued).

The Court-fee payable on a plaint or memorandum of appeal to obtain a declaratory right where no consequential relief is prayed for is Rs. 10. But where a consequential relief was also prayed for, the fee chargeable was an *ad valorem* fee under S. 7 (iv) (c) of the Court Fees Act.

Where a Court is prayed to exercise its discretion under S. 149 of the Civ. Pro. Code, the party making such a prayer should satisfy the Court that grounds exist on which the Court ought to exercise its discretion. *Saidunessa v. Teyendra Chandra Dhar*, 44 Ind. Cas. 398.

FLETCHER and SHAMSUL HUDA, JJ.

- (9) S. 7 (iv) (c)—*Specific Relief Act, S. 39—Suit for declaration of invalidity of registered deed—Consequential relief of forwarding copy of decrees to Registrar—Ad valorem Court-fee.*

On the adjudication that a deed is void, the Court is required by law, where the instrument has been registered to send a copy of its decrees to the officer in whose office the instrument has been so registered, and that this forwarding of the copy of the decrees to the Registrar is a consequential relief upon which an *ad valorem* Court-fee must be paid. *Museammatt Noowooagar Ojain v. Shidhar Jha*, 3 Pat. L.J. 194=45 Ind. Cas. 238.

ROE, J.

References:—39 B. 207, 4ppr; 21 W.R. 430; 5 A. 331; 15 M. 294; 23 M. 490; 20 B. 736, R.

- (10) S. 7, cl. 4 (c)—*Suit to set aside decrees—If plaintiff can put his own valuation—If Court bound to accept it for purpose of jurisdiction—Inferior Court if can set aside decrees of higher tribunal.*

A Munsif's Court can entertain a suit to set aside the decrees of a Subordinate Judge provided the subject-matter is otherwise within its jurisdiction.

A suit to set aside a decree falls within S. 7 (4) (c) of the Court Fees Act and plaintiff can put his own valuation (a).

Under S. 7 (4) (c), Court Fees Act, a Court cannot reject, for purposes of jurisdiction, the valuation made by a party for purposes of Court-fee, even though his valuation is arbitrary (b). *Pilla Kakkadu v. Yedulla Chennarayya Chundari*, (1918) M.W.N. 562=24 M. L.T. 264.

ABDUR RAHIM and BAKEWELL, JJ.

Reference:—(a) & (b) (1915) M.W.N. 118 (F.B.), F.

- (10-a) S. 7 (4) (c)—*Court-fee payable under—Revenue sale, Suit for declaration as to invalidity of, and for confirmation or restoration of possession. See REVENUE SALE, No. 7, 3 Pat. L.J. 448.*

(10-b) S. 7 (IV) (d)—*Injunction, Suit for, restraining defendants from cutting timber and undergrowth from jungle, Valuation of. See VALUATION OF SUIT, No. 3, 46 Ind. Cas. 384.*

Court Fees Act (1870)—(Continued).

(11) S. 7, cl. (v)—*Suit for specific performance of contract of sale and for possession of land sold—Court-fee payable.*

Held, that in a suit for specific performance of a contract of sale by execution of a sale-deed and for possession of the land sold, Court-fee is payable under cl. (v) of S. 7 of the Court Fees Act, namely, on ten times the land revenue. *Nathe Khan v. Muhammad Khan*, 128 P.W. R. 1918=46 Ind. Cas. 534.

WILBERFORCE, J.

Reference:—11 Ind. Cas. 228=14 O.L.J. 159, F.

(12) S. 7, cl. (v)—*Mokarrari deed, Possessory suit, based on—Court-fee payable—Mokarrari lease, if land.*

A suit for possession of immovable property based on a mokarrari lease is purely one for possession of immovable property within the meaning of S. 7, cl. (v) of the Court Fees Act.

A mokarrari lease of a definite share in a revenue-paying estate is land within the meaning of cl. (v) of S. 7 of the Court Fees Act. *Bibi Kulsam v. Syed Mahomed Hamid*, 45 Ind. Cas. 928.

ROE, J.

(13) S. 7(v)—Valuation of suit for pre-emption for purposes of jurisdiction. See SUITS VALUATION ACT (VII OF 1887), 34 M.L.J. 397.

(14) S. 7 (v) (b) and (d)—*Suit for possession of land not being definite share of estate nor sub-divided and separately assessed—What clause of Act to be applied.* See VALUATION OF SUIT, No. 5, 34 M.L.J. 558.

(15) S. 7, cl. 11. See No. 30, *infra*.

(16) S. 7, Art. 1—*Court fee payable—Suit for recovery of money due after adjustment of accounts.*

Held that:—

1. According to S. 7, cl. 10, of the Court-Fees Act, the fee payable in a suit for money must be according to the amount claimed.

2. Art. 1 of Sch. I of the Court Fees Act applies only to those cases, which are not otherwise provided for under the Act.

Where the plaintiff sued for the recovery of Rs. 1,125-4-0 alleged to be due to him after deducting a sum of Rs. 2,500 (said to be due by him to the defendant on account of the price of certain goods) from Rs. 3,625-4-0, which he assessed as the amount of damages suffered by him by reason of the defendant's failure to perform certain contracts entered into between parties.

Held that, the Court-fee paid *ad valorem* on the amount actually claimed was sufficient. *Qyam-ud-din v. The Delhi Flour Mills Co.*, 175 P.W.R. 1918=47 Ind. Cas. 992.

SHADI LAL and LE-ROSSIGNOL, JJ.

(17) Ss. 7, 11, Sch. II, Art. 17 (6)—*Suit for partition of immovables, moveables and funds of joint family business—Suit if bad for misjoinder—Oiv. Pro. Code (Act V of 1908), O. II, r. 4—Proper Court-fee in such suit.*

Court Fees Act (1870)—(Continued).

In a suit for partition, the plaintiff has to include the whole of his claim, that is to say, the whole of the properties which are alleged by him to be properties of the joint family, immovable properties, moveable properties and funds which according to him have resulted from joint business carried on by members of the family on behalf of all, and such a suit cannot be treated as one for recovery of possession of both immovable and moveable property requiring for their joinder Court's leave under O. II, r. 4 of the Oiv. Pro. Code.

An order passed in such a suit requiring the plaintiff to elect to proceed either with his claim for recovery of immovable properties or with that for recovery of the moveables and funds is erroneous:

Held—That the plaint in the suit was properly stamped as required by S. 7 and Sch. II, Art. 17, cl. (6) of the Court Fees Act. Should the amount due upon taking accounts prove on investigation to exceed the approximate value given in the plaint, the course to be pursued was that under S. 11 of the Court Fees Act. *Beni Madhar Sarkar v. Gobind Chandra Sarkar*, 22 O.W.N. 669=46 Ind. Cas. 165.

TEUNON and CHAUDHURY, JJ.

(18) S. 11. See No. 17, *supra*.

(19) S. 12—*Decision on question of value for purposes of Court-fee incidental to decision on question of value for purposes of jurisdiction—Appeal, whether competent.*

Plaintiff sued for possession of certain land which he valued for purposes of Court-fee and jurisdiction at Rs. 764-7-0. On an objection by the defendant that the suit had been undervalued, the Munsif appointed a Local Commissioner who fixed the value at Rs. 943, but the Munsif refused to accept this valuation and having come to the conclusion that the land was worth considerably over Rs. 1,000 returned the plaint for presentation to the proper Court. On appeal the District Judge held that the Munsif had wrongly disregarded that Commissioner's valuation and returned the case to him for disposal. The defendant preferred a second appeal to the Chief Court:

Held, (1) that, in arriving at a valuation of the land, the Munsif only looked at the question from the point of view of his own jurisdiction, and, although he decided the value for purposes of Court-fee, this decision was merely incidental to his decision on the question of the value for purposes of jurisdiction, and S. 12 of the Court Fees Act was not, therefore, applicable to the case;

(2) that, under these circumstances, the appeal to the District Judge was competent and was rightly decided. *Sikandar Shah v. Ghulam Nabl Shah*, 151 P.W.R. 1918=47 Ind. Cas. 7.

BROADWAY, J.

(19-a) Ss. 12 and 17—*Court-fees, Calculation of, in appeal or cross-objection—Appeal from original decrees and second appeals—Amount on date of decree to be basis—Costs, Appeal*

Court Fees Act (1870)—(Continued).

regarding, Court-fee in—Taxing Officer, Powers of. See **COURT-FEES**, No. 2, 3 Pat. L.J. 443.

(10-b) *Ss. 12, 17, Sch. I, Art. 1—Mortgage suit—Appeal or cross-objection—Costs, Appeal in respect of—Court-fee payable—Taxing Judge, Power of—Procedure.*

In the case of appeals or cross-objections in suits for redemption or foreclosure, in all cases whether a decree for interest has been made in them or not, in which the Court-fee declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account—i.e., in all original appeals the Court-fee should be levied on the sum due at the date of the original decree and in all second appeals it should be levied on the sum due at the date of the decree of the lower appellate Court.

When an appeal against costs is distinct and separate from the parts of the appeal, Court-fee must be paid *ad valorem* on the costs decreed.

When it is the appellant who failed to pay sufficient Court-fees in the Court below, his appeal will not be heard till the deficiency has been made good.

Where it was the respondent who was in default, no decree shall be executed in his favour until the deficiency has been made good.

The decision of the Taxing Officer in the matter of Court fees is final. The Court-fee fixed by him must be paid. *Rowllus v. Lachmi Narain Jha*, 44 Ind. Cas. 50.

ROE, J.

(20) *S. 12.* See No. 4, *supra*.

(21) *S. 13—Civ. Pro. Code (1908), O. XLI, r. 23—Appeal against preliminary decree—Remand—Certificate for refund of Court-fees.*

O. XLI, r. 23, Civ. Pro. Code, applies only where the original Court has disposed of the suit on a preliminary point. For the Court-fees paid on an appeal against a preliminary decree, a refund certificate cannot be given by the Court under S. 13, Court Fees Act. *Nand Kumar Singh v. Bilas Rammarwaral*, 3 Pat. L.J. 116.

CHAPMAN and JWALA PRASAD, JJ.

(22) *S. 13—Remand of case in appeal—Refusal to order refund of Court-fees.* See **REVISION**, No. 10, 20 Bom. L.R. 848.

(23) *S. 17—Applicability of—Alternative reliefs asked for—Court-fees payable.*

S. 17, Court Fees Act, applies to cases in which two different reliefs may be applied simultaneously to the wrong done to the plaintiff; it does not apply to cases in which alternative reliefs are asked for. Where alternative reliefs are sought, a Court-fee must be paid on the relief which appears to be of the higher value. *Mukhlalji v. Ramdheyani Rai*, 44 Ind. Cas. 148.

ROE, J.

Court Fees Act (1870)—(Continued).

(23-a) *S. 17.* See Nos. 19-a and 19-b, *supra*.

(24) *Ss. 19 (viii) and 19-(i), Sch. I, Art. 2, Sch. III—Probate—Letters of Administration—Calculation of Court-fee payable on application for grant of letters.*

In a petition for the grant of letters of administration, it was held that on the true construction of the Act no duty is payable where the value of the estate after making the deductions specified in annexure B of the third schedule is less than Rs. 1,000. *In the goods of Mrs. E. E. W. Melk*, 40 A. 279=46 Ind. Cas. 865.

RICHARDS, C.J. and BANERJI, J.

(25) *S. 48—Conciliator's certificate—Exclusion of time taken up in obtaining certificate—Decree—Execution—Civ. Pro. Code (V of 1908), S. 48.*

The plaintiff obtained a decree on the 28th October, 1909, to execute which he gave three applications. He next applied, on the 1st July, 1911, to obtain a conciliator's certificate under the provisions of the Dekkhan Agriculturists' Relief Act, 1879; and he obtained the same on the 29th May, 1913. The fourth application to execute the decree was accordingly made on the 23rd August, 1913. It was resisted by the defendant on the ground that the execution of the decree was barred under S. 48 of the Civ. Pro. Code, 1908:

Held, that the application was within time, inasmuch as the plaintiff was entitled, under S. 48, Dekkhan Agriculturists' Relief Act, 1879, to exclude the interval of time occupied in obtaining the conciliator's certificate. *Shidaya Virbhadraya Kodlimath v. Satappa Bharmappa Mutgauda*, 20 Bom. L.R. 360.

BATCHELOR, A.C.J. and SHAH, J.

(26) *Sch. I, Art. 1—Amendment made by Act V of 1908—Cross-objection in appeal—Ad valorem fee payable on cross-objection.* *Lakhan Singh v. Ram Kishan Das*, 15 A.L.J. 886=40 A. 98=43 Ind. Cas. 179. See Final Part, 1917, Col. 361.

(27) *Art. 1—Memorandum of cross-objections, Court fee if payable on—Payment of more than necessary Court-fees by appellant on his appeal if absolves payment on cross-objections.* See **CROSS-OBJECTIONS**, No. 1, 27 C.L.J. 443.

(28) *Sch. I, Art. 1, Sch. II, Art. 17—Appeal—Cross-objection—Ad valorem fee.* See **CROSS-OBJECTION**, No. 2, 3 Pat. L.J. 197.

(28-a) *Sch. I, Art. 1.* See No. 19-b, *supra*.

(29) *Sch. I, Art. 2.* See No. 24, *supra*.

(29-a) *Sch. II, Art. 8—General power of attorney, Copy of, produced in Court for verification—Court-fee, Necessity of—Construction of Court Fees Act—S. 48, Stamp Act (1899), Object of.* See **STAMP ACT (1899)**, No. 16, 136 F.W.R. 1917.

(30) *Sch. II, Art. 5, S. 7, cl. 11—Suit for declaration that plaintiff is an occupancy tenant—Ara Tenancy Act (II of 1901),*

Court Fees Act (1870)—(Concluded).

S. 95—Court-fee payable on memorandum of appeal.

In a suit to establish or disprove a right of occupancy, the plaint or memorandum of appeal should bear a Court-fee of eight annas as provided in Art. 5, Sch. II to the Court Fees Act, and S. 7, cl. 11 of the Act does not apply to such a suit. *Ratan Singh v. Khem Karan*, 16 A.L.J. 167=40 A. 858=44 Ind. Cas. 608.

TUDBALL, J.

(81) Sch. II, Art. 17.—Suit for declaration of absolute ownership of land without liability to partition—Trial by Land Revenue Officer acting under Punjab Land Revenue Act—Appeal if lies to District Judge. See VALUATION OF SUIT, No. 6, 115 P.W.R. 1918.

(82) Sch. II, Art. 17. See Nos. 7-a, 17 and 28, *supra*.

(83) Sch. II, Art. 17, cl. (iii)—*Suits Valuation Act, S. 9—Suit to declare validity of an adoption—Suit for mere declaration of the validity of adoption—Ad valorem fee.*

Suit for mere declaration, without any consequential relief that an adoption is valid, falls for the purposes of Court-fees, within cl. (iii), Art. 17, Sch. II of the Court Fees Act. *Ganpatrao v. Laxmi Bai*, 43 Ind. Cas. 64.

BATTEN, PRIDEAUX and MITTRA, A.J.Cs.

(34) Art. 17 (3)—Suit instituted under S. 106, Bengal Tenancy Act, before settlement officer—Transfer of suit to Civil Court—Natu. of suit for Court-fees. See DECLARATORY SUIT, No. 2, 28 C.L.J. 301.

(35) Sch. III, *Annexures A and B—Trusts whose pecuniary value should be deducted from probate duty—Trusts created by testator's will if exempt from probate.* *Chandrabati Kuari v. Collector of Dharbanga*, 2 Pat. L.J. 611=45 Ind. Cas. 578. See Final Part, 1917, Col. 362.

Court of Wards.

Whether protection offered by S. 174, Oudh Land Revenue Act, extends to profits or acquisitions, after Court of Wards releases corpus from its superintendence. See ACT XVII OF 1876 (COURT OF WARDS), No. 1, 45 Ind. Cas. 219.

Court of Wards Act.

See ACT IX OF 1879 (BENGAL).

See ACT XXIV OF 1899 (C. P.).

See ACT I OF 1902 (MADRAS).

Court-sale.

(1) Irregular procedure in the proclamation of sale—Sale when to set aside. See EXECUTION SALE, No. 1-a, 44 Ind. Cas. 412.

(2) Suit to set aside alienation by widow—Plaintiff to prove doing by widow of act necessarily resulting in transfer—Defence of mortgage suit abandoned by widow after slight contest—Execution sale by Court if amounts to private alienation—Auction or Court sale when may be considered as private sale. See LIMITATION ACT (1908), No. 167 35 M.L.J. 364.

Courts of Justice.

Power of Governor-General in Council to create new—Power under emergency legislation to create a special tribunal to hold criminal trial. See DEFENCE OF INDIA ACT, 4 Pat. L.J. 587 (F.B.).

Covenant running with Land.

(1) Grant under Arakan Waste Land Rules for fixed term, with right of renewal after expiry of term—Assignment of unexpired term by document not reserving right of renewal to assignor—Right of assignee to obtain benefit of renewal for himself—Assignment if operates as sale. See GRANT, No. 2, 9 L.B.R. 268.

(2) Covenant in lease to file with lessor a set of juma wasil baki and juma mofussil papers at the end of each year, if specifically enforceable. See SPECIFIC RELIEF ACT, No. 8, 42 Ind. Cas. 521.

Crim. Pro. Code.

(1) Ss. 4 (m), 476—*Judicial proceeding, if includes execution proceedings—Attachment in execution of decree, resistance offered during—Whether prosecution can be sanctioned under S. 476.*

The definition given of a judicial proceeding in S. 4 (m) of the Crim. Pro. Code is wide enough to cover execution proceedings.

If resistance took place in the course of the attachment of property in execution of a decree, such resistance to the process of the Court is a resistance in the course of a judicial proceeding and the Court is justified in granting sanction or directing prosecution under S. 476 of the Crim. Pro. Code. *Barhamdeo Singh v. Emperor*, 19 Cr. L.J. 163=43 Ind. Cas. 441.

JWALA PRASAD, J.

(2) S. 145—*One person representing a community in the proceedings under the section—Order binds community—Limitation Act, Art. 47—Applicability.*

Where a person was accepted in the proceedings under S. 145, Crim. Pro. Code, as a sufficient representative of a whole community, all the members of the community are bound by the order of the Magistrate in the proceedings.

With regard to a civil suit arising out of the order of a Magistrate in proceedings under S. 145, Crim. Pro. Code, the rule of limitation runs under Art. 47 of the Limitation Act, from the date of the order of the Magistrate and not from the date when High Court refused to interfere with that order. *Lachman Singh v. Diljan Ali*, 43 Ind. Cas. 955=4 Pat. L.W. 186.

ROE and JWALA PRASAD, JJ.

Reference:—12 C.W.N. 840, F.

(2-a) S. 146 (1)—Ownership, Entry as to, Power of Revenue Officer under S. 36 (1), Punjab Land Revenue Act to order—Such order if order of competent Court under See LIMITATION PROCEEDINGS, 43 Ind. Cas. 216.

Crim. Pro. Code—(Continued).

- (3) S. 195 of the Crim. Pro. Code only refers to Courts and makes no distinction between appellate and original jurisdiction.

Appeals lie to the District Court and not to the High Court from orders passed by the Subordinate Judge whether in its original or appellate jurisdiction, under S. 195 (6) of the Crim. Pro. Code. *Rapaka Yiyanna v. Parakala Bajjamma*, 19 Or. L.J. 264=44 Ind. Cas. 120.

BAKEWELL and PHILLIPS, JJ.

Reference:—30 M. 882, F.

- (4) S. 195—"Court," Meaning of—*Calcutta Improvements Act, 1911, tribunal constituted under, whether Court—Sanction to prosecute.*

The word 'Court' in S. 195, Crim. Pro. Code, has a wider meaning than a Court of Justice as defined in the Indian Penal Code and it may include a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination.

The tribunal formed under the Calcutta Improvements Act of 1911 is a Court for the purposes of S. 195 of the Crim. Pro. Code. *Nando Lal Ganguli v. Khetra Mohan Ghose*, 19 Or. L.J. 315=44 Ind. Cas. 931=27 O.L.J. 463=45 C. 585.

CHITTY and SMITHER, JJ.

- (5) S. 195—Sanction for prosecution granted by successor of Judge who heard case—Delay, effect of.

On the application of the defendant in a Small Cause Court suit, the successor-in-office of the Judge who had decreed the suit granted, after an inordinate delay, sanction for the prosecution of the plaintiff for perjury in respect of a false statement in his deposition. This sanction was affirmed on appeal to the District Judge.

Held, that as the Court record of the deposition was not read over to the plaintiff and he was not cross-examined on the statement and as the sanction was granted after a long delay by a Judge who did not try the case, the sanction should be revoked especially as this sanction if not revoked, would be used by the defendant *in terrorem* both as regards execution under the decree passed against him and as regards the suit which he had brought for setting aside that decree and which was pending.

Per Smither, J.—When a person wants to prosecute criminally he must not be dilatory. *Prem Chand v. Sonatan Saba*, 19 Cr. L.J. 508=45 Ind. Cas. 268.

CHITTY and SMITHER, JJ.

- (6) S. 195—Sanction to prosecute—Perjury—Statements not altogether irreconcilable. See PENAL CODE, No. 1-a, 19 Cr. L.J. 434.

(6-a) S. 195—Calcutta Improvement Act (V of 1911) and Calcutta Improvement (Appeals) Act (XVIII of 1911), Tribunal constituted by, if

Crim. Pro. Code—(Continued).

mere body of arbitrators or Court under S. 195—Court in S. 195, distinguished from Court of Justice in S. 20, Penal Code. See SANCTION TO PROSECUTE, No. 1, 45 C. 585.

- (7) S. 195 (6)—Revoking or granting sanction granted or refused by lower Court—Powers of Court of appeal. *Mauhg Po Aung v. King-Emperor*, 10 Bur. L.T. 161=48 Ind. Cas. 100=19 Or. L.J. 68. See Final Part, 1917, Col. 87.

- (8) S. 195 (7)—Sanction to prosecute granted by Subordinate Judge—Appeal, forum of—District Judge or High Court—Jurisdiction.

Where a sanction to prosecute is granted or refused by a Subordinate Judge, an appeal against the order lies to the District Judge and not to the High Court, even where the value of the suit out of which the proceeding for sanction has arisen is beyond the appellate jurisdiction of the District Judge. *Bhairo Prasad v. Harihar Prasad*, 19 Or. L.J. 691=45 Ind. Cas. 679.

IMAM, J.

- (9) Ss. 195, 476—Order directing prosecution for using as genuine a forged document—Jurisdiction of Criminal Court. *Ganga Ram v. Emperor*, 15 A.L.J. 817=40 A. 24=42 Ind. Cas. 927=19 Or. L.J. 15. See Final Part, 1917, Col. 364.

- (10) Ss. 195, 476—Qualifications mentioned in S. 195, whether incorporated in S. 476—Courts in the Presidency towns, power of, to act under S. 476.

Per Curiam (Fletcher, J., dubitante)—S. 476, Crim. Pro. Code, does not apply to an offence committed before a Court in Presidency towns. Consequently it is not competent to the High Court, acting under S. 476, to direct the prosecution of a person for the offence of forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a probate case.

The qualifications mentioned in S. 195, Crim. Pro. Code, are to be treated as incorporated in the provisions of S. 476, Crim. Pro. Code. *In the matter of a Yakil*, 19 Or. L.J. 688=45 Ind. Cas. 686.

FLETCHER and SHAMSUL HUDA, JJ.

- (11) S. 476—Offence brought to notice of the Court in subsequent judicial proceeding, effect of—Power of Court to enquire into commission of offence.

There is nothing in S. 476 of the Crim. Pro. Code, to limit the exercise of the power referred to therein within any period or at any particular time. The power can be exercised at any time when an offence is committed before a Court in a judicial proceeding or when the commission of it is brought to its notice in the course of its judicial proceeding or in any other. *Ram Anuj v. Emperor*, 19 Cr. L.J. 981=48 Ind. Cas. 161.

KANHAIYA LAL, A.J.C.

References:—9 Cr. L.J. 41=32 M. 49; 5 Cr. L.J. 398=34 C. 551, *Dies*,

Crim. Pro. Code—(Concluded).

(11-a) S. 476. See Nos. 1, 9 and 10, *supra*.

(12) S. 488 — *Order under, Effect of—Judicial separation, same effect as order for—Birth of child while order in force—Onus of proof as to access—Legitimacy, Presumption as to, if arises when access not proved—Evidence Act, S. 112.*

In Buddhist Law there is no such thing as a judicial separation but an order under S. 488, Crim. Pro. Code, until it is rescinded, is for all practical purposes the same thing as an order for judicial separation. If a child is born to the wife while such an order is in force, the onus is shifted on to her of proving access. When the wife has failed to prove access and the order under S. 488, Crim. Pro. Code, which practically puts an end to the continuance of a valid marriage is in force, the presumption in favour of legitimacy cannot arise under S. 112 of the Evidence Act. *Ma Mya v. Mg. Shwe Ban*, 46 Ind. Cas. 620.

RIGG, J.

(13) Ss. 526, 556—*Local inspection by Magistrate—Magistrate, duty of—Transfer of case.*

A Judge cannot, without giving evidence as a witness import into a case his own knowledge of particular facts.

A Magistrate is entitled to make a local inspection for the purpose of explaining the evidence that has been given before him, but the law casts an obligation on him to make an accurate note on the record of what he has seen and the impression that has been created on his mind relative to the evidence already given.

In a case where a Magistrate made a local inspection but failed to make a note of what he had seen, the High Court ordered the case to be transferred to another Magistrate for trial. *Murat Lal v. Emperor*, 43 Ind. Cas. 252—19 Cr. L.J. 92—3 Pat. L.W. 261.

ATKINSON, J.

(14) S. 556. See No. 13, *supra*.

Cross-objections.

(1) *Court-fee—Memorandum of cross-objection—Court Fees Act (VIII of 1870 as amended in 1908), Sch. I, Art. 1—Lease—Covenant for renewal.*

Court-fees should be paid on a memorandum of cross-objections precisely in the same manner as on a plaint in a suit or on a memorandum of appeal. It is incumbent upon the respondent to value the relief claimed by way of cross-objection and to pay Court-fees accordingly, though the appellant may have paid more than adequate Court-fees on the memorandum of appeal.

Where there is a covenant for renewal, if the option does not state the terms for renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to

Cross-objections—(Concluded).

the covenant for renewal itself. *Secretary of State v. Digambar Nanda*, 27 O.L.J. 448—45 Ind. Cas. 989.

MOOKERJEE and BEACHROFT, JJ.

References :—16 O.L.J. 217 ; 20 C.W.N. 948, R.

(2) *Appeal—Cross-objection—Court-fee payable on—Ad valorem fee—Court Fees Act, 1870, Sch. I, Art. 1, Sch. II, Art. 17.*

A respondent filing a cross-objection must, under Sch. I, Art. 1, Court Fees Act, pay an *ad valorem* Court-fee on the subject-matter in controversy. *Daroga Raut v. Mussamat Farema Kuer*, 3 Pat. L.J. 197—4 Pat. L.W. 368—45 Ind. Cas. 668.

ROE, J.

Reference :—43 Ind. Cas. 179, R.

(3) Reversal of portion of lower Court's decree in favour of appellant on whose appeal, was partially allowed—No cross-objection filed by respondent—Reversal if valid. See *APPEAL (GENERAL)*, No. 12, 22 C.W.N. 536.

(4) Defendant's appeal dismissed as not duly presented—Cross-objections filed by defendant in plaintiff's appeal—Dismissal of cross-objections—Defendant's right to file cross-objections—Defendant's remedy. See *APPEAL (SECOND APPEAL)*, No. 16, 20 P.R. 1918.

(5) Cross-objections against co-respondent when may be filed. See *CIV. PRO. CODE* (1908), No. 498, 16 A.L.J. 587.

(6) Respondent content with decree appealed from—Right to resist appeal without filing memorandum of cross-objections. See *INTEREST*, No. 6, 48 P.W.R. 1918.

(7) Suit claiming relief alternately against two defendants—Decree against one—Appeal—Plaintiff-respondent if bound to file cross-objection against other defendants. See *RES JUDICATA*, No. 12, 42 Ind. Cas. 548.

Crown Debts.

Mortgage in English form—Priority—Still-head duty—Excise Act (XII of 1896), S. 34—Punjab Land Revenue Act (XVII of 1887), S. 70—Administration—Civ. Pro. Code (Act V of 1908), O. XX, r. 18 (2)—Presidency Towns Insolvency Act (III of 1909), Ss. 12, cl. (4), 49, Sch. II, cls. 9 to 16—Secured and unsecured creditors—Common Law of England—Its application in the Presidency Towns and in the Mofussil.

The administration of an estate under a decree of Court is governed by O. XX, r. 18 (2) of the Civ. Pro. Code, 1908, under which the same rules have to be observed as to the respective rights of secured and unsecured creditors and to debts and liabilities provable, as are in force in respect to estate of persons adjudged or declared insolvents, and, when the administration is under a decree of the High Court, under S. 49 of the Presidency Towns Insolvency Act,

Crown Debts—(Concluded).

1909, all debts due to the Crown shall be paid in priority to all other debts.

The Crown is not entitled to priority over a mortgage in respect of immoveable properties mortgaged under an English mortgage.

In such a mortgage, the ownership is wholly transferred to the creditor, which is however liable to be divested by the repayment of the loan on the appointed day. The mortgagee is not obliged to apply for sale of the property mortgaged under r. 18, Sch. II of the Presidency Towns Insolvency Act, 1909. He has no debt provable in insolvency until his security has been valued or realised. He stands outside the bankruptcy (a).

The ownership of the property passes to the first mortgagee in an English mortgage, but not to the pusine mortgagee, and he is not entitled to priority over the Crown.

Shares merely deposited and not actually transferred do not create a right in favour of the deposites superior to the right of the Crown (b).

According to English Law, whenever the right of the Crown and the right of the subject with respect to payment of a debt of equal degree come into competition, the Crown right prevails. This rule is of universal application except in so far as the legislature has thought fit to interfere with it (c). **The Bank of Upper India v. The Administrator-General of Bengal**, 22 C.W.N. 793=45 C. 653=47 Ind. Cas. 529.

CHAUDHURI, J.

References :—(a) 29 A. 537; 28 M. 420, R. (b) *Harrold v. Plenty*, (1901) 2 Ch. 314, R. (c) *In re Hesley & Co*, L.R. 9 Ch. Div. 469 at p. 481; *New South Wales Taxation Commr. v. Palmer*, (1909) A.C. 179; *King v. Wells*, 16 East. 278, 282 (1912), R.

Crown Grant.

Crown—Power to grant or transfer lands—Power to limit descent of such lands—No power in a subject to limit descent of property at variance with ordinary law—Hindu Law—Succession—Oudh Taluqa—Primogeniture Sanad—Property purchased or inherited by taluqdar—"Accretions"—Village transferred in exchange—House allotted by Government for use of Taluqdar.

The Crown has in British India power to grant or transfer lands and by its grant, or, on the transfer, to limit in any way it pleases the descent of such lands, but a subject has no right to impose upon the lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case.

In 1861 the Crown granted a Taluqa in Oudh to a Hindu, with a condition that it "shall descend to the nearest male heir according to the rule of primogeniture." In a suit as to the succession to the property of the last holder of the Taluqa the Privy Council declared in 1905 "that the Taluqa as constituted at the date of the Sanad, with accretions (if any) appurtenant to the

Crown Grant—(Concluded).

Taluqa," passed to the appellant, who was the next male heir according to the rule of primogeniture, but that other property passed to the respondent, who was the widow of the last holder, and remitted the suit for determination under the declaration. No family custom of primogeniture was alleged or proved. On appeal from final decrees:

Held, that under the declaration the villages, subsequently transferred by the Government to the taluqdar in exchange for taluqdari sanad villages must be treated as taluqdari villages and consequently passed to the appellant; that a house allotted by the Government in 1864 to the taluqdar for his use as taluqdar of the taluqa granted also passed to the appellant; but that the village purchased or inherited after 1861 by the late taluqdar passed to the respondent, whether or not the taluqdar intended to incorporate them with the taluqa. **Rajadras Bahadur Singh v. Rani Raghubans Kunwar**, 24 M.L.T. 282=28 C.L.J. 456=8 L. W. 570=(1918) M.W.N. 831=21 O.C. 106=20 Bom. L.R. 1075=40 A. 470=23 O.W.N. 101 (P.C.).

VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMER ALI and SIR WALTER PHILLIMORE, BART.

Cruelty.

(1) Single act of, if sufficient to grant divorce. See **BUDDHIST LAW (DIVORCE)**, No. 2, 46 Ind. Cas. 144.

(2) Adultery and, after judicial separation—If ground for dissolution of marriage. See **DIVORCE**, 45 Ind. Cas. 914.

Custody of Children.

Father, Suit *inter partes* by, for. See **GUARDIAN AND WARDS ACT (1900)**, No. 1, 10 Bur. L. T. 186.

Custom.

(1) *Proof of—Burden of proof where custom set up—Alleged presumption in favour of custom—Bombay Regulation (IV of 1927), S. 26—Punjab Laws Act (IV of 1929), S. 5—Family customs—Recognised in India—Requisites to legal recognition of custom—Antiquity and certainty—Instance adduced in proof of custom—May be useful even though all the requisite conditions are not proved in every case.*

When either party to a suit sets up "custom" as a rule of decision, it lies upon him to prove the custom which he seeks to apply.

No presumption in favour of custom as against the general or personal law is created by clauses such as S. 26 of Bombay Regulation IV of 1927 or S. 5 of the Punjab Laws Act; it is only when the custom is proved that it is made the rule of decision.

Custom binding inheritance in a particular family, although foreign to the spirit of English Law, is recognised in India; and if the custom is well established in one particular family, the fact that it might or might not

Custom—(Continued).

apply to other families will not make it void for uncertainty.

Special usages modifying the ordinary law of succession must be ancient, invariable, established to be so by clear and unambiguous evidence.

Where a large number of conditions have to be fulfilled to test a custom, and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all conditions should be proved in each instance. The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due.

- The best evidence as to custom of inheritance is generally found in connection with the division of land, and Revenue record may therefore be of great value. *Mir Abdul Hussain Khan v. Musammat Bibi Sona Dero*, 16 A.L.J. 17=34 M.L.J. 48=28 M.L.T. 117=27 C.L.J. 240=20 Bom. L.R. 528=22 C.W.N. 868=1 P.L.R. 1918=45 C. 450=4 Pat. L.W. 27=43 Ind. Cas. 306 (F.G.).

LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER, ALI and SIR WALTER PHILLIMORE.

Reference:—(1906) P.R. p. 390, *Appr.*

- (2) *Unreasonable and uncertain, not valid in law—Defence in rent suit that by custom no rent is payable in respect of certain classes of land in years of inundation.*

Where in a suit for rent, the tenants claimed remission of rent payable on account of what are called *hajabad* land under an alleged custom under which in years of inundation, no portion of such rent, irrespective of the extent of the land inundated or of the crops destroyed was recoverable from them.

Held—That the custom was both unreasonable and uncertain and was in consequence invalid in law. *Sibnarain Mookerjee v. Bhutnath Guchait*, 22 C.W.N. 432=29 C.L.J. 148=45 C. 475=45 Ind. Cas. 289.

MOOKERJEE and WALMSLEY, JJ.

Reference:—42 C. 455, R.

- (3) *Long standing custom—Presumption—Public policy—Market.*

It would be difficult to say that a custom which prevailed from at least 1865 was contrary to public policy. The fact that a custom prevailed for a very long time raises a strong presumption that it is reasonable. The custom of establishing markets by Zamindars originates for the convenience of the people. *Radha Prasad Sinha v. Dinanath Mistr*, 43 Ind. Cas. 451=1 Pat. L.W. 608.

CHAPMAN and JWALA PRASAD, JJ.

- (4) *Wajib-ul-arz—Pre-emption—The value of wajib-ul-arz as evidence—Prima facie evidence, Whether can be rebuttable.*

There is no doubt that the extract from a *wajib-ul-arz* recording a custom of pre-emption is *prima facie* evidence of the existence of the

Custom—(Continued).

custom and no instances need be given by plaintiff to support the entry but this does not prevent the defendant to show, if he can, that there have been a number of sales to strangers and the Court is bound to take such evidence into consideration in making up its mind whether or not a custom of pre-emption exists. *Kallu v. Kallu Singh*, 43 Ind. Cas. 854.

RICHARDS, C.J. and BANERJI, J.

Reference:—37 A. 129, *Appr.*

- (5) *Proof of—Community, Of an—Main body, History of, essential.*

In dealing with the custom of an entire community, it is of more importance to have regard to the history of the main body than to the history of less important branches. *Sah Deo Narain Deo v. Kusum Kumari*, 46 Ind. Cas. 929.

CHAPMAN and ATKINSON, JJ.

- (6) *Its weight and value.* See C.P. ACT XX OF 1875 (LAWS), No. 1, 44 Ind. Cas. 435.

(7) *Enhanced rent, Payment of—Value and relevancy of, in support of—Enhanced rent for garden crops, Custom to charge, Plea of—Acquiescence, Effect of, where plea negatived.* See MAD. ACT VIII OF 1865 (RENT RECOVERY), (1918) M.W.N. 733 (F.G.).

(7-a) *Established Church, meaning of—Roman Catholic Church, if an established Church—Voluntary association, rules of, different from those of the parent body—Parish Church adopting doctrines of Catholic Church, if can set up separate rules of discipline—Custom, question as to, whether one of fact or of law.* See ECCLESIASTICAL LAW, No. 1, 8 L.W. 403.

(7 b) *Gift by Raja to Ranis of jontak ramam britti reciting previous similar grants—Condition restraining alienation by future Ranis giving them only enjoyment of profits—Creation of successive life estates in favour of unborn persons without disposal of estate—Rule of succession to britti prescribed—Validity of usage creating family custom of succession—Essentials of custom.* See GRANT, No. 1, 45 C. 835.

(8) *Right to maintenance in impartible estates if claimable by custom of Hindu Law.* See HINDU LAW (MAINTENANCE), No. 4, 35 M.L.J. 392.

(9) *Landlord and tenant—Occupancy holding, Transferability of, subject to payment of nazar—Custom as to, Essentials of.* See LANDLORD AND TENANT, No. 42, 45 Ind. Cas. 747.

(10) *Requisites of—Construction of—Text-books, as evidence of.* See MAHOMEDAN LAW (GIFT), No. 1, 28 C.L.J. 306.

(11) *Memoirs—Halsi Memoirs, Law of succession and inheritance applicable to.* See MAHOMEDAN LAW (INHERITANCE), No. 1, 20 Bom. L.R. 289.

(12) *Custom of payment of nazar to landlord on transfer of occupancy tenure, Indefiniteness*

Custom—(Concluded).

in—Validity of such custom. See OCCUPANCY TENURE, No. 6, 22 O.W.N. 929.

(12) Succession, Of—Eunuch, Heirs of. See SUCCESSION, 46 Ind. Cas. 77.

(14) Wajib-ul-arz unsupported by other evidence—Family custom if thereby established. See WAJIB-UL-ARZ, No. 2, 21 O.O. 834.

Customs (Punjab).

- 1.—GENERAL.
- 2.—ABADI.
- 3.—ADOPTION.
- 4.—ALIENATION.
- 5.—DEBT.
- 6.—SUCCESSION.

—1.—General.

Question of customs in issue—Refusal of certificate by District Judge—Revision. See REVISION, No. 22, 18 P.R. 1918.

—2.—Abadi.

Shamilat—Mortgage by some proprietors of portion of abadi—Mortgages, erection by, of wall around such land—Injunction for demolition of wall—Conditions.

Some of the proprietors of a patti mortgaged about a fourth of the *abadi shamilat* or common land. Failing in their attempt to get the mortgage set aside, they instituted a suit alleging that the mortgagees erected a wall round the land mortgaged to them which they had no right to do and praying that a mandatory injunction be issued directing the removal of the wall. *Held* that the plaintiffs having failed to show any substantial and material injury such as could not be remedied on a partition of the joint land their suit was untenable (a). *Majju and Ishar Singh v. Taja Singh*, 29 P.R. 1918=118 P.L.R. 1918=114 P.W.R. 1918=44 Ind. Cas.=844.

BROADWAY, J.

References:—(a) 54 P.R. 1888; 187 P.R. 1869; 54 P.R. 1892, F.

—3.—Adoption.

(1) *Aroras of Lahore District—Adoption of daughter's son—Hindu Law—Adoption—Presumption as to validity—Burden of proof.*

The adoption of a daughter's son being prohibited by the Hindu Law, the personal law of the parties and being also opposed to the general agricultural custom of the Province, the presumption must be entirely against its validity. All persons propounding a special custom or usage must prove that custom (a).

No special custom has been proved amongst the Aroras of Lahore which permits an individual to adopt his daughter's son. *Gopi Chand v. Musammatt Malan*, 106 P.R. 1918.

RATTIGAN, C.J. and LE-ROSSIGNOL, J.

References:—(a) 50 P.R. 1893 (F.B.), R.; 50 P.R. 1874; 77 P.R. 1878; 35 P.R. 1885; 57 P.R. 1886, Dist.; 79 P.R. 1901, Dis.

Customs (Punjab)—(Continued).**—2.—Adoption—(Concluded).**

(1-a) *Adoption of sister's son not allowed among Muhammadan Gorewaha Rajputs of Mouza Dodbale in Newan Sheher Tahsil, Jullandhar District—General custom—Onus of proving special—Acquiescence—Solitary instances.*

1. *Found* no custom among Muhammadan Gorewaha Rajput of Mouza Dodbale in the Newan Sheher Tahsil of the Jullandhar District allowing adoption of sister's son.

2. *Held*, that the general custom of the Punjab agriculturists is against the adoption of sister's son, and consequently the burden of proving a custom to the contrary lies on the person asserting it. A solitary instance is quite insufficient to discharge the onus.

3. The following circumstances which occurred during the lifetime of the adoptor's widow are not sufficient to establish that the collaterals acquiesced in the adoption and are estopped from questioning its validity.

(a) Their omission to get the adoption declared invalid, although it took place about 35 years before the widow's death.

(b) Their not objecting to the mutation of the entire estate of the adoptor in favour of the adoptee, which was effected some 10 years before the adoptor's death.

(c) Their joining the adoptee in sinking a well in the joint holding.

(d) Adoptee mortgaging and then redeeming a part of the land and his gifting a small plot of it.

(e) His succeeding (without objection) to the share of Mude Khan in the estate left by a collateral of his along with the plaintiffs. *Abdulla v. Nable*, 25 P.W.R. 1916=45 Ind. Cas. 9.

SCOTT-SMITH and SHADI LAL, JJ.

(2) Daughter's son, Adoption of. See HINDU LAW (ADOPTION) No. 19, 21 O.O. 276.

—4.—Alienation.

(1) *Acquisition of occupancy rights by Government tenant—Acquisition by sons of such tenant of full proprietary rights—Alienation by sons of this land—Right of sons of alienors to question alienation as collaterals.*

The grandfather of the plaintiffs-appellants was a Government tenant of the suit land in which he had acquired occupancy rights. He was succeeded by his sons, who, after duly acquiring full proprietary rights, sold the lands to some of the defendants. The plaintiffs, contending that the land acquired by their grandfather was their ancestral property, sued for a declaration that the sale would not affect their reversionary rights, after the death of the vendors. *Held* that the occupancy rights had merged in the proprietary rights acquired by the vendors and had absolutely determined and that the plaintiffs could not question the sale as it could not be said that any portion of the proprietary rights was ancestral *qua* the

Customs (Punjab)—(Continued).**—4.—Alienation—(Continued).**

plaintiffs. *Lal v. Gauchar*, 5 P.R. 1918—44 Ind. Cas. 199.

SCOTT-SMITH and LESLIE JONES, JJ.

- (3) *Criminal prosecution of head of family—Money raised for expenses of his defence—Expenses of legal necessity—Mortgage for raising money, validity of.*

Under the customary law of the Punjab no less than under the Hindu Law, the necessity for raising money by way of mortgage on ancestral lands for the purposes of the defence of the head of the family on a criminal charge is a valid legal necessity (a). *Narain Singh v. Khazan Singh*, 22 P.R. 1918—44 Ind. Cas. 814.

BROADWAY, J.

Reference:—(a) 84 A. 4, F.

- (3) *Tuto Masara village in Hoshiarpur district—Custom as to whether non-proprietary body are entitled to alienate house sites.*

Case where it was held that, in the village of Tuto Masara in the District of Hoshiarpur, the right of non-proprietors to sell their sites was established by the evidence on the record. *Nandu v. Panjab Singh*, 35 P.R. 1918—62 P.W.R. 1918—45 Ind. Cas. 96.

LESLIE JONES, J.

References:—9 P.R. 1882; 13 and 50 P.R. 1889, R.

- (4) *Suit for declaration that alienation shall not bind reversioner's right of vendor except to the extent of legal necessity—Pre-emptor if bound like vendee to establish necessity for alienation.*

In a suit for a declaration that a sale of certain land subsequently purchased from the original vendees by pre-emptors should not affect the reversionary rights of the plaintiff after the death of the vendor, held, that the pre-emptors were, in a case of this kind, no less bound than the original vendee to prove that there was necessity as regards the consideration for the sale, as the right of pre-emption is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all rights and obligations arising from the sale under which he has derived his title. *Lal v. Milkhi*, 22 P.R. 1918—121 P.L.R. 1918—122 P.W.R. 1918—46 Ind. Cas. 454.

BATTIGAN, C.J.

References:—7 A. 775; 49 P.L.R. 1902, Rel. on.

- (5) *Mair Rajputs of Chakwal tahsil in Jhelum District—Mahomedan tribes—Right of sonless proprietor to devise ancestral property to daughter in presence of collaterals, custom as to.*

Held that, among the Mair Rajputs of the Chakwal-tahsil of the Jhelum District, a sonless proprietor can by custom make a will leaving

Customs (Punjab)—(Continued).**—5.—Alienation—(Continued).**

his entire ancestral estate to his daughter to the prejudice of his near collaterals, such as, his brother and nephew. *Hayat v. Musst. Gullan*, 87 P.R. 1918—99 P.L.R. 1918—172 P.W.R. 1918—47 Ind. Cas. 981.

SHADI LAL, J.

References:—86 P.R. 1907; 22 P.R. 1904; 93 P.R. 1885, F.

- (6) *Agreement between landlord and his occupancy tenant giving up proprietary rights in return for surrender of occupancy rights—Transaction an exchange—Character of land received by tenant as full owner in exchange—New fledged full-owner, Alienation by, if binds reversioner.*

Where a landlord and his occupancy tenant entered into an agreement by virtue of which the tenant gave up his occupancy rights in a certain plot of the land held by him and received from the landlord in consideration therefor full proprietary rights in the remaining plot, held that the transaction was clearly an exchange, though not one under S. 7 of the Punjab Tenancy Act, 1887, that the occupancy rights parted with by the tenant being ancestral, the land which he received in exchange from the landlords was also ancestral, and that, if the tenant alienated any portion of the exchange land, his brother could sue for a declaration that the alienation would not affect his reversionary rights after the death of the alienor. *Thakur v. Ram Singh*, 120 P.R. 1918.

SCOTT-SMITH and MARTINEAU, JJ.

References:—57 P.R. 1910 and O.A. No. 804 1897 (Unrep. Punjab), R.

- (7) *Creation of occupancy rights for consideration—Validity—Right of person creating such rights to challenge same.*

Held that the creation of occupancy rights for a consideration can, by custom, be challenged by the heirs of the person creating those rights, as such creation is not an act of management, but a transfer of valuable rights. *Ishar v. Sundar*, 125 P.R. 1918.

SCOTT-SMITH and MARTINEAU, JJ.

References:—69 P.R. 1900, Appr.; 89 P.R. 1898 (F.E.), R.; 16 P.R. 1906, doubted.

- (8) *Alienation by male proprietor—Ancestral property—Burden of proof—Presumption.*

Held, that the onus of proving that the property alienated was not self acquired in the hands of the last male owner was on the plaintiff who could not under the circumstances derive any assistance from conjectures, however reasonable, in place of positive proof (a).

In 1851 three sons of N were in joint possession of all the land which subsequently came to B.

Held, that it was not unreasonable to presume, that they got the land from their father

Customs (Punjab)—(Continued).**—4.—Alienation—(Continued).**

N, but this presumption could not be extended so as to hold that N's land came down to him from his grandfather. *Mussammat Ram Kaur v. Achhru*, 35 P.L.R. 1918=91 P.W.R. 1918=47 Ind. Cas. 17.

SCOTT-SMITH, J.

References:—(a) 217 P.L.R. 1914=257 P.L.R. 1912=42 P.R. 1910 (P.C.), *F*.

(9) *Abadi site—Alienation by non-proprietor, validity of—Status of alienor, when to be determined—Malik qabza, whether entitled to site.*

Held that:—

(1) A non-proprietary resident in a village cannot, in the absence of a well-established custom, dispose of the site on which his house is built or his right of residence in the house, without the consent of the proprietors of the village.

(2) The status of the person making the disposition must, however, be determined with reference to the time when he occupied the site.

Where, for instance, at the time of the occupation of the site the occupier was a proprietor in the village, but subsequently lost his proprietary rights, he would not for that reason lose his existing right of ownership either in the site or in the house built thereupon.

(3) A *malik qabza* having full proprietary rights over the cultivated land in his possession as *malik* has the same rights, in the absence of any proof to the contrary, over the house in the *abadi* and the proprietors, who are entitled to a share in the *shamilat*, are not entitled to interfere with the sale of his house by such *malik* (a). *Ladha Ram v. Bahadur Khan*, 39 P.L.R. 1918=39 P.W.R. 1918=43 Ind. Cas. 696.

SHADI LAL, J.

Reference:—(a) 39 P.R. 1912=7 P.W.R. 1912=13 P.L.R. 1912=13 Ind. Cas. 405, *F*.

(9-a) *Alienation by sonless male proprietor—Exchange by a male proprietor of ancestral land for another plot—Necessity—Finding not expressly based on lower appellate Court's own independent opinion.*

Held that a male proprietor governed by the customary law can make an exchange of his ancestral land to improve the estate and to benefit the person interested therein.

His rights in this respect differ from that of a widow (a).

Held, also, that in such a case the sole question for decision is, whether the transaction was made *mala fides* or to injure the reversioners or whether it was an act of good management and beneficial to the estate.

Held, further, that a finding of the lower appellate Court cannot be accepted in second appeal if it simply refers to the finding of the Court of first instance and does not expressly

Customs (Punjab)—(Continued).**—5.—Alienation—(Concluded).**

record its own opinion on the subject. *Nazir v. Amar Chand*, 156 P.L.R. 1917=9 P.W.R. 1918=44 Ind. Cas. 224.

SHADI LAL, J.

Reference:—(a) 2 P.R. 1911=46 P.L.R. 1911, *D*.

(10) Money required to pay husband's debt—Debt also incurred for maintenance—Alienee's duty to see to application of moneys—No principle involved in case. See *APPEAL (SECOND APPEAL)*, No. 18, 4 P.L.R. 1918.

—5.—Debt.

Daughter not agnate—Daughter's title derived not from common ancestor, but from father—Liability of her estate for father's debt.

A daughter, not being an agnate and deriving her title not from the common ancestor but from her father, represents her father and his estate in her hands is liable for his debts (a). *Kishen Singh v. Mussammat Rahmetbi*, 12 P.R. 1918=44 Ind. Cas. 561.

LE-ROSSIGNOL, J.

Reference:—(a) 4 P.R. 1913, *Dist*.

—6.—Succession.

(1) *Jats of Mauza Galwehra, Lahore District—Non-ancestral property—Custom as to exclusion of daughters by distant collaterals, proof of.*

Held that no custom was proved whereby among the Jats of Mauza Galwehra, Lahore District, a daughter is excluded by distant collaterals in regard to succession to non-ancestral property. *Mangal Singh v. Musst. Budho*, 4 P.R. 1918=46 Ind. Cas. 198.

SHADI LAL and BROADWAY, JJ.

(2) *Sister and her son if heirs preferable to proprietary body or Government—Onus of proof on sister—Punjab Pre-emption Act (I of 1913), S. 15 (a), (b) thirdly—Right of sister and her son to pre-emption.*

Though the onus is on a sister or her son to prove their right of succession as against near and possibly even remote collaterals yet in the absence of any agnate heirs their right to succeed is preferable to the rights of the proprietary body or Government, especially in villages which are not homogeneous and are composed as Mauza Doowal is, of proprietors belonging to different religions, different caste or different tribes. Accordingly a sister or her son would be entitled to inherit property in the event of the death of her brother or uncle and consequently entitled to the right of pre-emption superior to that of a co-sharer as their claim fell under S. 15 (a) and (b) *thirdly* of the Punjab Pre-emption Act. *Muhammad Yar v. Malik Umar Hayat Khan*, 65 P.R. 1918=14 P.L.R. 1918=103 P.W.R. 1918=45 Ind. Cas. 924.

RATTIGAN, C.J. and LE-ROSSIGNOL, J.

References:—117 P.R. 1901; 95 P.R. 1905, *R*.

Customs (Punjab)—(Continued).**—6.—Succession—(Continued).**

- (3) *Death of nanohi or slave kept for prostitution—Right of brothel-keeper by custom to succeed to her property—Immoral custom.*

A custom, by which a brothel-keeper alleges he is entitled to succeed to the property left by a deceased *nanohi*, or slave kept for the purpose of prostitution can, by reason of its immorality, have no legal force, even if proved. *Muhammad Bakhsh v. Nawafish Ali*, 75 P.R. 1918=183 P.W.R. 1918.

SCOTT-SMITH and LE-ROSSIGNOL, JJ.

- (4) *Gift of land to sister's son—Gift by widow of sister's son of part of such land to her daughter's son—Latter gift if questionable by reversioners of original donor—Res judicata.*

A certain plot of land was gifted to a sister's son, on whose death his widow in possession gifted a part of it to her daughter's son. In a suit by the reversioners of the original donor for a declaration that the gift did not affect their reversionary rights and subsequently for possession it was wrongly decided that the reversioners were not affected by the widow's gift, but only one of the reversioners was given a decree for his share, as the rest had acquiesced in the gift. In a subsequent suit by the daughter's son of the original donee (the sister's son) for the rest of the land not gifted by the widow of such original donee, *held* that the daughter's son of the original donee was entitled to the land, and not the reversioners, as there is no reversion by custom to the collaterals so long as descendants of the donee, whether in the male or in the female line, are existing; *held also*, that the subsequent suit of the daughter's son of the original donee was not *res judicata* except as to the reversioner in whose favour the previous suit by the reversioners was decided. *Tani v. Tara Chand*, 82 P.R. 1918=109 P.L.R. 1918=160 P.W.R. 1918=47 Ind. Cas. 378.

SCOTT-SMITH and SHADI LAL, JJ.

References :—84 P.R. 1909; 68 P.R. 1911, *Rel. on.*

- (5) *Dhani Brahmans of Kamalia in Montgomery District—Entry in Riway-i-am or Wajib-ul-arz relates to ancestral property generally.*

Case where it was *held* that the male collaterals, on whom the *onus* lay, of a deceased person had failed to establish any custom by which they were entitled to exclude daughters or daughters' sons from inheritance to acquired property.

It is well settled that, in the absence of a clear statement to the contrary, an entry in a *Riway-i-am* or *Wajib ul arz* refers merely to ancestral property. *Budhi Parkash v. Chander Bhan*, 123 P.R. 1918.

SHADI LAL and WILBERFORCE, JJ.

- (6-a) *Collaterals—Daughter—Gift by widow—Non-ancestral property—Wirk jats of*

Customs (Punjab)—(Continued).**—6.—Succession—(Continued).**

Koalki village, tahsil Gujranwala—Value of entries as to special custom opposed to general custom in the Riway-i-am—Ancestral property defined.

Held, that no special custom among *wirk jats* of Mauzia Koalki in the Gujranwala Tahsil of the Gujranwala District allowing collaterals in the 4th degree to succeed to non-ancestral land in preference to his daughter was proved.

That the entry in support of the alleged special custom in the *Riway-i-am* of the Gujranwala District unsupported by instances is not sufficient to establish that custom and that it has been imperfectly compiled (a).

Held, that the value of a *Riway-i-am* depends on the fullness and care with which it is prepared in each particular District. A statement as to special custom opposed to general custom of the province can carry little weight unless supported by instances (b).

Held, also, that ancestral property means and includes all property inherited from an ancestor common to the deceased owner and the collaterals who claim to succeed in preference to daughter.

Held, further, that the gift is void only if the succession of daughter has been allowed thereby to the ancestral property. *Wazira v. Maryan*, 3 P.L.R. 1918=84 P.R. 1917.

CHEVIS and LESLIE JONES, JJ.

References :—(a) 29 P.R. 1911=94 P.L.R. 1911; 25 P.R. 1912=41 P.L.R. 1912; 45 P.R. 1917=12 P.W.R. 1917 (F.C.); 73 P.R. 1893; 25 P.R. 1895; 116 P.R. 1892, *Dist.* (b) 129 P.W.R. 1915=7 P.R. 1916, *F.*; 48 P.R. 1909=72 P.W.R. 1909; 76 P.R. 1892; 79 P.R. 1895; 105 P.R. 1906=96 P.W.R. 1906; 146 P.R. 1889, *R.*

- (6) *Sister—Sister's son—Deowal village, Bhera Tahsil, Shahpur District.*

It is too broad and sweeping a proposition that a sister and sister's son cannot under any circumstances be regarded as heirs to property in cases governed by the general customary law of the province. No doubt the *onus* is on a sister or sister's son to prove their right of succession as against near and possibly even remote collaterals, but in the absence of any agnatic heirs their right to succeed is preferable to the right of the proprietary body or Government, especially in villages which are not homogeneous and are composed of proprietors belonging to different religions, different castes and different tribes (a).

Held, that, in the village of Deowal, Bhera Tahsil, Shahpur District, in the absence of collaterals a sister succeeds to the land left by her brother according to custom. *Muhammed Yar v. Malik Umer Hayat Khan*, 14 P.L.R. 1918=103 P.W.R. 1918=66 P.R. 1918.

RATTIGAN, C.J. and LE-ROSSIGNOL, J.

References :—(a) 117 P.R. 1901; 182 P.L.R. 1901; 95 P.R. 1905=47 P.L.R. 1906, *F.*

Customs (Punjab)—(Continued).**—6.—Succession—(Continued).****(7) Daughters — Collaterals — Self-acquired property—Goriwal Jats of Ludhiana District.**

Found that among Goriwal Jats of the Ludhiana District there is a special custom contrary to general custom, whereby daughter is excluded by collaterals of her father from succession to his self-acquired property (a).

Held that the appeal in a case decided by a District Judge of the old style lies to the Chief Court (b). *Hazara Singh v. Bishen Singh*; and *Bishen Singh v. Musammatt Jawall*, 71 P.L.R. 1918=72 P.W.R. 1918=44 Ind. Cas. 853.

SCOTT-SMITH, J.

References:—(a) 25 P.R. 1912=125 P.W.R. 1912=41 P.L.R. 1912=13 Ind. Cas. 177; 29 P.R. 1911=94 P.L.R. 1911=124 P.W.R. 1911=9 Ind. Cas. 608, *F.* (b) 30 P.R. 1915=25 P.W.R. 1915=27 Ind. Cas. 625, *R.*

(8) Sayads of Tahsil Jullundur—Daughter—Her offspring—Onus of proving special custom.

Held, that where, among the Sayads of Tahsil Jullundur in the Jullundur District, daughters succeed by custom to the ancestral estate of their father and one of them dies without issue, the survivors take her share, but if any one of them dies after leaving a daughter, she will succeed to her mother and she cannot be excluded by her mother's sister. The onus of proving a custom to the contrary lies upon the person asserting such custom (a). *Mt. Azim Bibi v. Mt. Umtan Bibi*, 21 P.W.R. 1918=41 Ind. Cas. 979.

LESLIE JONES, J.

Reference:—(a) 5 P.R. 1910=10 P.W.R. 1910, *R.*

(9) Posthumous son, Suit by—Burden of proof—Legitimacy, Proof of.

Held that, in cases of succession to landed property of a large value as well as to a jagir, more than ordinary care should be taken to place the legitimacy of a posthumous son beyond all possible dispute.

One T, a jagirdar and landowner, having died, his landed property was mutated in the names of his widows and his jagir lapsed to the Government. Plaintiff brought a suit for possession basing his claim on the ground that he was the deceased's posthumous son. There was no documentary evidence and the claim rested entirely upon the oral evidence of witnesses, the majority of whom were in some way or other interested in the plaintiff. It appeared that the alleged mother of the plaintiff supported his claim but avoided a medical examination even when called upon by the other widows to do so:

Held, that, under the circumstances, the plaintiff had failed to prove that he was the son of the deceased proprietor. *Jagir Singh v. Musammatt Dulip Kaur*, 43 P.W.R. 1918=44 Ind. Cas. 57.

CHEVIS and SHADI LAL, JJ.

Customs (Punjab)—(Continued).**—6.—Succession—(Continued).****(10) Self-acquired property—Banias of Palwal Tahsil, District Gurgaon—Sister versus collaterals of 4th degree—Will, oral, title based on—Burden of proof.**

Found, that among Banias of Palwal Tahsil, Gurgaon District, a sister has a preferential right of succession to self-acquired property against collaterals of the 4th degree.

Where a person based his title on an oral will, the onus lies heavily on him of proving the precise words on which he relies. *Narala v. Mt. Gaido*, 85 P.W.R. 1918=83 P.L.R. 1918=45 Ind. Cas. 183.

SCOTT-SMITH and SHADI LAL, JJ.

Reference:—12 M.I.A. 1 (28)=9 W.R. (P.C.) 15=2 Suth. P.C.J. 114=2 Sar. P.C.J. 348=20 E.R. 241 (P.C.), *F.*

(11) Ancestral property — Daughters versus collaterals of sixth degree—Manj Rajputs of Talwandi Rai, Tahsil Jagraon, Ludhiana District—Riwaj-i-am, evidentiary value of entries in—Burden of proof.

Held, that an entry in a *Riwaj-i-am* even though unsupported by instances constitutes a strong piece of evidence in support of an alleged custom and it lies upon the party impugning it to rebut the value of this evidence (a).

Plaintiffs, collaterals in the sixth degree of the last male owner, a Manj Rajput of Talwandi Rai, Tahsil Jagraon, Ludhiana District, sued for a declaration that a gift of his ancestral land made by his widow in favour of his two unmarried daughters should not affect their reversionary rights. It appeared that according to the *Riwaj-i-am* the daughters had a prior right of succession to the collaterals of the sixth degree.

Held, that in view of the entry in the *Riwaj-i-am* it was for the plaintiffs to establish their rights of inheritance as against the daughters of the deceased and that they having failed to do so were not entitled to obtain the relief they claimed (b). *Salde Khan v. Mt. Amir-un-Nissa*, 109 P.W.R. 1918=94 P.R. 1918=45 Ind. Cas. 966.

SHADI LAL and WILBERFORCE, JJ.

References:—(a) 34 P.R. 1915=2 P.W.R. 1915=26 Ind. Cas. 492; 104 P.R. 1914=122 P.W.R. 1914=24 Ind. Cas. 942, *F.*; 45 P.R. 1912=85 P.W.R. 1912=13 Ind. Cas. 421, *F.* (b) 139 P.R. 1892, *Dist.*

(12) Kalroo Jats of Mullan District—Muhammadan Law—Riwaj-i-am describing special custom—Entry unsupported by instances, Value of—Burden of proof—Failure to prove special custom, Effect of.

Plaintiffs sued for possession by inheritance of certain land, the property of their first cousin. Defendants were the sisters of the last owner. According to the *Riwaj-i-am*, which did not cite any instances, first cousins were excluded by sisters and daughters:

Held, (1) that no reliance could be placed upon the *Riwaj-i-am*, as it did not cite any instances

Customs (Punjab)—(Concluded).**—S.—Succession—(Concluded).**

(2) that the *onus* lay upon the defendants to establish that, among *Kakoo Jats* of Multan District, the sisters of a male proprietor excluded his collaterals as near as first cousins;

(3) that no specific rule of custom having been proved, the Muhammadan Law must prevail and the plaintiffs were entitled to half the property as their share according to the law;

(4) that the plaintiffs could not be deprived of their rights, merely because they had claimed the whole of the property in accordance with custom;

Held, also, that:—(1) a *Riwaj-i-am* which, without citing any instances, describes a special custom opposed to the general custom of the province and the great mass of authorities, does not raise a presumption in favour of the special custom described in it;

(2) the mere entry in a *Riwaj-i-am* that male collaterals, as near as first cousins, are excluded by sisters and daughters, unsupported by instances, is not sufficient to shift the *onus* on to the cousins to establish their rights of succession (a);

(3) where no definite custom is proved, the personal law of the parties must be followed (b). *Khuda Baksh v. Mt. Fattah Khatun*, 140 P. W.R. 1918 = 46 Ind. Cas. 679.

SCOTT-SMITH and MARTINEAU, JJ.

References:—(a) 84 P.R. 1917 = 151 P.W.R. 1917 = 42 Ind. Cas. 358; 12 P.R. 1889; 116 P.R. 1883, F.; 12 P.W.R. 1917 = 45 P.R. 1917 = 38 Ind. Cas. 354 = 44 O. 749 = 21 M.L.T. 310 = 32 M.L.J. 615 = 19 Bom. L.R. 388 = 16 A.L.J. 525 = 21 C.W.N. 842 = 26 C.L.J. 175 (P.O.), Dist. (b) 4 P.R. 1888; 89 P.R. 1888; 117 P.R. 1901, F.

(13) Possession of house as *kamir* in village *abadi*—Succession. See *ABADI*, No. 3, 116 P.R. 1918.

(14) Question of *onus* of proof on a point of custom—Question if a question of fact or question of law. See *PUN. ACT III OF 1914 (COURTS)*, No. 1, 7 P.R. 1918.

Cypres.

Doctrine of, How far in harmony with Hindu *sastras*—Application of, to gifts by Hindus—Jurisdiction of Indian Courts *re* applicability of—Scheme on Cypres application, Power of Indian Courts under S. 92, Civ. Pro. Code (1908), to frame. See *HINDU LAW (WILL)*, No. 2, 47 Ind. Cas. 611.

Dahyak.

(1) *Dahyak* or *Daswant* is analogous to *Nankar*—*Dahyak* charge on the property—Cash allowances in perpetuity treated as *Dahyak*.

Dahyak or *Daswant* is closely analogous to *Nankar* and is a charge on the property.

Held that a cash allowance in perpetuity awarded by an order of the Settlement Officer and amounting to a tenth of the Assessment

Dahyak—(Concluded).

• Officer's assumed rental was of the nature technically known as *Dahyak* or *Daswant*. *Praan Kunwar v. Shankar Bakhsh Singh*, 21 O.C. 327.

DANIELS, A J.C.

References:—S.A. No. 535 of 1913 (Oudh); 12 O.C. 124; 19 O.C. 49, B.

(2) *Birdars*' right to deduct *dahyak* from rental—Under-proprietary right in land. See *LANDLORD AND TENANT*, No. 70, 21 O.C. 244.

Damages.

(1) *Prior suit to remove obstruction in irrigation channel—Decree for removal—Subsequent suit to recover damages—Whether maintainable—Contributory negligence.*

Where a plaintiff obtained a decree for removal of obstruction in an irrigation channel from which the plaintiff's lands were watered and subsequently failed to have the decree executed, *held*, that in a subsequent suit to recover damages for loss of crops on account of the obstruction, the right to damages continued after the institution of the previous suit and there was nothing in law to bar the plaintiff's suit. *Raghnath Singh v. Achutanand*, 48 Ind. Cas. 374 = 3 Pat. L.W. 283.

CHAPMAN and MULLICK, JJ.

(2) Suit for—When proper remedy for an auction-purchaser at an execution sale. See *AUCTION PURCHASER*, No. 5-a, 3 Pat. L.J. 516.

(3) Burmese youth under age of eighteen if can make valid promise of marriage—Liability of such youth for damages for breach of such promise. See *BUDDHIST LAW (MARRIAGE)*, No. 3, U.B.R. (1918), 1st Qr., 75.

(4) Burmese Buddhists—Marriage arranged between parents of parties to be married—No consent to, or offer of, marriage proved on son's part—Breach of promise of marriage, Damages for, if can be claimed against parents of son. See *BUDDHIST LAW (MARRIAGE)*, No. 4, U.B.R. (1918), 3rd Qr., 106.

(5) Suit for, for illegal seizure of cattle. See *BURDEN OF PROOF*, No. 4, 41 Ind. Cas. 241.

(6) Representative suit for, with prayer for declaration, injunction, and scheme for management, Validity of—Suit by leading *mistradar* in respect of common forest land. See *CIV. PRO. CODE* (1908), No. 204-a, 8 L.W. 160.

(7) Vendor liable to damages for breach of agreement. See *CONTRACT ACT*, No. 11-a, 45 Ind. Cas. 569.

(8) Suit for, by judgment-debtor whose tender of decretal amount was collusively refused by *Amin* conducting sale. See *LIMITATION ACT* (1908), No. 106, 16 A.L.J. 1017.

(9) Suit for, for malicious prosecution—Essentials—Burden of proof. See *MALICIOUS PROSECUTION*, No. 2, 34 M.L.J. 517.

Damages—(Concluded).

(10) Suit for, by servant against master on ground of wrongful dismissal—Time for bringing—Measure of. See MASTER AND SERVANT, No. 3, 46 Ind. Cas. 615.

Damdapat.

Rule of—Berar, Applicability to, of—Mortgage debts.

In Berar it has been the practice from time immemorial to apply the rule of Damdupat to all debt cases including mortgage contracts. *Jalram v. Debdayal Suraj Prasad*, 46 Ind. Cas. 789.

STANYON, A.J.C.

Darpatni Tenure.

Condition in *darpatni* lease stipulating that, on sale for arrears of rent, subordinate interests created by *darpatindar* should become extinct—Condition, if void—*Darpatni* lease granted by Receiver appointed by decree in administration suit, if void because District Judge's sanction under S. 505 old Code not obtained. See LESSOR AND LESSEE, No. 1, 45 C. 940.

Daswant.

Nature of—Charge upon property—Cash allowance in perpetuity equivalent to tenth of assumed rental is—Similarity to *nankar*. See DAHYAK, No. 1, 21 O.C. 347.

Dead Person.

Suit against—Amendment of pleadings if permissible. See PLEADINGS, No. 2, 42 Ind. Cas. 539.

Death.

(1) Application to set aside order of appeal dismissed for default—Limitation—Death of appellant—Appellant if defaulter—Representative's right to come on record. See APPEAL (GENERAL), No. 33, 96 P.R. 1918.

(2) Person not heard of for more than twenty years—Presumption as to precise period of death if can be raised. See EVIDENCE ACT, No. 51, 98 P.R. 1918.

(3) Presumption as to particular time of death and presumption as to factum of death. See EVIDENCE ACT, No. 50, 21 O.C. 143.

Debtor and Creditor.

(1) Loan of certain sum—Agreement by debtor to return to creditor sum larger than that lent—Stipulation if penal. See CONTRACT ACT, No. 52, 24 M.L.T. 440.

(2) Complete discharge of debtor from liability on old transaction—Formation of new contract—New contract not enforceable by reason of contravention of stamp law. See HUNDI, No. 3, 15 P.W.R. 1918.

(3) Court's power to give relief when money-lender not shown to have taken undue advantage of his position. See INTEREST, No. 3, 23 C.W.N. 130 (P.C.).

(4) Payment by debtor without any instructions as to appropriation—Appropriation by

Debtor and Creditor—(Concluded).

creditor according to usual practice—Limitation, Fresh starting point of, if given by—Limitation Act (1908), S. 20. See LIMITATION, No. 5, 46 Ind. Cas. 532.

(5) Payment by mortgagor to one co-mortgagee if valid discharge. See MORTGAGE (GENERAL), No. 4, 22 Q.W.N. 1091.

(6) Transactions by money-lenders with expectant heirs—Provision for compound interest—Sum ultimately due found far in excess of sum originally lent—Burden of proving non-exercise of undue influence on lender—When such transactions become oppressive. See UNCONSCIONABLE BARGAIN, No. 1, 16 A.L.J. 905 (P.C.).

Debutter Property.

(1) Alienation of, by mahant—Necessity—Principles governing validity of such alienations. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 35 M.L.J. 5.

(2) Property already debuttered if passes by will. See WILL, No. 6, 22 C.W.N. 860.

Declaratory Decree.

(1) *Suit for—Specific Relief Act (I of 1877), S. 42, proviso—Defendant, usufructuary mortgagee from father—Suit by sons for declaration that their share is not liable to attachment and sale in execution of money-decree against father, if maintainable.*

The proviso appended to S. 42 of the Specific Relief Act refers to the legal character or right to property which is set up in the plaint. The further relief, referred to in that proviso, is a relief appropriate to, and consequent on, the right asserted.

Where the sons of a Hindu father sued merely for a declaration that they were the owners of 3rd share in the disputed property and that the said 3rd share was not liable to attachment and sale in execution of a money-decree obtained against their father, and it was found that the decree-holder defendant was in possession of the property under a mortgage effected by their father:

Held that the suit was not barred by the proviso to S. 42 of the Specific Relief Act, inasmuch as the right to seek a declaratory relief arose of the threatened sale of their share and as the right to seek relief quite independently of the mortgage. *Narindra Bahadur Singh v. Ram Singh*, 45 Ind. Cas. 869—5 O.L.J. 133.

KANHAIYA LAL and KENDALL, A.J.Cs.

(2) *Suit for—Specific Relief Act (I of 1877), S. 42, proviso—Applicability of—Execution of decree, Attachment in—Attachment withdrawn—Declaration, Suit for, by creditor that property belongs to judgment-debtor, if maintainable.*

Independently of a suit under the Civ. Pro. Code, a decree-holder may sue for a declaration that certain property attached in execution of his decree belongs to the judgment-debtor though the attachment had been withdrawn at the time of filing the suit and the

Declaratory Decree—(Concluded).

property was not in the possession of the decree-holder. To such a suit, the proviso to S. 43 of the Specific Relief Act does not apply. **Maung Sa Kyaw v. U Lau**, 45 Ind. Cas. 972.

MAUNG KIN, J.

(3) Landlord and tenant—Revenue suit for enhancement of rent of occupancy tenant—Denial by tenant of occupancy and claim of proprietary status—Civil suit for ejectment of tenant as trespasser—Admission in first Court of occupancy status by defendant—Decree declaring tenant an occupancy tenant passed by first Court—Ejectment decreed by appellate Court—Declaratory decree proper—Tenant not liable to forfeiture of occupancy status. See **EJECTMENT**, No. 6, 32 P.R. 1918.

(4) Person in possession as tenant not denying plaintiff's title—Persons claiming title not in possession—Suit for declaration only, without further relief, possible. See **SPECIFIC RELIEF ACT**, No. 19, 16 A.L.J. 666.

Declaratory Relief.

Court, Discretion of, Exercise of, re grant of—Declaratory suit that defendant is not under-proprietor—Ejectment, Remedy by, through Rent Court—Rent Court, adverse order of, Necessity of, for accrual of cause of action.

In a suit by a plaintiff proprietor for a declaration that the defendant is not an under-proprietor, the grant of declaratory relief being a matter within the discretion of a Civil Court, that discretion will not be exercised in favour of the plaintiff, until it is shown that he has exhausted his remedy by applying to the Rent Court for ejectment. It cannot be said that a plaintiff has no cause of action for a declaratory suit unless and until the Rent Court, acting on the representations of the defendant to the effect that he is an under-proprietor, has refused the plaintiff relief by way of ejectment. **Amraj Singh v. Sarab Sukh Pande**, 46 Ind. Cas. 650.

LINDSAY, J.C.

Declaratory Suit.

(1) *Specific Relief Act (I of 1877), S. 42—Suit for declaration—Right to pass along a public street accompanied by music past a masjid—Public road.*

The plaintiffs, trustees of a Hindu temple, brought a suit for a declaration, under S. 42 of the Specific Relief Act, that they were entitled to go in procession playing music past a Mahomedan mosque:

Held, that such a suit would not lie, inasmuch as playing music was not one of the natural uses to which public streets ought to be put. **Yenkaresh v. Abdul Kadir**, 20 Bom. L.R. 667 = 42 B. 438 = 46 Ind. Cas. 740.

BRAMAN and HEATON, JJ.

Reference:—11 Bom. L.R. 372 (376), *Appr.*

(2) *Bengal Tenancy Act (VIII of 1885), S. 106, suit under—Record-of-rights, entry in, correction of—Declaratory suit, if it is—Court-fee—Court Fees Act (VII of*

Declaratory Suit—(Continued).

1870); Sch. II, Art. 17, cl. (3)—Ad valorem fee, if necessary.

A suit instituted under S. 106 of the Bengal Tenancy Act before the Settlement Officer, although transferred to the ordinary civil Court for the purpose of trial, is a suit for a declaratory decree within the meaning of Art. 17, cl. (3) of Sch. II of the Court Fees Act, and is not chargeable with an *ad valorem* fee.

The mere fact that a plaint has been inartificially drawn up does not alter the nature of the suit (a). **Salleja Nath Roy Chaudhury v. Chand Charan Laha**, 28 C.L.J. 301.

FLETCHER and SHAMSUL HUDA, JJ.

References:—(a) 12 C.L.J. 638, *F.*; 17 C.L.J. 416, *Not F.*

(3) *Maintainability of, during pendency of administration suit.*

Where plaintiffs derived a share in the estate of a deceased person from the administrator of the estate, there can be no objection for their filing a suit for a declaration of their title to their share, during the pendency of a suit for the administration of the estate of the deceased person. **Maung Aung Myat v. Maung Sin**, 43 Ind. Cas. 539.

PARLETT and ORMOND, JJ.

Reference:—10 C. 713, *Dist.*

(4) *Declaratory suit to set aside a decree as fraudulent—Proof required.*

In a suit for a declaration that a decree, which had been obtained against plaintiff, was fraudulent, the fact, that, if the plaintiff had been able to establish that the usual process had been suppressed, would afford solid foundation for such a suit. **Gendu Nanya v. Sadi Banla**, 44 Ind. Cas. 983.

RICHARDSON and WALMSLEY, JJ.

(4-a) *Declaration of title with prayer for confirmation of possession and for temporary injunction, Suit for—Defence of possession and title with defendant—Cause of action, Plaint if discloses sufficient.*

Plaintiff sued for declaration of title to, and confirmation of possession in, a certain plot of land on the ground that the defendant had threatened to take possession thereof, and there was also a prayer for a temporary injunction; but the defence was that the title was with the defendant who was alleged to be also in possession. *Held* that the suit should not be dismissed on the ground that there was no cause of action in the plaint. **Hayanath Ray v. Blaeswar Das**, 46 Ind. Cas. 558.

TEUNON and RICHARDSON, JJ.

(5) *Suit to recover leased ryotwari lands—Prayer for declaration of right to restrain defendants from obstructing flow of water to suit lands from Government channel and for injunction—Government not made party—Declaration discretionary—Person in actual enjoyment of easement, not fully prescribed for, if entitled to reliefs against*

Declaratory Suit—(Continued).

persons interfering with such user—Possessory rights in re incorporeal hereditaments.

The plaintiff-appellants sued to recover possession of certain ryotwari lands from their lessees the defendants, and asked for a declaration of their right to the use of the water from a Government channel, called the Diguva channel, from which the defendants had been for a long time irrigating the suit lands and for an injunction restraining the defendants from causing obstruction to the flow of water from the said channel to the suit lands. The Secretary of State was not made a party to the suit. It appeared that the channel shown in the Government register as the source of supply to the lands in dispute was admittedly another Government channel called Yarrangunta Kalava and that the Diguva channel which was shown in the said register as the source of supply to the defendants' own lands, was used by the defendants for the irrigation of the suit lands under some arrangement between the Government and the defendants for their own convenience. The case of the plaintiffs was not that they had acquired any right of easement by prescription; but they contended that, since the defendants had long been in enjoyment of the Diguva channel as the lessees of the plaintiff, the latter must be held to be in possession of this right to take water and that, as the defendants had threatened interference with this possessory right, they were entitled on the analogy of cases regarding possessory rights in land to a prohibitory injunction against the defendants. *Held* that the plaintiffs were not entitled either to the declaration or the injunction prayed for by them; that the plaintiffs had established no right as against anybody in the water of this particular channel, whatever rights they might have as against the Government for the supply of water to the lands in dispute; that the plaintiff could not in any way be said to have been in possession of the channel of any easement with reference to it; that, as declaration being a discretionary remedy, the facts of the case did not justify the Court in granting a declaratory decree in the absence of the Secretary of State the owner of the channel (a). *Mahanakall Lakshmlah v. Kamam Narayanappa*, 31 M. L.J. 425= (1918) M.W.N. 276=23 M.L.T. 337=45 Ind. Cas. 80.

ABDUR RAHIM and NAPIER, JJ.

References:—(a) 38 M. 280, F.; 34 M. 178, Dist.

- (6) *Title to lands completed by adverse possession—Wrong entry as to lands made in finally published record-of-rights—Omission to sue to correct entry—Owner in possession—Fresh record-of-rights—Wrong entry again made in such record prejudicial to plaintiff's right—Suit for declaration of incorrect nature of record—Failure to bring suit to correct prior entry if bars plaintiff's right to declaration—Right to sue for declaration arises on each successive invasion of plaintiff's right—Liability of persons*

—(Contin

acquiring prescriptive title to bring suit for declaration of such acquisition—Limitation Act (1908), Art. 130 (a).

In a suit, instituted in 1907, for a declaration that a certain entry affecting the plaintiffs' rights, in a finally-published record-of-rights of 1906 with regard to the suit lands was incorrect, it appeared that the plaintiffs had, as to a portion of the lands, established a title by purchase made in 1885 from a lakerajdar and had been in adverse possession of the remainder for more than 12 years and that they had acquired a complete title of such remainder in 1897 as against the defendants. The plaintiffs appeared to have omitted to bring a suit to correct a similar entry against them in a previous finally published settlement record of 1888-9 within six years of publication. It was contended on behalf of the defendants that, as the prayer in the present suit of 1907 involved a correction of the record of 1888-9, the plaintiffs could not be indirectly allowed to obtain a declaration, which was barred by the law of six years limitation, and that it was no longer competent to them to bring a suit for a declaration that the record of 1906 was wrong. It was also contended that as regards the portion of the land acquired by adverse possession, the plaintiffs were bound to bring a suit within six years of 1897 in order to obtain a declaration that they had acquired a prescriptive title by adverse possession and that the present suit was out of time. *Held* that the present suit as regards both the portions of the suit lands was well within time and that the plaintiffs, being in possession, were entitled to a declaration under S. 42, Specific Relief Act, in spite of their failure to sue to have the previous entry corrected as an owner in possession is not bound to sue upon every challenge to his right.

Where there are two consecutive finally published records-of-rights, it is not incompetent to a party aggrieved by the second to ask for a declaration in respect of that second record without first displacing any prejudicial entries in the first record. A plaintiff seeking a declaration is entitled to sue upon each successive invasion of his right. In each case it must be seen whether the invasion upon which the plaintiff seeks to base his cause of action is in fact an invasion or not.

There is no authority for the proposition that every person who has acquired a title by adverse possession is bound to bring a suit for a declaration that he has acquired such title. *Sheikh Lataput Hosain v. Kumar Ganganund Singh*, 8 Pat. L.J. 361=4 Pat. L.W. 308=45 Ind. Cas. 432.

DAWSON MILLER, C.J. and MULLICK, J.

References:—2 Pat. L.J. 124 and 498, Rel. on; A.W.N. (1898) 215; 1 Ind. Cas. 556, R.; *Reeves v. Butcher*, (1891) 2 Q.B. 509; *Hemp v. Garland*, 4 Q.B. 519; 1 Pat. L.J. 173; 31 A. 9, Expl. and Dist.

- (6-a) *Revenue, Receipt of, in kind, Suit for declaration by a Jagirdar that he is entitled*

Declaratory Suit—(Continued).

to—Civil Court, Jurisdiction of, to enter, in—Punjab Land Revenue Act (XVII of 1887), Ss. 45, 48 and 158 (1).

In a suit by a *Mahant* of a *Dharamsala* for a declaration that he as *Jagirdar* or assignee of land revenue was entitled to receive the revenue in kind out of the landlords' share of the produce which had to be paid by the tenants to the proprietors but which, as a matter of fact, had always been paid to him by the cultivators in the shape of one-fourth of the produce.

Held that the suit as laid involved the question as to whether in that village land revenue should be paid to the *Jagirdar* in cash or in kind; and under S. 48 of the Punjab Land Revenue Act, this matter was one which only the Local Government can decide and under S. 158 (1) of the Act, no Civil Court can exercise jurisdiction in respect of it.

Held also that, although the suit was one for a declaration, it was, notwithstanding the provisions of S. 45 of the Punjab Land Revenue Act, excepted from the jurisdiction of the Civil Courts by reason of the provisions of S. 158 (1) of the Act (a). *Jiwan Das v. Piran Ditta*, 110 P.R. 1918.

SHAH DIN and CHEVIS, JJ.

References:—(a) 89 P.R. 1895; 95 P.R. 1907 (note), F.; 78 P.R. 1910, *Disappr.*

(7) *Plaintiff and defendant—alienees in possession of separate portions of house—Suit for mere declaration of invalidity of alienation—Suit if maintainable under S. 42, Specific Relief Act.*

In a suit for a mere declaration on the allegation that the defendant was a trespasser, it was found that the plaintiff and the defendant were in possession of portions of the suit house: *Held* that, as there was no prayer for the ejectment of the defendant, the suit was bad under S. 42, Specific Relief Act. *Shiv Ram Das v. Musst. Bhag Devi*, 118 P.R. 1918.

CHEVIS and BROADWAY, JJ.

References:—24 O. 212; 105 P.R. 1901; 37 Ind. Cas. 384; 25 M. 504; 69 P.R. 1882; 1 P.R. 1900, R.

(8) Whether maintainable, after sale in execution of rent-decree is set aside. See BEN. ACT VIII of 1885 (TENANCY), No. 87, 44 Ind. Cas. 532=3 Pat. L.J. 121=3 Pat. L.W. 264.

(9) Suit to avoid registered deed—Consequential relief of forwarding copy of decree to Registrar—*Ad valorem* Court-fee. See COURT FEES ACT, No. 9, 3 Pat. L.J. 194.

(10) Declaration about marriage 20 years after divorce—Maintainability. See SPECIFIC RELIEF ACT, No. 21, 29 C.W.N. 171.

(11) Right for, under S. 42, Specific Relief Act—Fresh invasion, fresh right. See SPECIFIC RELIEF ACT (1877), No. 22, 43 Ind. Cas. 175.

Declaratory Suit—(Concluded).

(12) Suit praying for declaration that the attachment of a decree invalid and for substitution of plaintiff's name in the place of *benami* decree-holder—Whether suit comes within terms of S. 42, Specific Relief Act. See SPECIFIC RELIEF ACT, No. 28, 43 Ind. Cas. 396.

(13) Execution of deed by Hindu widow conferring estate on one reversioner—Suit by other reversioners for declaration of invalidity of deed—Maintainability of suit. See SPECIFIC RELIEF ACT, No. 36, 7 L.W. 146 (P.C.).

(14) Private partition between parties—Subsequent application by discontented party to Revenue authorities for partition—Suit for declaration that plaintiff is sole owner of properties allotted to him—Maintainability. See SPECIFIC RELIEF ACT, No. 27, 12 P.W.R. 1918.

(15) Suit for declaration of right to attached property and for invalidity of attachment if barred by S. 42, Specific Relief Act. See SPECIFIC RELIEF ACT, No. 26, 3 Pat. L.J. 182.

(16) To declare that will giving authority to adopt was not executed, maintainability of. See SPECIFIC RELIEF ACT, No. 25, 36 M.L.J. 144.

(17) Revenue sale, Suit for declaration as to invalidity of a, and for confirmation or restoration of possession—Court-fee payable in respect of—Court Fees Act (1870), S. 7 (4) (c). See REVENUE SALE, No. 7, 3 Pat. L.J. 448.

Decree.

(1) See AMENDMENT OF DECREE.

(1-a) See SATISFACTION OF DECREE.

(2) *Application for decree under Civ. Pro. Code, O. XXXIV, r. 6, in mortgage suit—Order of refusal to make such decree—Appeal from order, Court-fee payable on, to be ad valorem.*

An order refusing to make a decree under Civ. Pro. Code, O. XXXIV, r. 6, must be regarded as a decree within the meaning of the definition of that term in the Code of Civil Procedure and a memorandum of appeal from such order must bear an *ad valorem* Court-fee calculated upon the value of the subject-matter of the appeal. *Muhammad Iltifat Husain v. Allm-un-nissa Bibi*, 40 A. 553=16 A.L.J. 438=47 Ind. Cas. 561.

RICHARDS, C.J. and BANERJI, J.

Reference:—14 A.L.J. 328, F.

(3) *Sale in execution of decree on prior mortgage—Its effect—Extinction of right of mortgagor.*

Where a property was sold in execution of a decree upon a prior mortgage, the effect of such an execution is to destroy the right, title and interest of the mortgagor in the property and to extinguish all incumbrances subsequent to the mortgage.

Decree—(Continued).

A the owner of two villages first mortgaged one village under a mortgage-deed and subsequently mortgaged the two villages under a different deed to the same mortgagees. The mortgagees obtained mortgage decrees on the deeds, and got the first village sold in execution of the decree on the prior mortgage. When the second village was brought to sale for the debt due on the second mortgage deed, defendants who were the purchasers of the equity of redemption in the second village objected. *Held* that, as the second incumbrance on the first village was destroyed by its sale in execution of the decree on the prior mortgage, the mortgagees were entitled to enforce their debt due on the second mortgage deed upon the remaining security. **Dand Bahadur Singh v. Deonandan Prasad Singh**, 43 Ind. Cas. 915 = 4 Pat. L.W. 108.

ROE and JWALA PRASAD, JJ.

References:—32 A. 612, R.; 4 O.L.J. 317; 31 M. 333, *Dist.*

- (4) *Decree for rent—Imposition of condition as to mode of execution—Invalid—Dismissal of application to set aside ex parte decree on specified grounds—Subsequent suit to set aside the ex parte decree—Res judicata.*

Where a Court gave a decree in a rent suit, it has no right to impose a condition as to the mode of execution of the decree.

In a suit to set aside an *ex parte* decree passed against the plaintiff on the ground that the service of summons had been fraudulently suppressed, the fact that an application under O. IX, r. 13, Civ. Pro. Code, to set aside the *ex parte* decree against him on the ground mentioned above, was dismissed will be a bar as *res judicata* for the maintenance of the suit on the same ground. **Chandra Kumar Roy Chowdhury v. Aswini Kumar Das**, 45 Ind. Cas. 250.

CHITTY and SMITHER, JJ.

- (5) *Drawing up of Court's duty in case of—Form and contents of.*

Decrees should be drawn up by the Judges in such a way as to make them self-contained and capable of execution without reference to any other document. A decree made in terms of a document filed with the record without embodying the terms of the document in the decree, is not necessarily bad. **Mahamaya Prasad Sinha v. Sukhdal Koer**, 46 Ind. Cas. 169.

MULLICK and THORNHILL, JJ.

- (6) *Meaning of—Order directing suit dismissed for default to be restored to file and to be tried, if a decree. See AGENCY RULES (GANJAM AND VIZAGAPATAM), No. 1, 42 Ind. Cas. 555.*

(7) *Order setting aside sale on ground of fraud in conducting sale—Order not a decree—Only one appeal from order—No second appeal. See APPEAL (SECOND APPEAL), No. 14, 3 Pat. L.J. 645.*

Decree—(Concluded).

- (8) *Suit for declaration of, in rent decree—Burden to be discharged by plaintiff. See BURDEN OF PROOF, No. 1, 27 O.L.J. 137.*

(9) *Decree imposing indivisible liabilities on defendants—Effect of setting aside the decree as against one defendant. See CIV. PRO. CODE (1908), No. 418, 45 Ind. Cas. 253.*

(10) *Dismissal of decree in default—Effect. See CIV. PRO. CODE (1908), No. 204, 43 Ind. Cas. 360.*

(11) *Meaning of—For the purposes of O. XX, r. 12, Civ. Pro. Code (1908). See CIV. PRO. CODE (1908), No. 292, 43 Ind. Cas. 855.*

(12) *Collusive decree—Person not party to such decree, can have such decree set aside—Nature of such decree—Its binding nature. See CIV. PRO. CODE (1908), No. 331, 43 Ind. Cas. 960.*

(13) *Death of one of several joint decree-holders—Execution of decree by surviving joint decree-holders—Proper procedure. See CIV. PRO. CODE (1908), No. 305, 43 Ind. Cas. 1008.*

(14) *Decree embodying a compromise which goes beyond the land in dispute—Whether successor Munsif has jurisdiction to set aside the decree. See COMPROMISE, No. 2, 43 Ind. Cas. 772.*

(15) *Decree passed—Decree void—Deceased's representative's right to show decree incapable of execution. See EXECUTION OF DECREE, No. 4, 16 A.L.J. 327.*

(16) *Against Malabar Karnavan how far binds tarwad. See MALABAR LAW, No. 6, 35 M.L.J. 51.*

(17) *Erima facie evidence of common liability as against persons against whom it is passed mortgagors and subsequent transferees impleaded simply as defendants—Decree if evidence of rights of defendants *inter se*. See MORTGAGE (GENERAL), No. 15, 21 O.C. 360.*

(18) *Obtained by false evidence—Decree if can be set aside on such ground—Suit when lies to set it aside. See SETTING ASIDE DECREE, 23 O.W.N. 139.*

Decree Absolute.

For sale, Suit to set aside a, on ground of application being barred by limitation, Maintainability of—Application, Notice of, to judgment-debtor, Failure to give—Limitation, question of, a question of jurisdiction—Limitation Act (1908), Ss. 4, 28. See MORTGAGE (SALE), No. 8-a, 3 Pat. L.J. 478.

Deed.

Presumption that consideration is imported if applies to India. See TRANSFER OF PROPERTY ACT, No. 10, 20 Bom. L.R. 177.

Defamation.

- (1) *Libel in judicial proceeding—Privilege—Liability for damages in a civil action.*

Defamatory statements made by a party in a petition presented to a Criminal Court, are

Defamation—(Continued).

absolutely privileged in a civil action for damages based on libel.

There is no statute in India dealing with civil liability for defamation. The rule to apply is that of justice, equity and good conscience. This has been interpreted by the Privy Council in L.R. 44 I.A. 89, to mean the rules of English Law if found applicable to Indian society and circumstances, and there is nothing in the circumstances and society of this country that would make it improper or inadvisable to apply the English Rule of privilege, which is well established in England, to India (a). *Ohunni Lal v. Naralagh Das*, 16 A.L.J. 360=40 A. 341=45 Ind. Cas. 540 (F.B.).

KNOX, BANERJI, TUDBALL, RAFIQ and WALSH, JJ.

References:—(a) 3 A. 815, overruled; 23 O. 867, Dist.; 11 B.L.R. 321, Rel. on.

- (2) *Privileged statement*—Defamatory statements made in pleadings in civil suit, if privileged—Maintainability of suit for damages—Suit settled by compromise, effect of—Compromise.

Held that defamatory statements made during the course of pleadings in civil suits are not privileged.

Held, further that, the fact that the suit in which the defamatory statements were made was settled by a compromise is by itself no bar to the maintainability of an action for damages. *Dalpat Singh v. Amarpal Singh*, 21 O.C. 321.

LINDSAY, J.C.

References:—23 O. 867; 3 A. 815; 29 A. 685, F.; 14 B. 97, Not F.

- (3) *Charge preferred by defendant outside Court against plaintiff*—Subsequent suit by plaintiff against defendant for damages for defamation—Complaint taken by defendant to police and to Court subsequent to institution of suit against him but without unreasonable delay—Dismissal of complaint—Other remedies open to plaintiff not availed of by him—Damages, suit for, if maintainable.

In a suit for damages for defamation on the ground that the allegations, which formed the subject of the defendant's subsequent complaint against the plaintiff to the police and to the Magistrate had been previously made outside the Court, it appeared that the defendant had taken his complaint to the police and to the Court without unreasonable delay, but it was dismissed: *Held* that the defendant was protected from an action for defamation of character in respect of the allegations contained in his subsequent complaint, the plaintiff not having availed himself of two other remedies that were open to him when the complaint was dismissed. *Maung Myo v. Maung Kywet E*, U.B.R. (1918), 2nd Qr., 88=47 Ind. Cas. 674.

SAUNDERS, J.C.

References:—26 B. 226, R.; 30 C.L.J. 518; 38 O. 680, Dist.

Defamation—(Concluded).

- (4) *Fair comment*—Facts commented on by journalist must in substance be truly stated—Trivial mis-statements of fact do not affect plea of fair comment. See *LIBEL*, No. 1, 20 Bom. L.R. 186.

- (5) *Master and servant*—Communication by servant to his co-employees of suspicion of being poisoned at instigation of master—Communication made in self-interest but *bona fide* and without malice—Such imputation of crime, if actionable. See *SLANDER*, No. 1, 85 M.L.J. 673.

Defence of India Act (1915).

Ss. 1 to 11—*Power of Governor-General in Council to create special Courts*—Course of legislation on the subject traced—*Habeas corpus*, *Writ of*, *High Court of Patna if can issue*—*Power of High Court to declare ultra vires enactment made by Governor-General in Council beyond the scope of his powers*—*Government of India Act, 1915*, S. 72—*Indian Councils Act, 1861*, (24 and 25 Vic., c. 67), S. 104—*Indian High Courts Act, 1861* (24 and 25 Vic., c. 104), S. 22.

A person confined under the sentence of a tribunal constituted under the Defence of India Act of 1915 moved the Patna High Court for a writ of *habeas corpus* on one ground only, *vis.*, that, so far as the Defence of India Act authorised the creation of the tribunal, the Act was void, because it was *ultra vires* or beyond the power of the Governor-General of India in Council to constitute a Court of Justice or to authorise any other person or persons to constitute such a Court. *Held* that, under S. 22 of the Indian Councils Act of 1861 read with S. 9 of the High Courts Act and with the previous enactments and the powers consistently exercised thereunder, the Governor-General in Council had power by means of the Defence of India Act, to create the tribunal or Court in question.

The High Court has power, in a proper proceeding, if an Act of the Indian Legislature is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, to declare such an enactment *ultra vires* and of no force and effect with all the consequences that may result therefrom.

Whatever jurisdiction the Patna High Court has, whether derived from its Letters Patent or as the successor to the jurisdiction of the Calcutta High Court formerly exercised in the province of Bihar and Orissa, in either case such jurisdiction is subject to the legislative powers of the Governor-General in Council.

At the time when the Indian Councils Act of 1861 was passed, the words "laws and regulations" had received a recognised significance and included the power of making laws and enforcing their observance by the creation of Courts of Justice.

The Governor-General in Council has power to interfere with the jurisdiction of the High Court and also the power to substitute a new Court to act in place of that whose jurisdiction

Defence of India Act (1918)—(Concluded).

is determined. *Parmeshwar Akle v. Emperor*, 8 Pat. L.J. 537 (F.B.).

DAWSON MILLER, C.J., CHAPMAN, MUL-
LICK, ROE and ATKINSON, JJ.

References:—4 C. 172; 1 B. 460; 3 O. 63; 11 A. 490; *Commissioners for Income-tax v. Pemsel*, (1891) A.C. 591; *Campbell v. Ball*, 20 St. Tr. 239; *In the matter of the States of Jersey*, 8 St. Tr. 286; *A-G. v. G.E. Ry. Co.*, 5 Ap. Cas. 473; 15 C.W.N. 1053, R.

Dekkhan Agriculturists' Relief Act (1879).

- (1) S. 13 (b)—*Mortgage—Suit for account—Mortgage bond taken in satisfaction of decree—Account of decretal debt cannot be taken afresh under the accounts suit.*

In satisfaction of a decree passed against him, the plaintiff executed a mortgage for Rs. 1,480 in defendant's favour. At the plaintiff's suit to take accounts of the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, lower Courts treated Rs. 866 out of the mortgage amount as representing the original principal under the earlier decree and allowed interest only on that sum. The defendant having appealed:—

Held, that interest should be calculated on the whole amount of Rs. 1,480, for, in the present case, original interest had not been converted into principal at any statement or settlement of account, or by any contract made between the parties, but the conversion had taken place by means of a decree of the Court and by that decree a single integral sum was awarded to the defendant as the judgment-debt. *Mareppa Panditeppa Bhojannavar v. Gundu Annaji Deshpande*, 20 Bom. L.R. 469=46 Ind. Cas. 166.

—BACHELOR, AG. O.J. and KEMP, J.

References:—7 B. 330, *Rel. on*; 13 Bom. L. R. 1004, *Dist.*

- (2) S. 48—*Conciliator's certificate—Exclusion of time taken up in obtaining certificate—Decree—Execution—Civ. Pro. Code (V of 1908), S. 48.*

The plaintiff obtained a decree on the 28th October 1899 to execute which he gave three applications. He next applied on the 1st July, 1911, to obtain a conciliator's certificate under the provisions of the Dekkhan Agriculturists' Relief Act, 1879, and he obtained the same on the 29th May 1913. The fourth application to execute the decree was accordingly made on the 23rd August, 1913. It was resisted by the defendant on the ground that the execution of the decree was barred under S. 48 of the Civ. Pro. Code, 1908:

Held that the application was within time, inasmuch as the plaintiff was entitled under S. 48, Dekkhan Agriculturists' Relief Act, 1879, to exclude the interval of time occupied in obtaining the conciliator's certificate. *Shidaya Yirabhadraya Kodimath v. Satappa Bharmappa Motgauda*, 20 Bom. L.R. 360=42 B. 867=45 Ind. Cas. 494.

BACHELOR, A.C.J. and SHAH, J.

Delay.

- (1) In applying under Civ. Pro. Code O. XXII, r. 9 or for review—Jurisdiction of lower Court to excuse delay—High Court's powers of revision. See HINDU LAW (REVERSIONERS), No. 6, (1918) M.W.N. 888.

(2) Powers of authorised person and copy of first Court's judgment not filed with appeal—Presentation of same after great delay and in defective form—Extreme want of diligence—No excuse for delay—Appeal out of time. See LIMITATION ACT (1908), No. 10, 94 F.L.R. 1918.

Delegation.

Duty of enquiry under S. 25 of Act VIII of 1890, if can be delegated by Court. See GUARDIANS AND WARDS ACT, No. 2, 21 O.G. 194.

Delivery of possession.

- (1) To transferee from auction-purchaser—Transferee's right to apply for delivery of possession. See CIV. PRO. CODE (1908), No. 363, 16 A.L.J. 150.

(2) Application for, more than three years after sale confirmed—Prior applications dismissed for purchaser's default—General order to "deliver" made on prior applications preferred in time—Subsequent dismissal of same owing to purchaser's failure to take delivery—Present application if can be treated as one for further execution of prior general order. See LIMITATION ACT (1908), No. 204, 7 L.W. 16.

(3) Gift by grandfather to minor grandson—Transfer of possession if necessary—Gift to minor ward by the guardian—Declaration of—Whether raises any presumption of an intention to complete the transfer—Acceptance of gifts under Muhammadan Law—Principles as to, discussed. See MAHOMEDAN LAW (GIFT), No. 5, 35 M.L.J. 541.

Deposit.

- (1) Act VIII of 1869 (B.O.), S. 52—*Transferee of a portion of non-transferable holding, whether can make deposit under S. 52.*

Where, in execution of a decree for rent, the landlord decree-holder proposed to eject the tenant of a non-transferable holding under the provisions of S. 52 of the Bengal Act VIII of 1869, and to avoid the ejectment, a third person claiming to be a transferee from the tenant sought to make the deposit provided for by the section: **Held**, that having regard to the principles laid down in the Full Bench case of 42 C. 172, the transferee could make the deposit. *Kali Kishore Das v. Gopal Ram Shaha*, 29 C.W.N. 182.

TEJON and CUMING, JJ.

References:—42 C. 172 (F.B.), *Rel. on*; 1 Marsh. 417=1 Hay 527, *Dist.*

(2) Deposit in A's name Maral B, Effect of—Deposit repayable on demand after certain time. See LIMITATION ACT (1908), No. 197, 8 L.W. 221.

Deposit—(Concluded).

(3) Return of money deposited with another—Suit for return thereof—Demand—Limitation for suit. See **LIMITATION ACT (1908)**, No. 42, 65 P.L.R. 1918.

(4) By mortgagor of mortgage-money before notice, but after institution, of suit—Deposit, if valid. See **TRANSFER OF PROPERTY ACT**, No. 58, 35 M.L.J. 605.

Deposit in Court.

- (1) Arrest before judgment of defendant—Deposit of money in Court adjudged sufficient to meet plaintiff's claim—Presentation of insolvency petition by defendant before decree—Adjudication after decree—Claim to deposit by plaintiff and Official Receiver—*Civ. Pro. Code, 1908, O, XXXVIII, r. 2.*

Where a defendant arrested before judgment pays, under *Civ. Pro. Code, O. XXXVIII, r. 2 (1)*, a sum of money into Court sufficient to meet the plaintiff's claim to the general credit of the action, it is, as such, charged with a lien on the plaintiff obtaining a decree in his favour and if the defendant becomes an insolvent before decree, neither the assignee of the bankrupt's estate—the Official Receiver in this case—nor the general body of creditors nor any specific creditor has a claim which can prevail over the title of the plaintiff to the deposit. *Rama Iyer v. Gopala Iyer, 35 M.L.J. 355=41 M. 1058.*

AYLING and COUTTS TROTTER, JJ.

References:—(1903) 2 K.B. 41; (1892) 1 Q.B. 94; 34 M.L.J. 84; 32 M.L.J. 503, F.; 25 C. 179; 89 M. 908; 29 B. 405, R.

(2) Money in deposit in Court—One party withdrawing on giving undertaking—Other party found entitled to it afterwards—Whether entitled to interest from date of withdrawal—*Civ. Pro. Code, S. 144. Alagappa Chettiar v. Muthukumara Chettiar, 22 M.L.T. 162= (1917) M.W.N. 669=41 M. 307. See Final Part, 1917, Col. 388.*

(3) Deposit in Court by mortgagor of more amount than that due—Deposit if a valid tender—Mortgagor's right to interest on amount so deposited. See **TRANSFER OF PROPERTY ACT**, No. 64, 34 M.L.J. 439.

Deposition.

- (1) Made before registration officer in enquiry by him as to genuineness of will—Subsequent death of deponent—Subsequent suit between same parties raising question as to genuineness of will—Admissibility of deposition before Sub-Registrar in such subsequent suit—*Evidence Act, S. 33—Registration Act, S. 41.*

In an enquiry held by a Sub-Registrar, under S. 41 (2) of the Registration Act, regarding the genuineness of a will presented to him for registration, certain witnesses were examined and their depositions recorded by him in accordance with the provisions of the Registration Act and the rules made thereunder for the conduct of the enquiry contemplated by S. 41 (2)

Deposition—(Concluded).

of the Act. The witnesses had since died. In a subsequent suit between the same parties as were arrayed before the Sub-Registrar, or those whom they represented, an issue was raised as to the genuineness of the same will. Held that the depositions of the deceased witnesses, made by them before the Sub-Registrar, were admissible in evidence, as that enquiry was between the same parties and substantially about the same question as was covered by the suit and as the provisions enabling the Sub-Registrar to summon, and record the evidence of, witnesses necessarily implied that they were to be examined and cross-examined in the ordinary way by the adverse party, who had thus the right and opportunity to cross-examine the witnesses.

Per Wallis, C.J.—In construing the provisos to S. 33 of the Evidence Act, it is important to remember that it is applicable even where the earlier proceeding was not a judicial proceeding and therefore that the section contemplates that the provisos may be satisfied and the evidence at the earlier enquiry be admissible even where that enquiry does not satisfy all the requisites of a judicial proceeding. Lanka Lakshmana v. Lanka Vardhamanna, 35 M.L.J. 657= (1918) M.W.N. 918.

WALLIS, C.J. and SRSHAGIRI AIYAR, J.

References:—Godbold's case, 78 E.R. 192 (193); 12 B. 86; 23 M.L.J. 60; 15 M. 188; Co-partnership Farms, Ltd. v. Harvey Smith, (1918) 34 Times L.R. 414, R.

(2) Deposition not read over in presence of Judge and signed by witness—Admissibility. See *CIV. PRO. CODE (1908)*, No. 290, 7 L.W. 435.

Deposit of Title-deeds.

- (1) Banker or Chetty, With—Ambiguity—Equitable mortgage or for custody—Estoppel cannot be created by ambiguous act nor from ambiguous document—Promissory notes, Pledge of, Validity of.

Just as an estoppel cannot be created from an ambiguous document so too can it not be created from an ambiguous act.

A deposit of title-deeds especially with a Banker or a Chetty is ambiguous and may be either for custody or by way of mortgage, and the ambiguity is not eliminated by showing that the depositor is also a debtor.

A promissory-note may be the subject of a pledge. *Mamra Bros. v. Sallayjee, 46 Ind. Cas. 609.*

YOUNG, J.

(2) Successors in-title of original equitable mortgagee in possession with consent of mortgagors—Such possession and receipt of rents and profits in lieu of interest to be presumed to be under mortgagor's authority—Termination of possession, Repayment of loan before. See **MORTGAGE (EQUITABLE MORTGAGE)**, No. 3, 9 L.B.R. 172.

Diluvion.

Tenure-holder contracting to pay full tenure irrespective of diluvion—He cannot claim reduction of rent, on the ground of diluvion. See (BEN. ACT VIII OF 1885 TENANCY), No. 30, 44 Ind. Cas. 222.

Discharge.

(1) Damages for malicious prosecution—Suit for damages if maintainable only if plaintiff acquitted and not discharged. See MALICIOUS PROSECUTION, No. 3, U.B.R. (1918), 1st Qr., 67.

(2) Payment by mortgagor to one co-mortgagee if valid discharge. See MORTGAGE (GENERAL), No. 4, 22 C.W.N. 1021.

Discretion.

Erroneous exercise of discretion—Correction by Court of appeal—Principles. See ADMISSION, No. 1, 44 C. 138.

Discretion of Court.

Document not filed with plaint—Subsequent production thereof—Rejection by Court, whether proper. See CIV. PRO. CODE (1908), No. 247, 44 Ind. Cas. 21.

Dismissal for Default.

- (1) *Service of summons—To be made as directed by Court—Restoration of case dismissed in default of plaintiff—Its transfer from one Court to the other—Sufficient cause for non-appearance—Revision—Munim, whether a member of family—Direction by Court to issue notice to party and his pleader—Service on party's Munim, not sufficient—Civ. Pro. Code (Act V of 1908), O. V, r. 15; O. IX, r. 3; O. XXX, r. 3.*

In a suit for recovery of money, the Court directed that notice should issue to the parties and their pleaders and that they should attend on a certain date. It appeared that no notice was served on the plaintiff's pleader, but one was served upon the *munim* of the plaintiff's firm. The plaintiff not having appeared on the date fixed, the suit was dismissed in default:

Held, that, inasmuch as the Court actually directed that the notices should be served upon the plaintiffs themselves as well as upon their pleaders, the service on the *munim*, even if he was the person having the control or management of the plaintiff's business, was not sufficient and that the Court had no power to dismiss the suit for default. *Held*, also, that a *munim* is not a member of the family of his employer within the meaning of O. V, r. 15, Civ. Pro. Code, 1908. *Firm Ram Gopal v. Narain Das*, 105 P.W.R. 1918=45 Ind. Cas. 992.

SCOTT-SMITH, J.

(2) Appeal preferred under S. 109-A (3) of Bengal Tenancy Act in suit under S. 106 of said Act—Dismissal of appeal for default—Appeal if lies from order refusing to rehear appeal. See APPEAL (GENERAL), No. 1, 45 C. 699.

(3) Petition for restoration of suit, Dismissal of, Appeal if lies from—Civ. Pro.

Dismissal for Default—(Concluded).

Code (1908), O. XLIII, r. 1 (c), O. IX, r. 9. See APPEAL (GENERAL), No. 17, 43 Ind. Cas. 54.

(4) Application for execution of decrees dismissed for default—No application to cancel *ex parte* order—Appeal if lies from dismissal order—Procedure. See APPEAL (GENERAL), No. 34, 64 P.L.R. 1918.

(5) Application to set aside order of appeal dismissed for default—Limitation—Death of appellant—Appellant if defaulter—Representative's right to come on record. See APPEAL (GENERAL), No. 33, 96 P.R. 1918.

(6) Order of, Application to set aside, to be disposed of on evidence properly recorded, not on the view of Judge as to application whether or not *bona fide*. See CIV. PRO. CODE (1908), No. 260-a, 22 C.W.N. 671.

(7) Plaintiff and defendant present in Court—Non-prosecution of case by plaintiff—Dismissal for default—Restoration of case, Application for, if lies. See CIV. PRO. CODE (1908), No. 259, 3 Pat. L. J. 355.

(8) Order of, of appeal—If decrees within meaning of S. 2, Civ. Pro. Code (1882)—Limitation for execution of decrees not commencing from date of order of dismissal of appeal for default but from date of original decrees. See EXECUTION OF DECREE, No. 21-c, 47 Ind. Cas. 135.

(9) Pleader instructed to appear and conduct case—Dismissal of suit in presence of pleader, if for default—Review. See REVIEW, No. 5, 46 Ind. Cas. 492.

Dismissal of Suit.

(1) Attachment before judgment how affected by dismissal of suit—Attachment if continues if no express withdrawal made at time of dismissing suit. See ATTACHMENT BEFORE JUDGMENT, No. 1, 45 C. 780.

(2) One of many plaintiffs present—General attorney for absent plaintiffs held by plaintiff appearing—Dismissal of suit for want of prosecution—Dismissed on merits—Second suit on same cause of action barred. See CIV. PRO. CODE (1908), No. 254, 16 A.L.J. 462.

(3) Refusal to exhibit as evidence document produced—Suit if may be dismissed. See CIV. PRO. CODE (1908), No. 281, 28 C.L.J. 24.

(4) Plaintiff present in Court—No further step taken—Suit dismissed—Dismissal not for default. See CIV. PRO. CODE (1908), No. 258, 45 Ind. Cas. 199.

(5) Plaintiff's name, Immaterial misdescription of—For—Legality of. See PARTNERSHIP, No. 7-b, 155 P.L.R. 1917=3 P.W.R. 1918=44 Ind. Cas. 288.

(6) Dismissal of suit upon its frame and upon the ground of want of evidence to support plaintiff's case—Appeal by plaintiff on dismissal of his suit—Leave granted to plaintiff-appellant on ground of his not having adduced evidence

Dismissal of Suit—(Concluded).

to support case—Subsequent suit on substantially same question between same parties if not barred. See *RES JUDICATA*, No. 84-a, 3 Pat. L.J. 469.

Disqualified Proprietor.

Court of Wards, Under, Suit against—Manager of Court of Wards, if a necessary party—Bengal Court of Wards Act (IX B.C. of 1879), Ss. 5, 6 (e) and 85.

Where a Court of Wards is in possession of the property of a disqualified proprietor under S. 6 (e) of the Bengal Court of Wards Act, a suit brought against such a proprietor based upon contract may proceed without causing the defendant to be represented by the Manager of the Court of Wards. So also has it been held with regard to suits for declaration of title to or recovery of possession of property that if the suit is in respect of property which is not in the actual possession and disposal of the Court of Wards under Ss. 85 and 5 of the Act, then the suit may proceed against the proprietor alone. *Mohammad Abdul Salam v. Kamalamukhl*, 46 Ind. Cas. 316.

MULLICK and THORNHILL, JJ.

District Municipalities Act.

See BOM. ACT III OF 1901.

See MAD. ACT IV OF 1884.

Divorce.

(1) *Judicial separation—Marriage, Dissolution of—Adultery and cruelty after separation on ground of—Divorce Act (IV of 1869), S. 10.*

A wife who has obtained judicial separation on the ground of her husband's adultery alone, is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation and has in addition been guilty of cruelty to her after the separation. *Ma Thin Kyu v. Mg. Ba Thain*, 45 Ind. Cas. 914.

TWOMEY, C.J., ORMOND and PRATT, JJ.

(2) *Cruelty, Single act of, if sufficient to grant. See BUDDHIST LAW (DIVORCE), No. 2, 46 Ind. Cas. 144.*

Divorce Act (1869).

(1) S. 4—High Court, Matrimonial jurisdiction of—Court if precluded from considering provisions of Ss. 4, 5, Christian Marriage Act (XV of 1872)—Divorce Act and Christian Marriage Act, Ss. 4 and 5, Scope of, Difference between—Deception, Degree of—Consent—Fraud, Nature of, for avoiding marriage. See HIGH COURT (JURISDICTION OF), No. 1, 47 Ind. Cas. 544.

(2) Ss. 7, 11—*Petition for divorce of wife without mentioning co-respondent—Leave to proceed without respondent to be obtained before hearing of petition—Jurisdiction of Court to entertain petition without such leave.*

Divorce Act (1869)—(Concluded).

Upon the hearing of a petition, presented to the Court by a husband for dissolution of marriage on the ground of his wife's adultery, in which the master had directed citations to issue even though no co-respondent was mentioned, leave was asked to proceed without a co-respondent. Held that the leave could be asked for only by an application to the Judge on motion founded on affidavit before the hearing of the petition, that the master was wrong in issuing the citation, and that the Court had no jurisdiction to entertain the petition under such circumstances. *Cox v. Cox*, 45 C. 525=47 Ind. Cas. 510.

FLETCHER, J.

(3) S. 10—Judicial separation—Marriage, Dissolution of—Adultery and cruelty after separation. See DIVORCE, 45 Ind. Cas. 914.

(4) S. 11. See No. 2, *supra*.

(5) S. 16—*Decree nisi—Power of High Court.* A decree nisi can be pronounced only by a High Court under S. 16, Divorce Act. *Ma Waing v. Ebrahim*, 43 Ind. Cas. 519 (F.B.).

ORMOND, FARLETT and ROBINSON, JJ.

Document.

(1) *Alteration in a document—Whether it amounts to forgery—Difference of ink—Whether amounts to material alteration—Disposal of suit on point taken by appellate Judge—Illegality—Revision.*

It is wrong to say that because a man alters a figure in a document, he thereby forges the document, or because there is something in a different ink to the rest of the document, there must be a material alteration.

A Judge who disposes of a suit on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, was wrong in law. Such an error was a good ground for revision. *Bichay Sukul v. Behari Sukul*, 43 Ind. Cas. 488.

MAUNG KIN, J.

Reference:—17 M. 410, Appr.

(2) *Execution of, Proof of—Registration endorsement, if conclusive proof of—Evidentiary value of—Evidence Act, S. 67.*

While, under S. 67 of the Evidence Act, no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it.

A Court is not ordinarily bound to treat the registration endorsement as conclusive proof of the fact of execution of a document and especially when there are suspicious circumstances attending its execution such endorsement cannot be accepted as proof of execution of that document. *Jagannath v. Dhiraaja*, 46 Ind. Cas. 279.

LINDSAY, J.C.

Document—(Continued).

- (3) *Ambiguous, Interpretation of—Evidence of surrounding circumstances, Admissibility of—Evidence Act, S. 92.*

Where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing light on its interpretation. *Aditya Prasad v. Muhammad Mubarak Ali Baksh*, 21 O.O. 284.

KANHAIYA LAL and DANIELS, J.CS.

References:—22 A. 149 (P.G.); 45 C. 320 (P.C.), *Rel. on*; 22 A. 205; 10 O.C. 243, *Dist.*; 39 A. 173 (P.G.), R.

- (4) Submitted with memorandum of appeal, admissibility of. See APPEAL (GENERAL), No. 37, 150 P.W.R. 1918.

- (5) Construction of, a question of law—Second appeal if lies. See APPEAL (SECOND APPEAL), No. 25, 161 P.W.R. 1918.

- (6) False recitals—Fraud. See JURISDICTION (OF CIVIL COURTS), No. 2, 43 Ind. Cas. 16.

- (7) Production of—Refusal to exhibit as evidence—Suit if may be dismissed. See CIV. PRO. CODE (1908), No. 281, 28 C.L.J. 24.

- (8) Admission of, execution of—Effect of. See EVIDENCE ACT, No. 23, 22 C.W.N. 444.

- (9) Language of document clear and easily applicable to facts of case—Admissibility of extrinsic evidence to interpret document. See EVIDENCE ACT, No. 45, 40 Ind. Cas. 491.

- (10) Land described in a mortgage-deed ambiguous—Ambiguity of description bearing analogy to the description given in the illustration to S. 97, Evidence Act—Right of person to clear ambiguity by showing the land described in the deed. See EVIDENCE ACT, No. 46, 43 Ind. Cas. 721.

- (11) Handwriting in, Comparison of—Only documents signed or containing some intrinsic statement of identity of writer, if admissible. See EVIDENCE ACT, No. 25, 35 M.L.J. 608.

- (12) Proof of, for a collateral purpose—Amount of formalities of proof. See GIFT, No. 1, 21 O.C. 312.

- (13) Construction of—Grant undertaken Waste Land Rules for fixed term—Assignment of unexpired term by document without reservation of right of renewal provided for in original grant—Renewal obtained by assignee on expiry of original term—Assignment if complete sale—Covenant for renewal if can be availed of by assignee for his own benefit. See GRANT, No. 2, 9 L.B.R. 269.

- (14) Validity of documents of title—Jurisdiction of Revenue Courts to finally determine such validity—Jurisdiction of Civil Courts to decide matter exclusively reserved to Revenue Court. See JURISDICTION (OF REVENUE COURTS), No. 6, 21 O.C. 210.

Document—(Concluded).

- (15) Document establishing relationship of landlord and tenant—Construction in rent suit—*See judicata*. See LANDLORD AND TENANT, No. 28, 43 Ind. Cas. 753.

- (16) Document exhibited by consent in trial Court—Rejection by appellate Court if proper—Procedure. See LANDLORD AND TENANT, No. 54, 35 M.L.J. 11.

- (17) Plaintiff fraudulently made to execute a deed of a different nature from that agreed upon—Suit to recover property affected—Void or voidable. See LIMITATION ACT (1908), No. 143, 23 C.W.N. 93.

- (18) Documentary evidence conflicting—Value of opinion of trial Judge. See MAHQ-MEDAN LAW (GIFT), No. 1, 28 C.L.J. 306.

- (19) Attestation of document before its execution if proper—Nature of—Requirements of law as to, if complied with by admission of executant—Attestation if deals only with proof or validity of document. See MORTGAGE (GENERAL), No. 13, (1918) M.W.N. 853.

- (20) Construction of—Sale-deed—Money left with purchaser for discharge of mortgage. See VENDOR AND PURCHASER, No. 2, 40 Ind. Cas. 361.

Documentary Evidence.

- (1) *Evidence—Probabilities—Oral and documentary evidence unsatisfactory—Conclusion how to be arrived at—Admissions in documents, how far binding on executors.*

Even in a case where the oral evidence was untrustworthy and the documents recorded a state of affairs hard to reconcile with probabilities, unless the facts evidenced by documentary and oral testimony are so much at variance with known conditions as to be incapable of reasonable explanation, it is to those facts and those facts alone that the Court must trust to reach a safe conclusion in the matter.

Prima facie a statement contained in a document must be accepted as true as against the executant, unless it can be shown to be false by independent evidence. *Ibrahim Ali v. Muhammad Karim*, (1918) M.W.N. 394—28 C.L.J. 173—24 M.L.T. 86—22 C.W.N. 530—20 Bom. L.R. 790—46 Ind. Cas. 217—21 O.C. 86 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE,
SIR WALTER PHILLIMORE, BART.,
and SIR LAWRENCE JENKINS.

- (2) *Evidence Act, Ss. 58, 92—Evidence—Registered mortgage—Admissibility of a subsequent oral agreement to accept less—S. 92, proviso 4—Admission on pleadings of such agreement—If can be acted upon notwithstanding S. 92.*

In a suit upon a mortgage, the defendant pleaded a subsequent oral agreement by which it was alleged, the plaintiff agreed to accept in full satisfaction of his mortgage a less sum than was due under it. The plaintiff had however

Documentary Evidence—(Concluded).

admitted the said agreement in a counter-statement filed by him in the suit.

Held, that the agreement is inadmissible in evidence under proviso 4 to S. 92, as the same was one clearly modifying the terms of a contract in writing.

Held, however, that the proof of such agreement is dispensed with in consequence of the admission of the plaintiff in the pleadings under S. 58 of the Indian Evidence Act and that therefore the question of its admissibility arises herein. *Yenkata Reddi v. Kuppa Reddi*, (1918) M.W.N. 680=8 L.W. 400=47 Ind. Cas. 716.

ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

References:—30 C. 231; 30 C. 725; 30 C. 738; 32 Ind. Cas. 955, R.

(3) Oral agreement to receive less than due under registered mortgage—Admission in pleadings of such oral agreement—Oral agreement if admissible in evidence. See EVIDENCE ACT, No. 18, 35 M.L.J. 555.

(4) Not produced at first hearing of suit—Admissibility at subsequent stage. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 35 M.L.J. 422.

(5) Document containing recitals of ownership of land—Document not *inter partes*—Admissibility. See RES JUDICATA, No. 44, 132 P.W.R. 1918.

Documents, Construction of.

(1) *Usufructuary mortgage—Construction—If contains a personal covenant.*

Where a usufructuary mortgage-deed contained the following provision:—

"At whatever cultivation season in the month of Chitrai in any year after the stipulated period of ten years, I may pay the principal amount, you shall at that time receive the amount, leave the undermentioned lands in my possession and deliver the document also to me."

Held, that the clause did not contain an implied covenant to pay at the end of ten years, that the stipulation as to payment was one entirely for the benefit of the mortgagor as it allowed him to choose his own time for payment if he wished to pay; and that to construe it as a personal covenant would be to destroy the whole effect of the express arrangement between the parties. *Rengayya Pillai v. Narasimma Iyengar*, (1918) M.W.N. 672=47 Ind. Cas. 852.

PHILLIPS and KRISHNAN, JJ.

(2) *Kayam Saswatham deeds—Rule of interpretation.* See LANDLORD AND TENANT, No. 55, 35 M.L.J. 129.

Easement.

(1) *Water, Flow of, from higher to lower land—Diversion by owner of higher land—Owner of lower land, if entitled to restrain diversion.*

For many years water accumulating on higher land had found its way down across

Easement—(Concluded).

lands of the defendants on to the land of the plaintiff, which lay below. The defendants having stopped the flow of water on to land below their own and diverted it towards the east, the plaintiff brought a suit to restrain the defendants from diverting the flow on the ground of the productive powers of his land being thereby lessened:

Held, that the plaintiff had not proved any right which he could enforce at law. This case was really the case of the owner of a servient tenement endeavouring to retaliate by claiming an easement against the owner of the dominant tenement. The defendants may have acquired a right by prescription to discharge surplus water from their land on to that of the plaintiff but this would not give him the right to insist that they should continue to do so for all time. *Ballave Mandal v. Bepin Behari Mandal*, 46 Ind. Cas. 24.

CHITTY and WALMSLEY, JJ.

(2) *Of necessity—How it arises—Severance of tenants—Right of way, private and public—Distinction between.*

An easement of necessity cannot arise in any way other than on a severance of tenants (a).

Authority explaining the distinction between private and public rights of way and the remedies allowed in each case, respectively pointed out (b). *Maung Shwe Daing v. Ma Thet Su*, U.B.R. (1918), 1st Qr., 65=46 Ind. Cas. 327.

SAUNDERS, J.C.

References:—(a) 4 L.B.R. 246, R. (b) 4 L.B.R. 134, R.

(3) *Possessory rights in incorporeal hereditaments—Right to easement not fully prescribed for—Remedy against persons interfering with such user.* See DECLARATORY SUIT, No. 5, 34 M.L.J. 425.

(4) *Watercourse, use of, for more than nineteen and half years—Subsequent interruption of such user at close of period of twenty years—Interruption innocuous.* See LIMITATION ACT (1909), No. 97, 48 P.R. 1918.

(5) *Right of, and trees go with land by pre-emption.* See PRE-EMPTION, No. 14-b, 47 Ind. Cas. 654.

(6) *Way, Right of—Points to be established by plaintiff.* See RIGHT OF WAY, No. 1, 22 C.W.N. 922.

(7) *Right to supply of water from natural stream—If such easement may be acquired.* See WATER, No. 1, 57 P.R. 1918.

(8) *Surface water—Right of owner of higher land to discharge such surface water over adjacent lower land—Inability of owner of servient tenement to discharge same—Rise of bed of adjacent stream silting—Dominant owner not liable to suffer.* See WATER RIGHTS, 22 C.W.N. 666.

Easements Act (1882).

- (1) *Ss. 2 (c), 17 (c)*—*Right to water*—*River water taken through the field of another in an undefined channel for irrigation*—*Enjoyment of right from time immemorial*—*Presumption of lost grant.*

The plaintiff, who owned non-riparian lands, used from time immemorial to irrigate his lands by river water which he took through the paddy fields belonging to defendants. The water did not flow in a definite channel but spread over the whole of the defendants' lands till it overflowed into the plaintiff's lands. The defendants having obstructed the passage of water through their lands, the plaintiff sued to establish his right to the enjoyment of the river water:

Held, that the plaintiff, having acquired the right and enjoyed it from time immemorial, was not prevented from enforcing it by any provision of the Indian Easements Act, by virtue of S. 2 (c) of the Act.

Held, by *Beaman, J.*, that even if it were a right that could not be acquired as an easement, there was nothing intrinsically unreasonable in it; but on the contrary it was compatible with the usages and sentiments of the agricultural population in many parts of India.

Held, by *Marten, J.*, (1) that S. 17 (c) of the Indian Easements Act did not apply, for the plaintiff's claim was to river water and to mere surface water on the defendants' lands.

Per *Marten, J.*—"The presumption of a lost grant is one which may be made in India as well as in England. It arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be rebutted like other presumptions. It also requires certain conditions and one is that the right could have been subject of a grant." *Janardan Ganesh Khadilkar v. Ravji Bhikaji Kondakar*, 30 Bom. L.R. 399 = 42 B. 268 = 45 Ind. Cas. 448.

BEAMAN and MARTEN, JJ.

References:—37 M. 304; 30 C. 1077; 4 C. 633; 6 C. 394, R.

- (2) *Ss. 3, 15*—*Right of fishery claimed in tank of certain Mouza by inhabitants of another*—*If such right can be acquired under S. 15.* See *FISHERY*, No. 2, 14 N.L.R. 35.

- (3) *S. 4*—*Easement of light and air*—*Right to open and shut windows over another's land, if an easement and if can be acquired*—*Kitchen smoke polluting air*—*If substantial nuisance*—*Injunction, when proper remedy.*

Where the kitchen smoke flowing from out of certain chimneys in the defendant's house pollutes the air passing into the plaintiff's house and one of the chimneys discharges directly into the plaintiff's window.

Held that a substantial and actionable nuisance has been caused in the above circumstances and that the appropriate remedy is to direct the removal of the chimneys as being the nuisance.

Easements Act (1882)—(Continued).

A right to open and shut the windows of a person's house is an easement within the meaning of S. 4 of the Easements Act for it is a right, which the owner of the house has, as such, for the beneficial enjoyment of his house, to do something, i.e., to swing the shutters upon certain other land not his own and such a right can be acquired as an easement by prescription (a).

Where it is impossible to make an accurate estimate of the pecuniary damage which may be sustained by a party by reason of the wrongful act of another, an injunction is the most appropriate remedy. *Ranga Row v. Ramathilakamma*, 7 L.W. 332 = 45 Ind. Cas. 435.

WALLIS, C.J. and PHILLIPS, J.

Reference:—(a) *Drewell v. Towler*, (1832) 3 B. and Ad. 735, R.

- (4 & 5) *Ss. 4, 12, 15, 28*—*Land, meaning of*—*Evidence of user prior to statutory period*, *Admissibility of*—*Effect of user by tenants of dominant tenement*—*Easement over roof if can be acquired*—*Easement for sitting, drying clothes over roof*—*Right of way where delineation of path not necessary.* See *RIGHT OF WAY*, No. 3, 21 O.C. 78.

- (6) *S. 7 (b)*. See *MAD. ACT VII OF 1863 (IRRIGATION CESS)*, 7 L.W. 1.

- (7) *S. 12*. See No. 5; *supra*.

- (8) *S. 15*—"*Belongs to Government*," *meaning of*—*Property belonging to Government. Transfer of, to private persons*—*Thirty or forty years' enjoyment of easement against Government at time of transfer*—*Easement if acquired against transferee also.*

The words "belongs to Government" in the last paragraph of S. 15 refer, not to the time of suit, but to the time during which the easement is enjoyed.

A servient tenement belonged to Government till two years before suit and was then assigned by Government to a private person. At the time of assignment, the easement had been exercised only for 30 or 40 years, and had, therefore, not become absolute as against Government. *Held* that the transfer of ownership had not the effect of rendering the easement absolute against the transferee because of the previous 30 or 40 years' enjoyment against the Government but that the persons claiming the easement must make good his title by 20 years' enjoyment against the transferee after the transfer.

Semble:—Where the 60 years' period has nearly expired during Government ownership of the land, and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee. *Srinivasa Upadya v. Ranganna Bhatia*, 34 M.L.J. 396 = 41 M. 622 = 45 Ind. Cas. 98.

AYLING and PHILLIPS, JJ.

Easements Act (1882)—(Continued).

(9) Ss. 15, 17—*Right of easement to surplus water flowing in defined channel—Prescription—Grant.* Boddaluru Nagayya v. Bachu Chenchuramayya, 33 M.L.J. 674—(1917) M.W.N. 868—44 Ind. Cas. 625. See Final Part, 1917, Col. 392.

(10) S. 15. See Nos. 2 and 5, *supra*.

(11) S. 17. See No. 9, *supra*.

(12) S. 17 (c). See No. 1, *supra*.

(13) S. 20—*Reconstruction involving change in situation of roshandans, whether fresh easement—Building up wall so as to block roshandans—Injunction, Suit for, whether maintainable.*

Held, that a reconstruction of a house involving a change in the situation of *roshandans* does not mean a fresh easement requiring a fresh period of 20 years for its acquisition.

Plaintiff sued for the issue of a mandatory injunction to the defendants that they should demolish a wall built by them. It appeared that the plaintiff had reconstructed his house and had changed the position of his *parwalas* and *roshandans*. Defendants had thereafter built up their wall so as to block these *parwalas* and *roshandans*.

Held, that the plaintiff was entitled to the relief claimed. *Dharam Das v. Piyare Lal*, 98 P.W.R. 1918—45 Ind. Cas. 985.

CHEVIS, J.

References:—7 Bom. L.R. 73, F.; 26 B. 374; 4 Bom. L.R. 34, *Diss.*

(14) S. 32—*Drainage of water—Higher to lower land—Natural right—Scope of—Whether confined to surface overflow—Water brought down for irrigation—Whether right covers—Easement right—Infringement of—Form of decree to be passed.*

Sadasiva Aiyar, J.—The term "natural right" of drainage strictly so called covers only the right to allow rain-water falling on land of a naturally higher level to drain off by surface flow wherever and along whatever lines the water could find its way on the neighbouring land. The right to drain off water brought according to the custom and usages of the country along irrigation channels upon the land may also be said to be a natural right.

Phillips, J. (dissenting).—An owner of land can have no natural right to pass the water, which has come upon his land artificially to the adjoining land. Where the upper field is watered by irrigation sources, a right to pass such water away from the field cannot be a natural right but only a prescriptive or customary right.

Per Ouriam.—Under S. 22, Easements Act, the easement must be exercised in the way least onerous to the servient owner and must at his request be confined to a determinate part of the servient heritage.

Injunctions against such easements when broken should not descend to details but should be confined to a direction to the defendant not to obstruct its exercise.

Easements Act (1882)—(Continued).

The mandatory injunction granted by the lower Courts against the servient owner to restore the original level of his lands was set aside. *Doraiswamy Muttiriyar v. Muttachi*, (1918) M.W.N. 167—29 M.L.T. 210—44 Ind. Cas. 500.

SADASIVA AIYAR and PHILLIPS, JJ.

(15) S. 24—*Accessory easement—Easement of discharging rain-water from projecting eaves—Accessory easement of going over the servient tenement to repair the wall, not allowed.*

The plaintiff, who had acquired an easement of discharging rain-water upon defendant's land from projecting eaves, sued for an injunction restraining the defendant from building upon his land in such a way as to prevent the plaintiff from going upon it for all the purposes of repairing the wall which supported the eaves. The lower appellate Court granted the injunction on the ground that the repair of the wall was an accessory easement to the admitted easement of discharging water through the eaves. The defendant having appealed:

Held, dismissing the suit, that to grant any relief with regard to the wall was an illegitimate extension of the doctrine of accessory easement, for the wall was not an absolute necessity for the support of the eaves. *Himalal Maganlal Shah v. Bhikabhai Amritlal Shah*, 20 Bom. L.R. 403—42 B. 529—45 Ind. Cas. 422.

BEAMAN and HEATON, JJ.

(16) S. 24—*Right of way over private field—Right of public to pass over adjoining land of owner who obstructs public way. See RIGHT OF WAY, No. 2, 14 N.L.R. 75.*

(17) S. 28. See No. 5, *supra*.

(18) S. 47—*Cessation of easement by agreement no bar to its resumption—Estoppel—Transfer (=Intiqal) includes all kinds of transfer.*

Held, following the principles laid down in S. 47 of Act V of 1882, that an easement is not extinguished when the cessation is in pursuance of a contract between the dominant and servient owners.

In 1566, plaintiff's ancestor entered into an agreement with N, the then owner of the house of F, defendant, by which N admitted their right to discharge their water through two *parwalas* on to F's house, while the other side also agreed not to exercise it so long as N or his descendants remained owners of the house but to resume the enjoyment when the house was transferred to any other person. In 1916 the house of N was sold to F in execution of a decree against the descendants of N and F was informed of the existence of the said agreement before the sale.

Held, that the agreement was binding upon F and the plaintiffs were entitled to resume enjoyment of the suspended easement.

Held, further, that the word transfer (=Intiqal) was wide enough to include all

Easements Act (1882)—(Concluded).

alienations whether voluntary or involuntary.
Fateh Chand v. Paras Ram, 31 P.L.R. 1918
= 45 Ind. Cas. 618 = 56 P.W.R. 1918.

SHADI LAL, J.

Ecclesiastical Law.

Canon Law—Established Church—Meaning of—Roman Catholic Church—If an established Church—Voluntary association—Rules of—Different from those of the parent-body—Status of association—If altered—Spiritual and temporal powers—Distinction between—Whether recognised by the Canon Law—Parish Church adopting doctrines of Catholic Church—If can set up separate rules of discipline—Separate rules of discipline—How to be proved—Question of custom—Whether a question of law or fact.

The Church of England is an established Church and is therefore subject to the ordinary Courts of Law not only as to matters temporal but even as to matters of doctrine.

The Roman Catholic Church is not an established Church but a voluntary association and any member who joins that Church will be bound by any rules which it has framed for its internal discipline and for the management of its affairs (a).

If a branch voluntary association has adopted rules which differ materially from those of the parent-body, then the members of that association will not be members of the parent-body but will be an independent organisation with their own rules.

The Canon Law recognises no distinction between the spiritual and temporal powers of the papacy and the episcopate, and a member of any Church which is part and parcel of the universal Catholic Church would be bound by the Canon Law and the control of temporalities vested in the Bishop.

If a Church while adopting in the main the doctrines of the Roman Catholic Church has yet erected certain rules different from the rules of the Catholic Church in matters of discipline and management, those rules must be proved in the same way in which a custom would have to be proved in a Court of Law.

Questions of custom though they may in the end become questions of law are at the outset necessarily questions of fact.

Where an appointment as manager of a vicar in a Roman Catholic Parish Church by the Bishop was questioned on the ground that he was not appointed by the *junta* composed of the heads of houses in a village as was the custom and that the delegation of any authority by the Bishop was only permissive:

Held (i) that whether the Church be viewed as a branch of the Roman Catholic Church or as a voluntary association the appointment was valid;

(ii) that whether the custom was for the *junta* to appoint was one of fact on which the finding of the lower appellate Court cannot be

Ecclesiastical Law—(Concluded).

interfered with in second appeal. **Gaspari Louis v. Gonsalves**, 8 L.W. 208 = 35 M.L.J. 407 = (1918) M.W.N. 842 = 47 Ind. Cas. 941.

AYLING and COUTTS-TROTTER, JJ.

References:—(a) *Long v. The Bishop of Cape Town*, (1863) 1 Moo. P.O. (N.B.) 411; *Merriman v. Williams*, (1882) L.R. 7 A.O. 484, F.

Ejectment.

(1) Suit for—Proof of title—Burden of proof.

In a suit in ejectment, the plaintiff must prove good title, there is no onus on the defendant to prove title relatively good or bad at all.

Where the plaintiff, in an ejectment suit, fails to prove title, the fact that he was once in possession within twelve years of suit does not throw the onus of proving good title on the defendant. **Bapuji Narayan Chitla v. Bhagwant Balwant Chitla**, 20 Bom. L.R. 346 = 42 B. 357 = 45 Ind. Cas. 550.

BEAMAN and HEATON, JJ.

(2) Lease, forfeiture of—Rent, non-payment of, for two consecutive years—Waiver—Transfer of Property Act (IV of 1882), S. 111 (g)—Overt act—Institution of suit.

If rent is claimed for two consecutive years, ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year, because the very fact that rent is claimed for the second year, shows conclusively that the forfeiture, if any, incurred at the end of the first year, has been waived by the landlord.

Where the rights and obligations of the parties are regulated by S. 111 (g) of the Transfer of Property Act, there is no determination of a lease by forfeiture, immediately on breach of covenant, but the lessor is required to do some act thereafter showing his intention to determine the lease: in other words, the breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law.

Institution of a suit for ejectment is not regarded as a requisite act to show an intention of a landlord to determine the lease within the meaning of S. 111 (g) of the Transfer of Property Act. The forfeiture must be complete and the lease must be determined before the commencement of action for ejectment. The act, however, need not be a formal notice to quit, and may be a demand for possession, oral or written: what is essential is an overt act, which intimates to the tenant the intention of the landlord to determine the lease. **Nowrung Singh v. Janardan Kisor Lal Singh Deo**, 27 C. L.J. 277 = 22 C.W.N. 312.

MOOKERJEE and WALMSLEY, JJ.

References:—16 C.W.N. 104; 22 C.L.J. 546, R.; 9 A.L.J. 794, Appr.; 81 M. 408; 86 M. 445; 25 M.L.J. 486, Dist.

(3) Suit for—Notice to quit—Registered post—Service of notice, Proof of—Evidence requisite for.

Where a notice to quit was sent through registered post and the posting was duly proved

Ejectment—(Continued).

by producing in Court the registered envelope with an endorsement said to have been made by the postal peon certifying the refusal of the addressee to accept the same.

Held, that though the evidence adduced was not legally sufficient to prove the service of the notice, the plaintiff's suit for ejectment should not have been dismissed on the ground of the service of notice not having been proved, but that the plaintiff ought to have been given an opportunity of proving the service of notice on the defendant by producing other evidence. *Kalamun Khadim v. Amir Ali and Mahamad Sayad*, 46 Ind. Cas. 917.

FLETCHER and SHAMSUL HUDA, JJ.

(4) *Suit for—Determination of tenancy—Plea of title in third person—Landlord and tenant, Relationship of, Proof of.*

In a mixed suit partly for recovery of arrears of rent and partly for ejectment on determination of tenancy, the defendant denied the plaintiff's title and set up the plea of title in a third person:

Held, that the plaintiff cannot succeed unless and until he proves the existence of the relationship of landlord and tenant between the defendant and himself. *Kuber Nath Singh v. Gopal Narain Ram*, 46 Ind. Cas. 238.

MULLICK and THORNBILL, JJ.

(4-a) *Suit for, Maintainability of—Usufructuary mortgage—Mortgage satisfied—Mortgagee refusing to deliver possession—Mesne profits accruing from date of ejectment suit, Suit for, if lies.*

A mortgagee whose right to possession is unconditionally and automatically determined by the terms of the contract cannot claim to remain in possession thereafter in spite of demand by the mortgagor. The mortgagor can, in such a case, sue the mortgagee in ejectment.

In 1885 plaintiff's deceased father mortgaged certain *Khudkashi* land to the defendant. For the satisfaction of the balance due on the mortgage, he executed, in 1891, a lease for 14 years. In 1898 for a fresh advance he granted a further term of three years to come into force after the expiration of the previous lease. The lease expired in 1907-08 but the defendant having refused to deliver possession, the plaintiff brought a suit for its recovery in 1908 and the suit was decreed. It was conclusively decided in that suit that the documents of 1891 and 1898 were usufructuary mortgages and under the terms of the documents, there was to be no accounting between the parties and the amount to be advanced to be deemed to have been satisfied on the expiration of the lease. In a suit brought by the plaintiff to recover mesne profits accruing after the date of the previous suit.

Held, that the previous suit being in form one in ejectment and not one for redemption, the present suit for mesne profits was not barred. *Pasamsukh v. Vadaji*, 46 Ind. Cas. 743.

MITTRA, A.J.C.

Ejectment—(Continued).

(4-b) *Occupancy holding, Purchasers of, Failure of, to attorn to landlord—Ejectment, Suit for, by landlord—Bengal Tenancy Act (1885), S. 88—Suit, Filing of, by agent of lady, without authority, Allegation as to—Burden of proof in case of.*

There is nothing in S. 88 of the Bengal Tenancy Act (1885) to warrant the ejectment of the purchasers of an occupancy holding if they do not jointly and severally attorn to the landlord within a time to be fixed by the Court.

Where it is pleaded in defence that a suit for ejectment had been filed by the naib of a landlord, who is a lady, without her knowledge, the onus is on the defence to prove affirmatively that the plaintiff was ignorant of the suit. It was not enough to point to a few facts which give cause to suspect that it was the naib who instituted the suit and then to call upon the plaintiff to prove that she did authorise the institution of the suit. *Giribala Dasi v. Kudruttulla Paramanick*, 47 Ind. Cas. 575.

WALMSLEY and PANTON, JJ.

(5) *Presidency Small Cause Courts Act (XV of 1882), S. 41—Suit in ejectment 'Property whose annual value at rack-rent exceeds Rs. 1,000,' meaning of—Rental of portion of property in actual occupation of tenant less than Rs. 1,000—Jurisdiction of Small Cause Court to try suit—Question of title, when can be gone into by Small Cause Court.*

Where a suit was brought under S. 41 of the Presidency Small Cause Courts Act to eject a tenant in occupation of a portion of a house and the annual rental of the entire house exceeded Rs. 1,000 but the annual rental of the actual portion of the house in the occupation of the tenant was much less than Rs. 1,000.

Held that the suit had reference only to the portion of the house in the tenant's possession and that therefore the annual rental of that portion alone determined the jurisdiction of the Court under S. 41 and that the Small Cause Court had jurisdiction to give a decree for ejectment.

Where a Small Cause Court goes into a question of title to enable it to exercise its jurisdiction, its order cannot be set aside as being without jurisdiction. *In re Yekkatarama Chetty*, 7 L.W. 610.

KRISHNAN, J.

(6) *Landlord and tenant—Revenue suit for enhancement of rent of occupying tenant—Denial of occupancy and claim of proprietary status by tenants—Civil suit for ejectment—Admission by tenants of occupancy status before judgment—Liability of tenants to forfeiture.*

In a revenue suit by a landlord for enhancement of rent against his occupancy tenant, the latter denied his occupancy, and claimed a proprietary status. The Revenue Court referred the landlord to a civil suit and the landlord relying on the defendant's denial of occupancy status, sued for his ejectment on the ground of his being a trespasser. In the first Court the

Ejectment—(Continued).

tenant admitted before judgment that he had only an occupancy status. The first Court found that the tenant had only occupancy right and no proprietary status and gave the landlord a declaratory decree, but the appellate Court decreed the tenant's ejectment.

Held that the first Court's decree declaring the status of the parties was proper and that the tenant was not liable to forfeiture of his occupancy tenure in cases of this kind. **Fakir v. Wazir Khan**, 32 P.R. 1918=45 Ind. Cas. 105.

LE-ROSSIGNOL, J.

References:—24 Ind. Cas. 181, R.; 43 P.W.R. 1912; 35 P.R. 1885; 6 O. 55; 6 O. 436; 8 C.L. R. 150; 80 P.W.R. 1910; 34 C. 922; 2 O.W.N. 755; 2 C.W.N. 292; 34 M. 165, *Dist.*

(6-a) *Adverse possession, Effect of, on landlord's remedies—Ejectment, Suit for, after acquisition of adverse title by occupant, if lies.*

After the acquisition, by the occupant of land, of title thereto by adverse possession, the real owner of it loses the option, he had before such acquisition, of treating the occupant as a trespasser and suing him for possession and damages in the Civil Court or of treating him as a tenant and of suing him for fair occupation rent. Any proceedings the real owner might take, after such acquisition, in a Revenue Court to eject the occupant by notice, as if he were a tenant-at-will, would be without jurisdiction. **Shoo Gobind v. Ambika Prasad**, 47 Ind. Cas. 930.

KANHAIYA LAL, A.J.C.

Reference:—20 Ind. Cas. 580=16 O.C. 163, R.

(7) In Malabar redemption suits are by statute treated as ejectment suits—One decree in ejectment provided. See **MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS)**, No. 6, (1918) M.W. N. 551.

(7-a) *Decree for, Execution of—Judgment-debtor, Payment by, Necessity of—Under raiyat, Payment by, Validity of.* See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 39-a, 27 O.L.J. 478.

(8) Ejectment by notice is inadmissible where rent is deliberately favourable under provisions of Oudh Rent Act. See **OUDH ACT XXII OF 1886 (RENT)**, No. 3, 44 Ind. Cas. 644.

(9) Mortgage with mortgages in possession—Lease on monthly rent to mortgagor—Agreement to credit rent to interest due under mortgage-deed—Registration of mortgage-deed and rent-deed on same day—Suit for eviction of mortgagor and for arrears of rent—Transactions different—Relationship of landlord and tenant. See **APPEAL (SECOND APPEAL)**, No. 25, 161 P.W.R. 1918.

(10) Perpetual lease taken by one co-sharer from some of other co-sharers—Lease if binding

Ejectment—(Continued).

on remaining co-sharers—Proper decree in such cases, where remaining co-sharers sue to eject lessee. See **CO-SHARERS**, No. 6, 35 M.L.J. 402.

(11) *Plan of suit for—Numerous parties—Procedure—Frame of suit.* See **HINDU LAW (REVERSIONER)**, No. 5, 24 M.L.T. 429.

(12) *Forfeiture for non-payment of rent under express covenant—Ejectment suit—Inclusion in suit of claim for rent for period subsequent to default—Failure of ejectment suit on account of claim made for rent—Forfeiture waived by such claim.* See **LANDLORD AND TENANT**, No. 24, 42 Ind. Cas. 614.

(13) *Occupancy holding—Usufructuary mortgage of the holding—Landlord's consent not obtained—Death of tenant without heirs—Landlord's right to eject mortgagees.* See **LANDLORD AND TENANT**, No. 32, 44 Ind. Cas. 721.

(14) *Consent decree between landlord and tenant providing ejectment of tenant in case of his refusal to cultivate—Nature of the clause—Landlord's right to sue for arrears of rent.* See **LANDLORD AND TENANT**, No. 34, 44 Ind. Cas. 925.

(15) *Whether co-sharer landlord can eject a tenant—Partial ejectment of tenant, whether valid.* See **LANDLORD AND TENANT**, No. 39, 45 Ind. Cas. 496.

(16) *Burden of proof on landlord, Extent of.* See **LANDLORD AND TENANT**, No. 53, 7 L.W. 194.

(17) *Suit for, between landlord and tenant—Parties to suit.* See **LANDLORD AND TENANT**, No. 72, 3 Pat. L.J. 88.

(18) *Ejectment suit—Licensee not entitled to notice to quit.* See **LICENSEE**, No. 1, 45 Ind. Cas. 317.

(19) *Suit for, Decree for redemption, whether valid.* See **MORTGAGE (REDEMPTION)**, No. 9, 44 Ind. Cas. 921.

(20) *Suit for ejectment of licensee in possession—Necessity of notice to quit.* See **NOTICE TO QUIT**, No. 2, 27 O.L.J. 523.

(21) *Suit for, of under-ryyat—Notice to quit signed by one co-sharer landlord—Validity.* See **NOTICE TO QUIT**, No. 3, 23 O.W.N. 76.

(22) *Under-ryyat's interest if heritable—Form of decree in suit for ejectment against descendants of tenant holding under *Shayee Karsha Kabala* from person whose interest is described as *kayemi karsha jote*—Right of occupancy tenant to grant heritable under-ryyati interest—Raiyat holding at fixed rate of rent if may create permanent heritable interest in favour of his grantee an under raiyat.* See **OCCUPANCY TENURE**, No. 2, 27 O.L.J. 579.

(22-a) *Of trespasser—Revenue Court, jurisdiction of, re.* See **JURISDICTION (REVENUE COURTS)**, No. 4-a, 46 Ind. Cas. 549.

Ejectment—(Concluded).

(98) Landlord suing tenant in ejectment—Denial of landlord's title—Assertion of denial in plaint—Sufficient intention to determine lease—Forfeiture. See TRANSFER OF PROPERTY ACT, No. 92, 20 Rom. L.R. 29.

Ejectment Suit.

Splitting up of occupancy holding by several transferees of a holding—Landlord's right in regard to the holding as a whole. See LANDLORD AND TENANT, No. 26, 43 Ind. Cas. 377.

Elections.

- (1) *Municipal Election Roll—Expunging names of certain voters from such Roll—Disqualifications precluding names of such persons from being on Roll—Occupier under Calcutta Municipal Act, Connotation of—Notice of claim to be voter, contents of—Rates, Persons actually liable to pay, to Municipal Corporation, for eligibility as voters—Decision of Chairman refusing to expunge names of certain voters from Roll—Jurisdiction of High Court to interfere with decision under S. 45, Specific Relief Act—Calcutta Municipal Act (III of 1899), S. 3 (30), 37, 47, Sch. IV, rr. 3, 8 (1).*

A voter of a particular ward and the sitting Commissioner for another ward, who also intended to become a candidate for election as a Commissioner for the latter ward, obtained a rule to show cause why the names of certain persons should not be expunged from the Municipal Election Roll for the ward for which he was a candidate. It was contended that the decision of the Chairman of the Corporation refusing, after considering the objectors' objection, to expunge the said names was final and that the High Court had no jurisdiction to deal with the matter and that the objector did not come within the provisions of S. 45, Specific Relief Act. *Held* that, as there was no provision in the Municipal Act expressly making the decision of the Chairman final and as the Municipal Act itself gives to a person in the position of the objecting candidate a right to object, before the Chairman or his Deputy, to votes that are put upon the Election Roll, the High Court had jurisdiction to interfere in the matter and the applicant fell within S. 45 (a) of the Specific Relief Act (a).

Held, also, that to entitle a person to an occupier's vote in respect of the premises occupied by him, for which premises he is entitled to an owner's vote, such person must either pay rent to the owner or be liable to pay rent, and only then could his name be on the Municipal Election Roll as an occupier.

Held, further, that where voters have to give written notice of their claim to the Chairman of the Corporation under the provision of r. 8 (1) of Sch. IV prior to a certain date and have given it, the fact that they have so given the notice would be sufficient whether they signed the notice or not, it being upon the person objecting to their votes to prove that they have not complied with the provisions of the Act or the rules.

Elections—(Continued).

Held, again, that the only persons to whom r. 8 of Sch. IV applies are persons, who are actually liable for the rates in respect of the six months for which they are alleged not to have paid them.

Held, also, that the mere fact that persons occupy flats or, portions of a house sub-divided into and used as flats, which are not separately numbered as such and are not separately assessed as such in the records of the Corporation, would not make them associations of individuals within the meaning of S. 37 of the Calcutta Municipal Act.

Held, further, that the word "occupier," used in both the sub-cls. 2 (i) (a) and (2) (i) (c) of S. 37 of the Calcutta Municipal Act, means an occupier in the ordinary sense and not as defined in S. 3 (30) of the same Act, and that the only person who falls within sub-S. (2) (i) (c) of S. 37 is a person who occupies a building separately numbered and valued for assessment. *Ip re* Surendra Chandra Ghose, 45 C. 950.

GREAVES, J.

References:—39 C. 754; 16 C.W.N. 472, F.

- (2) *Calcutta Municipal Act (III B. C. of 1899), Sch. V, r. 2—Requisites of valid nomination paper—Candidate, description of—Description in the letter, whether sufficient—Proposer, seconder and approver—Proposer or seconder whether can be an approver—Approver being a firm name, Effect of.*

The appellant, a candidate of Municipal election, sent in his nomination papers consisting of a letter signed by himself addressed to the Chairman of the Corporation of Calcutta and three forms of a nomination paper all stitched together. The first form contained the name and address of the candidate and also the statement that he was Voter No. 1553 of Ward No. 6. It also contained the signatures with names and addresses of the proposer, seconder and of 18 approvers, the seconder being one of the approvers and the approver No. 15 being the name of a firm. The other two forms did not contain the name either of the candidate, the proposer or seconder, but contained the signatures of some approvers:

Held—That the nomination paper was invalid in law inasmuch as it did not contain the description of the candidate.

Sch. V, r. 2 of the Calcutta Municipal Act contemplates that a nomination paper should be self-contained and complete in itself and so the letter could not be taken as part of the nomination paper:

Held also—That the 2nd and 3rd forms could not be taken as part of the nomination paper inasmuch as they did not contain the name of the candidate.

Held further—That the nomination paper was bad in law inasmuch as it did not contain the signatures of 18 approvers in addition to those of the proposer and seconder.

It is clear from Sch. V, r. 2, that if a person signs a nomination paper of a candidate, either as a proposer or seconder, he cannot also sign it as an approver.

Elections—(Continued).

Signature of approver No. 15 not being that of an individual was bad in law and should be rejected.

Per *Woodroffe, J.*—Alternative nomination papers may be sent to the Chairman, so that if one is held, either in whole or in part, to be invalid, the other may be used. In such case, however, each nomination paper should be complete in itself.

A candidate may also send in a nomination paper with names of more than 19 voters as mentioned in the rule, in order to meet the case of possible objections to any of the voters whose names appear upon the paper. In such a case more than one nomination paper may be used, but the papers must be connected (otherwise than as here by mere pinning together). That connection is effected by placing on each paper the name, description and address of the candidate as appearing on the first paper. *Narendra Nath Mitter v. Radha Churn Pal*, 22 C.W.N. 943—28 C.L.J. 289.

SANDERSON, C.J. and WOODROFFE, J.

- (3) *Calcutta Municipal Act* (III B.C. of 1899), S. 56, Sch. V, r. 2—*Specific Relief Act* (I of 1877), Ss. 45, 50—*Public Officer, failure of, to exercise a discretion—Nomination paper—Description of the candidate—Rai Bahadur, if sufficient description—Delay in presenting the petition, effect of—Infructuous order, whether ought to be passed*

The appellant sent in his nomination paper on the 14th March 1918, in which he was described as Rai Bahadur and it was also stated that he was voter No. 679. On the 16th March a list of nominated candidates was published. On the 18th March judgment was delivered by the appeal Court in the election case of Narendra Nath Mitter. On the afternoon of the same day the applicant (respondent in this case) applied to the Chairman of the Corporation to reject the nomination paper of the appellant on the ground that the nomination paper did not contain the description of the appellant. The Chairman declined to entertain the application on the ground that it was too late. On the morning of the 19th March a petition was presented by the applicant before Chaudhuri, J., and a rule was issued on the appellant returnable at 4 p.m. on the same day to show cause why his name should not be expunged from the list of nominated candidates and the rule was made absolute. In pursuance of this the appellant's name was taken out of the list. On the 20th which was the day fixed for the election, the respondent being the only nominated candidate was elected Commissioner. This appeal was filed on the 20th March and came on for hearing on the 21st after the election had taken place :

Held—That an order overruling the decision of Chaudhuri, J., would be infructuous ; for the appellant's name had been expunged from the list of nominated candidates, the election had taken without the inclusion of the appellant's name in the list of candidates and the appeal

Elections—(Concluded).

Court had in this appeal no power to set that right, and so the appeal must be dismissed.

The Court's order ought to have been limited to a direction to the Chairman of the Corporation to exercise his jurisdiction and to hear and to determine the application which had been made to him and which he had refused to entertain on the ground that it was too late.

The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case or of the principle involved in it, of delay on the part of the applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for, or against, the Court's intervention, due weight is to be given to them, regard being always had to the principles already enumerated (a). *Rai Bahadur Mani Lal Nahar v. Mowdad Rahaman*, 22 C.W.N. 951.

SANDERSON, C.J. and WOODROFFE, J.

References:—(a) 7 B. 341, F.; 22 C.W.N. 943, *Dist.*

- (4) Rice, Contract for sale of, milled by seven firms—Provision for breakdown in mill—Delivery of rice milled by a different firm—Acceptance of same by purchaser—Breakdown of that mill, if seller absolved from liability—Construction of contract—Breach of contract, if failure amounts to. See *CONTRACT*, No. 7, 47 Ind. Cas. 541.

- (5) Grounds for avoiding election of Municipality—Provision against corrupt practices—S. 56, *Calcutta Municipal Act*. See *CORRUPT PRACTICES*, 22 C.W.N. 678.

- (6) Usufructuary mortgage—Mortgagor in possession for stipulated rent—Provision in case of default for recovery of possession by mortgagee and for interest—Decree according to stipulation obtained by mortgagee on default—Non-satisfaction of decree for rent but possession taken—Mortgagee's right to demand payment of amount of decree for rent together with interest before redemption—Merger in decree of amount claimed—Right to amount if decree barred—Election of remedies. See *MORTGAGE (REDEMPTION)*, No. 16, 35 M.L.J. 414.

Electricity Act.

See *ACT IX OF 1910*.

Employer and Employee.

Injury to person using Municipal road under repair owing to negligence in keeping it—Municipality how far exempt from liability by reason of employing independent contractor to do repair. See *TORT*, No. 1, 41 M. 538.

Encroachment.

- (1) By tenant on neighbouring land of stranger—Presumption of acquisition for landlord's benefit—Presumption rebuttable. See *LANDLORD AND TENANT*, No. 60, (1918) M.W.N. 38.

Encroachment—(Concluded).

(2) Building erected on village bhamilat—Right of some of proprietary body to sue for its removal without proof of special damage. See PUBLIC NUISANCE, No. 1, 176 P.W.R. 1918.

(3) Chajjas, Construction of, projecting over neighbouring plot of land—Right of owner of such plot to have them removed. See TRESPASS, 47 Ind. Cas. 950.

Endowment.

Deed of endowment by pardanashin lady—Test of validity. See WILL, No. 8, 44 Ind. Cas. 645.

Enfranchisement.

Of service inam—Inam lands, if vest in joint family only or also in divided branches of original grantees. See SERVICE INAMS, No. 1, (1918) M.W.N. 849.

English Law.

Purchase of property by husband in name of wife—Advancement, Presumption as to—English Law, Applicability of, to India. See ADVANCEMENT, 47 Ind. Cas. 376.

Enhancement of Rent.

(1) *Enhancement—Occupancy raiyat—Bengal Tenancy Act (VIII of 1885), S. 29—Holding, area of, change of.*

The area of the holding was described in the *dakhilas* given to the tenant and in the papers kept by the landlord as 7½ bighas and in 1809 (1902-3) there was a fresh survey made by the landlord when the area was found to be 9½ bighas. In 1811 (1904-5) the tenant agreed to pay him rent at the rate of Rs. 16-14 as. per annum for the holding as found by measurement in 1809. Before 1809 the rent was at the rate of about Rs. 1-6½ as. per bigha but in 1811 the rent according to the agreement was at the rate of Rs. 1-12½ as. per bigha. In a suit by the landlord for recovery of rent at the rate of Rs. 16-14 as. per annum for three years: Held, the agreement was made in violation of S. 29 of the Bengal Tenancy Act (a). *Sonaulla Sardar v. Bhagabati Debye Chowduran*, 28 C.L.J. 142.

WALMSLEY and PANTON, JJ.

Reference:—(a) 22 C.L.J. 88, Dist.

(2) *Suit for—Tenant shown to have asserted right to hold at unalterable rent more than 12 years before suit—Title by adverse possession if arises—Change of case on appeal, if should be allowed.*

Where the rent of a tenancy is enhancable, an assertion by the tenant, that his rent cannot be enhanced, not followed within 12 years by a suit for enhancement, does not confer on the tenant a right to hold the land at a permanent rent.

In this case, it was held that the lower appellate Court had erred in accepting and

Enhancement of Rent—(Concluded).

acting upon a case made in that Court, but not in the trial Court. *Maharaja Birendra Kishore Manikya Bahadur v. Muzahi Mahamed Doulat Khan*, 22 C.W.N. 866-48 Ind. Cas. 59.

SANDERSON, C.J. and TEUNON, J.

References:—22 C.L.J. 151, 153, 140; 16 C.W.N. 929, Dist.; 21 B. 394; 27 B. 515, R.

(3) Presumption arising from payment of uniform rent when rebutted. See BEN. ACT VIII OF 1885 (TENANCY), No. 25, 22 C.W.N. 321.

(4) Presumption arising from payment of uniform rent when rebutted. See BEN. ACT VIII OF 1885 (TENANCY), No. 26, 22 C.W.N. 322.

(5) Suit for—Bengal Tenancy Act (1885), S. 30, Under—Presumption in, under S. 30—Payment of rent at uniform rate for 20 years—Proof as to—Rent receipts, Value of, when Zamindars papers, such as *chitta*, evidence that fact. See BEN. ACT VIII OF 1885 (TENANCY), No. 12-a, 22 C.W.N. 999.

(6) Invalid contract for enhancement of rent—Whether S. 37, Bengal Tenancy Act, is a bar to a suit for enhancement of rent. See BEN. ACT VIII OF 1885 (TENANCY), No. 14, 44 Ind. Cas. 499.

(7) Usage to pay enhanced rent—Contract to pay enhanced rent, presumption as to. See MAD. ACT I OF 1908 (ESTATES LAND), No. 3, 7 L.W. 477.

(8) Suit for enhancement of rent—Possession by tenant of land in excess of formerly understood area—Burden of proof on landlord. See BURDEN OF PROOF, No. 2, 22 C.W.N. 826.

(9) Alienes of rights in soil—Kadim Inamdar—Right of such Inamdar to enhance rents of permanent tenants. See LANDLORD AND TENANT, No. 4, 20 Bom L.R. 16.

Enlargement of Time.

(1) *Revision—Decree fixing a date for payment of money—Suit to be dismissed if money not paid on date fixed—Part of decree—Court has no jurisdiction to extend the time so fixed.*

Where a decree embodies certain conditions and provides that a suit shall stand dismissed, if those conditions are not complied with, e.g., where the date is fixed in the decree for paying in money and, in the event of non-compliance, it is provided that the suit shall be dismissed, the Court has no jurisdiction to interfere with the decree by altering any of the conditions, namely, by extending the time.

There is no distinction in this respect between a decree for pre-emption and any other decree. The only exception is that of a mortgage-decree in which time may be extended by virtue of the provisions of O. XXXIV of the Code of

Enlargement of Time—(Concluded).

Civil Procedure. *Sajjadi Begam v. Dilawar Husain*, 16 A.L.J. 635=40 A. 579=47 Ind. Cas. 4.

RICHARDS, C. J. and BANERJI, J.

Reference :—15 A.L.J. 511, R.

(2) Extension of time fixed for payment—Decree becoming final—Power of Court to alter terms of decree. See *PRE-EMPTION*, No. 11, 16 A.L.J. 892.

Equity of Redemption.

(1) Mortgagee when can purchase equity of redemption—Mortgagee if holds equity of redemption as trustee for mortgagor. See *MORTGAGE (REDEMPTION)*, No. 5, 27 C.L.J. 481.

(2) Purchaser of portion of—Mortgaged property, Sale of, If can object to. See *MORTGAGE (SALE)*, No. 5-a, 47 Ind. Cas. 374.

Error of Law.

Legal inferences drawn from proved facts when an. See *APPEAL (SECOND APPEAL)*, No. 6-b, 48 Ind. Cas. 49.

Escheat.

Escheat to the Crown—Right of Zamindar—Residents in houses on the abadi in village Sakitra—Rights of such residents—Death without legal heirs.

Two persons, D and M, Sahukars by profession, were owners and occupiers of a house situated within the limits of a village, known as mauza Sakitra, and also within the limits of the town of Gobardhan. D and M died in that house without leaving any heirs. The Collector of Muttra, representing the Secretary of State for India, took possession of the house and its site as the ultimate heirs to the property of a deceased person. The plaintiff, the Bharatpur State, claimed the site as Zamindar and asserted that D and M were owners of only the materials of the house with a right of residence therein, but had no right to transfer the site or the right of residence. The defendant, on the other hand, contended that the house being situated in a town, the owners of it were also owners of the site and consequently the house escheated to him. The plaintiff's case rested on two sets of documents, namely, the settlement papers prepared in 1850 A.D., and the *wajib-ul-ars* of 1877 A.D. The *wajib-ul-ars* provided that residents in houses of mauza Sakitra, though their houses might form part of the town of Gobardhan, had no proprietary rights in anything except the materials thereof, and they could not sell the site or the right of residence on the site; and that, in the event of the death of the occupier of such a house without legal heirs, the proprietor of mauza Sakitra would be entitled to possession of the house along with the site. Under the documents of 1850 A.D., the Government conferred on the Bharatpur State revenue free proprietary rights

Escheat—(Concluded).

over the soil of the five biswa mahal of mauza Sakitra:—*Held*, upon the facts and the evidence in the case, that D and M were limited owners of the house and that the effect of the settlement of 1850 A.D., was to grant to the Bharatpur State proprietary rights in the *abadi* of mauza Sakitra, and that, therefore, the Bharatpur State was entitled to the house and the site of the house. *Bharatpur State v. Secretary of State*, 16 A.L.J. 653=47 Ind. Cas. 823.

FIGGOTT and WALSH, JJ.

Reference :—39 A. 111, *Appl.*

Estates Land, Madras.

See *MAD. ACT I OF 1908*.

Estates Partition.

See *BEN. ACT V OF 1897*.

Estoppel.

(1) *Evidence Act (I of 1872)*, S. 115—*Estoppel by representation or action causing another to change his position—Conveyance by person entitled by estoppel—Gives transferee good title against those bound by the estoppel.*

The doctrine of estoppel is based upon the change of position brought about by the representations or actions of the person bound by the estoppel.

Estoppel applies not only in favour of the person induced to change his or her position, but also of a transferee from such person, and it binds not only the person whose representations or actions have created it, but all claiming under him by gratuitous title.

The estates of B, a Raja, were taken under Government management under the Enumerated Estates Act. The Manager appointed, who had power of sale under the Act, put up a village to sale. B bought it *benami* in the name of K, but the manager never executed any conveyance to K. Thereafter the management was removed and B restored to his estates. K having died, B procured K's heir, L, to convey the village to B's illegitimate daughter R. After B's death, R conveyed to S, who sued B's heir, J, for possession. *Held* that J was estopped from denying S's title. *Jagannath Prasad Singh v. Syed Abdullah*, 16 A.L.J. 576=28 C.L.J. 192=35 M.L.J. 46=(1918) M. W.N. 406=24 M.L.T. 62=45 C. 909=8 L.W. 169=20 Bom.L.R. 861=22 C.W.N. 891=5 Pat. L.W. 83 (P.C.).

VISCOUNT HALDANE, LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE and MR. AMEER ALI.

Reference :—(1892) 19 I.A. 208=20 C. 296, R.

(2) *Mortgage—Registration—Property not in existence, Inclusion of—Evidence Act (I of 1872)*, S. 115—*Estoppel, if could be invoked to defeat provisions of Registration Act—Fraud on the Registration Law—*

Estoppel—(Continued).

Onus to prove the existence of property mentioned in mortgage-deed.

The predecessors of defendants-respondents executed a mortgage in favour of the plaintiffs-appellants on 15th April 1902. The mortgaged properties included a plot of rent free land in the District of Burdwan, about 1 bigha in area, and butted and bounded as described in the mortgage-deed. The said deed of mortgage was registered at Burdwan. One of the defendants contended that the mortgagors never possessed the said plot of land nor did such a plot of land ever exist, that it was a fictitious plot mentioned in the said deed of mortgage in fraud of the law of registration and that the registration was thus invalid and so the plaintiff could not get any relief in respect of the same.

Held, that the onus lay on the defendants to disprove the existence of the plot of land in 1902.

Held, further, that the defendants failed to discharge the onus and therefore the suit should be decreed with costs.

There can be no doubt about the general rule that the principle of estoppel cannot be invoked to defeat the plain provisions of a statute (a).

Quard—Whether the plaintiffs in the present case were invoking an estoppel to defeat the provisions of the Registration Act? *Sudhir Chandra Sett v. Syed Abdulla-ul Musavi*, 22 C.W.N. 894.

SANDERSON, C.J. and WOODROFFE, J.

References:—(a) 29 C. 654; 31 C. 146; 18 C. W.N. 817 (P.G.), *Dist.*

(3) *Constructive notice of party pleading—Effect of.*

There cannot be any case of estoppel, when the person pleading the estoppel was put on notice and he could have by reasonable diligence discovered what the true facts of the case were. *Sarada Prosad Roy v. Ananda Moy Datta*, 46 Ind. Cas. 228.

FLETCHER and SHAMSUL HUDA, JJ.

(4) *Burden of proof in plea of—Execution sale of tenure—Sale proclamation, mis-statement of rent in—Rent, Recovery of, at a higher rate, if precluded—Evidence Act, 1872, S. 115.*

The onus of proving estoppel really falls upon the person setting up the estoppel.

Defendant purchased property at a sale in execution of a rent decree obtained by the plaintiff against a former tenant. In the sale proclamation for the form of which the plaintiff was responsible, the rent was stated to be Rs. 28 per annum whereas the rent had been enhanced at the date of sale to Rs. 67. In a suit brought by the plaintiff against the defendant for arrears of rent at the rate of Rs. 67 it was contended that the plaintiff was precluded from suing for a larger rent, as the property was sold as being held at a rent of only Rs. 28:

Held, that the question whether the plaintiff was precluded or not, depended on the circumstance, whether the defendant was misled into

Estoppel—(Continued).

thinking by reason of the proclamation of sale that the property sold to him bore a rent of Rs. 28 instead of a rent of Rs. 67. *Birendra Kishore Manikra v. Balkuntha Chandra Deb*, 46 Ind. Cas. 474.

FLETCHER and SMITHER, JJ.

(4-a) *Mortgage-decree—Execution sale of mortgaged property, Balance still due after the, Recovery of, Application for—Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 6, Under—Objection to, by mortgagor—Points not adjudicated in mortgage-suit, Mortgagor if estopped from raising in.*

The sale-proceeds of the mortgaged property in execution of a mortgage-decree, which, however, made no mention of the plaintiff's right to proceed under O. XXXIV, r. 6 of the Civ. Pro. Code, not being sufficient to satisfy the decree, the plaintiff applied under O. XXXIV, r. 6, to proceed against the other properties of the defendant. The defendant objected to this application on the ground that part of the amount covered by the decree was barred at the time of the institution of the suit:

Held, that there could be no estoppel against the mortgagors either legal or equitable, which would prevent them from raising this objection and asking for an adjudication upon a point which was not adjudicated upon in the suit. *Boukal Sahu v. Mosahab Ali*, 46 Ind. Cas. 892.

MULLICK and THORNHILL, JJ.

(5) *Civ. Pro. Code, S. 335—Order disallowing obstruction not given effect to—Auction-purchaser's suit for possession.*

When the Civ. Pro. Code, 1882, was in force, an auction-purchaser applied for possession of the properties sold but was obstructed by the persons in possession. The Munsif passed an order for possession overriding the objection. No attempt was made by the auction-purchaser to obtain possession and the objectors remained in possession. In a subsequent suit by the auction-purchaser against the persons in possession brought after three years:

Held, that the defendants were not estopped under S. 335 of the Civ. Pro. Code, 1882, from setting up their title to the property, even though, if possession had been given under the order of the District Munsif in the previous suit, they would have been bound by it, if they did not bring a suit within one year (a). *Yamajala Sanjavedu v. Nakka Venkadu*, 23 M.L.T. 283 = 45 Ind. Cas. 24.

SESHAGIRI AYYAR and NAPIER, JJ.

References:—(a) 7 W.R. 87; 30 M.L.J. 404 (411), *F.*; 10 M. 357; 9 M.L.J. 131, *D.*

(6) *Evidence Act (I of 1872), S. 92—Presumption suit by third party—Evidence to show real nature of transaction, Admissibility of—Estoppel.*

S. 92, Evidence Act, is confined to proceedings between the parties to the deed or their representatives in interest and has no application to claims by or against third persons (a).

Estoppel—(Continued).

Parties to a transaction, which is not really an out and out sale, are not estopped in a suit for pre-emption brought by a third party from showing the real nature of the transaction, even when the document evidencing the transfer stands in the form of a sale-deed (b). *Bishunath Singh v. Baldeo Singh*, 21 O.O. 165=47 Ind. Cas. 191.

KANHAIYA LAL and DANIELS, J.Cs.

References:—(a) 45 C. 320 (P.C.), *F.* (b) 11 O.O. 176; 20 O.O. 249, *R.*

(6-a) *Representation, Fraudulent intention if necessary to establish—Execution of decree, Compromise by judgment debtor in, if can be repudiated afterwards.*

It is not necessary, according to the law as at present accepted that there should be any fraudulent intention established in connection with the representation, which is the subject of the estoppel.

A compromise entered into by a judgment-debtor in execution proceedings against him cannot subsequently be repudiated. *Balbir Prasad v. Jugul Kishore*, 3 Pat. L.J. 454=46 Ind. Cas. 473.

MULLICK and THORNHILL, JJ.

References:—2 A. 809, *Not F.*; 31 C. 822, *F.*

(6-b) *Fraud—Suit to set aside decree—Undivided tenancy—Surrender—Death of one tenant—Surrender by survivor of deceased's rights to landlords—Collaterals of deceased, right of—Suit by surviving tenant for possession, whether maintainable.*

Plaintiff and one S were tenants of an undivided tenancy. Mutation of S's share having, on the death of S, been effected in favour of the landlord, plaintiff contested it and on appeal put in a compromise whereby she gave up her claim to the share of S. The collaterals of S then brought a suit against the landlords for the share of S joining the plaintiff as a *pro forma* defendant on the ground that she had surrendered all claim to the landlords. This suit also ended in 1912 in a compromise between the collaterals and the landlords, whereby the latter recognised the right of the former to succeed to S. In 1916 plaintiff brought the present suit against the collaterals and the landlords to recover the share of S, alleging that she had no notice of the earlier litigation, in which the decree had been obtained by fraud:

Held, (1) that although plaintiff was not served personally in the earlier litigation, she might have been aware of it and its result, inasmuch as the collaterals had taken possession of the share of S;

(2) that plaintiff had not specified any fraud in the plaint and no fraud had been proved;

(3) that inasmuch as the plaintiff did not challenge her compromise with the landlords and had surrendered to them whatever right she had, she was not now competent to claim

Estoppel—(Continued).

the property from the collaterals of S. *Flann v. Mast. Shihbo*, 184 P.L.R. 1917=6 P.W.R. 1918=48 Ind. Cas. 189.

LE-ROSSIGNOL, J.

(7) *Claim in Civil Court for possession of land as owner after failing to establish occupancy rights in Revenue Court—S. 115 of Act I of 1872—Res judicata.*

A part of *shamilat* land fell to the share of B, who caused a notice of ejectment to be served on H, who was in occupation of the land. H unsuccessfully contested in the Revenue Courts the notice on the ground that he was an occupancy tenant; consequently he was ejected therefrom: *Held*, that, in the Civil suit subsequently brought by H for recovery of possession of the land, he is not estopped from establishing that he is its owner by adverse possession or otherwise.

Held, also, that three things are generally necessary for bringing a case within the scope of S. 115 of Act I of 1872.

(i) There must have been a representation which amounts to an intention of causing or permitting to believe in another.

(ii) There must have been belief on the part of that other.

(iii) There must have been an action arising out of that belief. *Har Lal v. Basant Singh*, 75 P.L.R. 1918=75 P.W.R. 1918=47 Ind. Cas. 98.

SCOTT-SMITH, J.

References:—155 P.W.R. 1912=186 P.L.R. 1912=16 Ind. Cas. 886; 36 B. 500=14 Bom. L.R. 390=15 Ind. Cas. 830, *Dist.*; 77 P.W.R. 1918=45 P.R. 1918=61 P.L.R. 1918, *R.*

(8) *Benamidar allowed to pass as ostensible owner and to alienate property—Real owner, whether can deny title of benamidar—S. 115, Evidence Act.*

In a suit for recovery of a mortgage-debt, it appeared that the house in question was mortgaged to the plaintiff's father by P, the owner, in 1906. In 1909, P sold it to respondent L, wife of O. A portion of the mortgage money due to P was paid off and in security for the balance, L executed a mortgage-deed in favour of plaintiff's father. Plaintiff's claim to realize the mortgage-debt as a charge on the house was opposed by A, a third party, who in 1912 had obtained a decree against O, followed by another decree which declared that the mortgaged house was the property of O, and that L was merely the benamidar.

Held, (1) that inasmuch as O allowed L to pose as the ostensible owner of the property and attested the mortgage by L in favour of the plaintiff O, was estopped from denying as against a *bona fide* encumbrancer for value that respondent L was not competent to deal with the property;

(2) that A, who claimed through O, as his creditor, had no superior rights against the plaintiff to that of O, and the plaintiff's claim

Estoppel—(Continued).

must, therefore, prevail against A's debt
Sant Singh v. Lachhmi, 126 P.W.R. 1918=45
Ind. Cas. 102.

LE ROSSIGNOL and WILBERFORCE, JJ.

(9) *Both parties estopped, effect of—Court, duty of, to decide case on merits.*

Held that, in the case of one estoppel against another, the parties are set free and the Court has to see what their original rights are.

S, deriving title by sale from D, sold certain land to J. B subsequently sold the same land to L. Before the sale to S, B had mortgaged the land and in 1905 he sued S, and his co-mortgagees for redemption. On the same day L sued S, B and one R for redemption for another mortgage executed by B, in favour of R. Both these suits were compromised:—B withdrawing and acknowledging S as full owner, and L agreeing to get possession in the second suit on payment of Rs. 550 to S. J now brought the present suit to recover the land from L:

Held, that though S was estopped by the compromise decrees from denying L's right to redeem, L himself was estopped by the decrees in B's suit from denying that S was full owner and that, therefore, the plaintiff was entitled to recover the land in suit. **Jiwan Lal v. Behari Lal**, 152 P.W.R. 1918=45 Ind. Cas. 68.

SCOTT-SMITH, J.

(9-a) *Privy also benefits notwithstanding subsequent contrary arrangement between representor and the person to whom representation is made—Evidence Act, S. 115.*

Estoppel holds good not only for the benefit of the person to whom a representation is made but also for the benefit of his privy, who can take advantage of it notwithstanding any subsequent contrary arrangement between the representor and the person to whom he made the representation after. **Shri Pandit Badri Bihari v. Baijnath**, 47 Ind. Cas. 934.

LINDSAY, J.O. and KANHAIYA LAL, A.J.O.

(9-b) *Against defendants—To be supported by production of pleadings in previous suit.*

Actual production of written statement, and not a mere copy of judgment containing summary of defendant's pleadings, in a previous suit is required to support estoppel set up against defendants raising a certain plea on the ground of those pleadings. **Annada Prasaana Lahiri v. Badulla Mandal**, 47 Ind. Cas. 985.

WALMSLEY and PANTON, JJ.

(10) *Pleadings respecting.* See **BEN. ACT VIII OF 1895 (TENANCY)**, No. 17, 42 O.W.N. 179.

(11) *Reversioner voluntarily signing deed of mortgage executed by Hindu female—Property held by female as daughter—Reversioner's right to question deed and claim in opposition thereto.* See **APPEAL (GENERAL)**, No. 9, 28 C.L.J. 123.

Estoppel—(Continued).

(11-a) *Attachment, Consent to, if operates as, of objection to sale.* See **ATTACHMENT**, No. 1, 47 Ind. Cas. 29.

(12) *Execution sale of agriculturist's house—No objection raised to sale on ground of exemption of house from liability to sale—Resistance to suit for possession by auction-purchaser on such ground—Sale conclusive—Defendant estopped.* See **AUCTION-PURCHASER**, No. 2, 16 A.L.J. 691.

(13) *Pleas and proofs to be adduced by transferee relying on.* See **BENAMI TRANSACTIONS**, No. 6, 46 P.R. 1918.

(14) *Real owner of property allowing another to appear as owner—Purchase by third person for value from such ostensible owner—When real owner estopped from asserting his title—Circumstances negating acquiescence of real owner—Notice.* See **BENAMI TRANSACTIONS**, No. 7, 73 P.R. 1918.

(15) *Title by estoppel—Whether valid.* See **CIV. PRO. CODE (1908)**, No. 855, 44 Ind. Cas. 978.

(15-a) *Cannot be created by ambiguous act nor from ambiguous document—Deposit of title-deeds with Chetty or Banker, Effect of, if pledge or custody.* See **DEPOSIT OF TITLE-DEEDS**, 46 Ind. Cas. 609.

(16) *Law of, whether applicable to transfer of gaontia tenures.* See **GAONTIA TENURE**, 3 Pat. L.J. 229.

(17) *Acts and representations by reversioner prior to reversion falling in—Inducement to widow to alter position to her own detriment—Reversioner if estopped.* See **HINDU LAW (REVERSIONERS)**, No. 1, 8 L.W. 212.

(17 a) *Against reversioner on account of reversioner's deed of relinquishment in favour of widow.* See **HINDU LAW (REVERSIONERS)**, 47 Ind. Cas. 978.

(18) *Facts necessary to establish—Representation by plaintiff and defendant changing his position.* See **MAHOMEDAN LAW (GIFT)**, No. 3, 43 Ind. Cas. 867.

(19) *Acceptance of fresh kanom deed by assignee of kanom mortgages—Assignee not inducted into possession by mortgagor—Assignee if estopped from denying mortgagor's title.* See **MALABAR LAW**, No. 11, 24 M.L.T. 472.

(20) *Duty of a joint mortgagee to inform his joint co-mortgagee as to any claim which he may have in respect of the mortgage property prior to their joint mortgage—Failure to inform as to his claim—Estoppel.* See **MORTGAGE GENERAL**, No. 5, 44 Ind. Cas. 547.

(21) *Suit by mortgagee for interest—Objection by mortgagor in execution proceedings to sale invoking aid of O. XXXIV, r. 14 (1), Civ. Pro. Code—Subsequent suit by mortgagee for principal and interest—Mortgagor if estopped from pleading O. II, r. 2, Civ. Pro. Code, against suit by previous reliance on Civ. Pro. Code, O. XXXIV, r. 14 (1).* See **MORTGAGE (GENERAL)**, No. 18, 38 P.R. 1918.

Estoppel—(Concluded).

(22) Admission of compromise before Court—Suit withdrawn—Estoppel. See REGISTRATION, No. 1, 45 Ind. Cas. 331.

(23-a) Finding in prior suit between co-defendants on question raised *inter se*—Decree in spite of finding—No *res judicata* or estoppel—Evidence Act, S. 115. See RES JUDICATA, No. 23-a, 33 M.L.J. 740.

(23) Dispute over public pathway—Previous suit dismissed for want of special damage—Subsequent suit in representative capacity—Estoppel by previous judgment. See RES JUDICATA, No. 30, (1918) M.W.N. 175.

(24) Suit for possession of land—Agreement by plaintiff in previous suit to give up land—Relinquishment—Second suit, if *res judicata*, or if plaintiff estopped from bringing. See RES JUDICATA, No. 43, 121 P.W.R. 1918.

(25) Mere silence of real owner of property if amounts to consent to continuance of trespass thereon. See TRANSFER OF PROPERTY ACT, 47 Ind. Cas. 688.

Munich.

Heirs of — Succession, custom of. See SUCCESSION, 46 Ind. Cas. 77.

Evidence.

(1) *Admissibility in evidence—Entry in draft record of rights—Admission—Persons jointly interested in the subject-matter of suit—Identity in legal interest—Co-party in litigation—Evidence Act (I of 1873), Ss. 18, 32 (3)—Objection as to admissibility of document in evidence, when to be taken.* Ambar Ali v. Lutfi Ali, 25 C.L.J. 619=21 C.W.N. 996=41 Ind. Cas. 116=45 C. 159. See Final Part, 1917, Col. 402.

(2) *Admissibility of Parganah Registers, Kanongo Registers, General and Mauzawar Registers kept under the Land Registration Act—Thak Map and Statement—Presumption of lakheraj title from long possession without payment of rent.*

The plaintiffs who were recorded under Settlement Proceedings as persons in possession of a number of plots, each less than 50 bighas in area, without payment of rent but as liable to pay rent, instituted suits under S. 106, Bengal Tenancy Act, and proved long possession without payment of rent. The defendant produced the Parganah Register, the Kanongo Register, the General and Mauzawar Register, and the Thak Map and Statement to show 'by omission of entries of lakherajes therein that no lakherajes existed in the village :

Held—That long possession without payment of rent raises a presumption of lakheraj right ;

Held also—That it being apparent that the Parganah and the Kanongo Registers are not kept punctiliously, they are not admissible in evidence to prove an omission of entry therein as to lakherajes.

That the Kanongo account and the General Mauzawar Registers being intended to facilitate the collection of Government dues, there was

Evidence—(Continued).

no authority to enter therein lakherajes less than 100 bighas in area or lakherajes not the subject-matter of resumption proceedings.

That the Thak officers not being empowered to measure and record lakherajes of less than 50 bighas in area, the omission of lakherajes in the Thak statement was not of any probative value. Bipradas Pal Choudhry v. Monorama Dahi, 22 C.W.N. 396=45 C. 574=47 Ind. Cas. 49.

MOOKERJEE and WALMSLEY, JJ.

Reference :—14 M.L.A. 152, R.

(3) *Will—Probate—Verbal testimony—How to value.*

In order to find out whether the witnesses give a true or false statement of facts, it is necessary to see the surrounding circumstances under which a will is said to have been executed. Makunda Nand v. Bholanath Nanda, 43 Ind. Cas. 195.

SHARFUDDIN and CHAPMAN, JJ.

(4) *Document, original not found—Secondary evidence, Admissibility of.*

Secondary evidence could be admitted to prove the contents of the original of a document, when in spite of all reasonable efforts it it was not possible to produce the original before the Court. Raj Bahadur Lal v. Bindeshri, 46 Ind. Cas. 344.

LINDSAY, J.C.

(4-a) *Map and Chitta showing allotments on partition—Registration, Necessity of—Registration Act (1908), Ss. 17, 43—Documents, Improper exclusion of, on ground of non-registration, by appellate Court—Effect of.*

A map and a chitta put in to prove that the land in dispute was allotted on a partition to a certain person, could not be said to be instruments falling within the purview of S. 17 of the Registration Act and thus requiring registration.

The lower appellate Court having held the map and the chitta being unregistered were not admissible in evidence and having also under S. 91 of the Evidence Act excluded other evidence in support of the partition, it was held, that it was impossible to say what effect the consideration of those documents as evidence, might have had upon the judgment of the lower appellate Court. It can hardly said that the appellate Court has properly considered all the evidence in the case. The decrees of the appellate Court was therefore set aside and the case remanded for a re-hearing of the appeal and for a fresh judgment on consideration of the whole of the evidence including those two documents. Brindaban Chandra De v. Krishna Mohan De, 47 Ind. Cas. 159.

CHITTY and WALMSLEY, JJ.

(4-b) *Marriage—Recognition—Presumption.*

When a man and woman have long cohabited and have been treated by their acquaintances, and have treated each other, as man and wife, such long cohabitation plus such treatment, is

Evidence—(Continued).

sufficient, among *Jats*, to establish a marriage and the legitimacy of the offspring. *Partap Singh v. Must. Partap*, 146 P.L.R. 1917=44 Ind. Cas. 598.

LE-ROSSIGNOL, J.

(4-c) Enhancement of rent, Suit for—Uniform payment of rent for 20 years, Proof as to—Rent receipt, Value of, as, when Zamindar's papers evidence the fact. See BEN. ACT VIII OF 1885 (TENANCY), No. 12-a, 22 C.W.N. 999.

(5) Ryot holding at fixed rate of rent, Permanent sub-lease by—Admissibility in evidence of document creating sub-lease See BEN. ACT VIII OF 1885 (TENANCY), No. 21, 43 Ind. Cas. 534.

(6) Inadmissible evidence admitted at request of parties—Whether parties can question such admission in appeal. See BEN. ACT VI OF 1908 (CHOTA NAGPUR TENANCY), No. 6, 44 Ind. Cas. 362.

(7) Muchilika containing admission of landlord's title—Admissibility in evidence under Estates Land Act. See MAD. ACT I OF 1908 (ESTATES LAND), No. 21, 7 L.W. 271.

(8) Admission in unregistered solenama, Admissibility of, in. See ADMISSION, No. 2, 46 Ind. Cas. 442.

(9) Court of first appeal allowing document as evidence on behalf of defendant and refusing permission to plaintiff to adduce rebutting evidence—Validity. See CIV. PRO. CODE (1908), No. 513, 43 Ind. Cas. 320.

(10) Records produced as evidence—Legal requirements. See CIV. PRO. CODE (1908), No. 279, 43 Ind. Cas. 525.

(11) Lower Court refusing to record—Appellate Court, Power of—Remand, Order of, Validity of. See CIV. PRO. CODE (1908), No. 510, 45 Ind. Cas. 832.

(12) Illegitimate issue—Assimilation of such issue in caste, Effect of—Mathur and Srivastava Kayasthas—Ishtkal—Teva—Horoscope—Evidence of birth. See HINDU LAW (MARRIAGE), No. 1, 21 O.C. 298.

(13) Receipt of rent by gomasta of landlord—Its value as evidence. See LANDLORD AND TENANT, No. 36, 45 Ind. Cas. 196.

(14) Proof of incorrectness of entry made—S. 103-B, Bengal Tenancy Act. See LEASE, No. 6, 27 C.L.J. 107.

(15) Text-books, if may be referred to as. See MAHOMEDAN LAW (GIFT), No. 1, 28 O.L.J. 306.

(16) Decree right when made—Happening of event subsequent to decree—Proper procedure is to request appellate Court to take additional evidence thereon—Failure to comply with provisions of Code for taking it in the absence of objections. See PRE-EMPTION, No. 28, 111 P.W.R. 1918.

(17) Of insolvent, if admissible against transferee of property in view of insolvency. See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), No. 7, 22 C.W.N. 835.

Evidence—(Concluded).

(18) Judgment in criminal trial, Evidentiary value of. See PRINCIPAL AND AGENT, No. 2, 40 Ind. Cas. 452.

(19) Admissibility of, in evidence—Their value as evidence. See SURVEY MAPS, No. 1, 44 Ind. Cas. 247.

(20) Recitals in old conveyances, Evidentiary value of. See WILL, No. 15, 3 Pat. L.J. 199.

Evidence Act (1872).

(1) S. 8—Deputy Collector holding enquiry under Bengal Land Registration Act, if Court. See JUDICIAL PROCEEDING, 47 Ind. Cas. 710.

(1-a) Ss. 6, 32 (3), (7)—Testator, Statements by, before Sub-Registrar at time of registration of will and in written statement in judicial proceedings, Admissibility of, under. See HINDU LAW (WILL), No. 2, 47 Ind. Cas. 611.

(1-b) S. 8—*Res Gestae*, Admissibility of. See CONTRIBUTION, No. 4, 45 Ind. Cas. 904.

(2) Ss. 11 (b), 13, 57—Document not *inter partes*, Relevancy of—Historical works, if admissible on question of title between trustee of mosque and private person. See RES JUDICATA, No. 44, 132 P.W.R. 1918.

(3) S. 13—*Private chittas*, admissibility of—Objection as to non-objection whether can be taken in second appeal for first time.

Private chittas cannot be admitted in evidence under S. 13 of the Evidence Act.

Where a private chitta was admitted in the first Court without objection and the Judges of the lower Courts and the Commissioner acted on them.

Held, that objection to the proceedings in the lower Courts, on the ground they were based on the chittas, which were inadmissible in evidence, could not be taken for the first time in second appeal. *Nafar Joardar v. Pratima Sundari Dassya*, 41 Ind. Cas. 726. 8

FLETCHER and NEWBOULD, JJ.

(3-a) S. 13—*Suit for rent by co-sharer landlord—Decree for rent obtained by another co-sharer, admissibility of, to prove holding and rent.*

The plaintiff, a co-sharer landlord, sued the defendant for his share of rent in respect of a certain holding. He produced a decree for rent previously obtained by another co-sharer landlord against the defendant for his share of rent in respect of the same holding:

Held—That whether the decree was by a predecessor of the plaintiff or by a stranger, it was admissible under S. 13 of the Evidence Act for the purpose of showing that the defendant held the holding at the particular rent. *Byomkesh Chakravarti v. Jagadishwar Rai*, 22 C.W.N. 304=40 Ind. Cas. 442.

FLETCHER and SMITH, JJ.

(4) S. 13. See No. 2, *supra*.

Evidence Act (1872)—(Continued).

(5) S. 32—Report of Nazir if relevant to prove knowledge of defendant applying to set aside *ex parte* decree. See SUMMONS, No. 1, 99 P.R. 1918.

(5-a) S. 31—Witness, Death of, after examination and cross-examination, Applicability of section to—Previous statement, Admissibility of, under. See WITNESS, No. 1, 46 Ind. Cas. 929.

(6) Ss. 32, 34, 90—Application for enhancement of rent—Defence of raiyats being raiyats at fixed rents or rates of rent—Collection and other connected papers produced by landlords to rebut defence, Admissibility in evidence of—Second appeal, objection to admissibility of documents in—Bengal Tenancy Act, Ss. 105, 104.

In an application by certain landlords under S. 105 of the Bengal Tenancy Act against the raiyats for enhancement of rent, the defence set up by the tenants was that they were raiyats either at fixed rents or fixed rates of rent from whom no enhancement could be claimed. The landlords produced in support of the claim certain Zamindari papers, some of them bearing, and some not, the signature of certain officers in their employ or in that of their predecessors. Held that, the documents both signed and unsigned would be admissible not only as corroborative evidence but as independent evidence, if the landlords complied with the requirements of S. 32 of the Evidence Act (a).

S. 90 of the Evidence Act merely allows a party to ask the Court to presume that a document which is more than 30 years' old and purports to have been prepared or signed by a particular person was in fact prepared or signed by such person. Further than that the section does not go. It certainly does not contemplate that, where a party producing a document is unable to say who prepared or signed it, or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than 30 years' old makes it admissible without proof. If that was the law it would be impossible to test the value of such evidence and in cases between landlord and tenant no tenant would be safe.

Held, that it was too late for the raiyats in second appeal to take the objection that the documents, admitted in the trial Court without objection, required formal proof (b). *Charitar Rai v. Kallash Bihari*, 3 Pat. L.J. 308=44 Ind. Cas. 422=4 Pat. L.W. 213.

MILLER, C.J. and MULLICK, J.

References:—(a) 16 C.L.J. 328; 98 B. 294, F. (b) 34 C. 1059 (1074), F.

(6-a) S. 32 (3) (7). See No. 1, *supra*.

(7) S. 33—Depositions recorded by Sub-Registrar in enquiry before him—Death of deponents—Subsequent suit between same parties about same question as was before Sub-Registrar—Previous depositions if admissible in suit. See DEPOSITION, No. 1, 35 M.L.J. 657.

Evidence Act (1872)—(Continued).

(8) S. 33. See No. 68, *infra*.

(9) S. 31—Official record compiled in course of business. See LANDLORD AND TENANT, No. 54, 35 M.L.J. 11.

(10) S. 34. See No. 6, *supra*.

(11) S. 35—Evidence—Certified copies of chittas and map relating to partition under Reg. XIX of 1814, if admissible in evidence.

The plaintiffs' suit for ejectment related to a tank claimed as appertaining to a certain estate which, and three other revenue paying estates, came in 1852 under the operation of Reg. XIX of 1814 for partition of common lands. The lower appellate Court relied on certified copies of certain chittas and a map kept in the Collectorate. The map was authenticated by a Deputy Collector but the chittas were not signed: Held—That *prima facie* that papers appeared to be the record of the partition which was in fact made in a proceeding between the predecessors-in-interest of the parties. If so, the certified copies produced were good and admissible evidence, quite apart from anything in S. 35 of the Evidence Act. *Khetra Nath Mondal v. Mahammad Alla Rakha*, 23 C.W.N. 48=45 Ind. Cas. 921.

RICHARDSON and WALMSLEY, JJ.

References:—25 C. 90; 17 C.W.N. 779; 6 C.L.R. 139; 13 C.W.N. 93, Dist.; 21 W.R. 29, R.

(12) S. 35—Register of births and deaths kept at Police Stations, if a public document.

A Register of births and deaths kept at the police station is a public document within the meaning of S. 35 of the Evidence Act, and a certified copy of an extract therefrom is admissible in evidence. *Sheikh Tamijuddin Sarkar v. Sheikh Tazu*, 22 C.W.N. 822=46 Ind. Cas. 297.

TEUNON and RICHARDSON, JJ.

Reference:—41 M. 26, Rel. on.

(13) S. 35—Extract from death register maintained by a Village Official—Admissibility—Extract, evidence of the actual date of death. *Ramalinga Reddi v. Kotaiyya*, 22 M.L.T. 17=6 L.W. 246=33 M.L.J. 60=(1917) M.W.N. 558=41 Ind. Cas. 286=41 M. 26. See Final Part, 1917, Col. 405.

(14) S. 35—Official document—Admissibility of.

Where a register is clearly an official document, it is admissible in evidence under S. 35, Evidence Act. It may be possible that, in the case of such a document, if it could be shown that any particular part was in excess of the official duty by reason of which it came into existence, that part might not be admissible. *Bhalye Raj Kishore Deo v. Bani Mahto*, (1918) M.W.N. 305=22 C.W.N. 489=23 M.L.T. 382=47 Ind. Cas. 1=28 C.L.J. 1=20 Bom. L.R. 712 (P.C.).

LORD PARKER OF WADDINGTON, LORD WRENDSBY, SIR JOHN EDGE and MR. AMBER ALL.

Evidence Act (1872)—(Continued).(15) S. 57. See No. 2, *supra*.(16) S. 58—*Facts admitted not to be proved—Admission of a signature to a bond—Proof of bond not necessary—Inference of facts must be based on evidence adduced—High Court—Second appeal—Error of law.*

In a mortgage suit, which was brought on almost the last day allowed by the law of limitation, the defendants, who were the sons of the mortgagor, pleaded that they knew nothing of the mortgage transaction. One of the defendants, who had attained majority, when examined as a witness and shown the mortgage deed, admitted that the signature was his father's. On the day fixed for hearing the suit, the plaintiff was not present, as he was ill and the attesting witnesses were absent. The lower Court declined to grant him any further time and dismissed the suit on the ground that the plaintiff had failed to prove the mortgage-deed. The Court inferred from the fact that the plaintiff had delayed bringing his suit until almost the last day allowed him by the law of limitation, that he must have been receiving interest all that time at the rate stipulated for in the deed and on that calculation it reached the conclusion that the debt had been fully satisfied. The plaintiff having appealed:

Held, (1) that, so far as the adult defendant was concerned, his admission would under S. 58, Evidence Act, relieve the plaintiff of any further responsibility of proving the document;

(2) that there was no trial of the suit at all, since the inference in question was not drawn from any evidence and the drawing of such inferences from matters not in evidence before the Court was an error of law. *Lakhchand Chhatrabhuj Marwadi v. Lalchand Ganpat Patil*, 20 Bom. L.R. 351=42 B. 353=45 Ind. Cas. 556.

BEAMAN and HEATON, JJ.

References:—33 A. 463; 36 A. 370, R.

(17) S. 58—*Attestation of document before its execution, if proper—Nature of attestation—Admission of execution of document if compliance with law as to attestation—Discretion of Court to require proof of due attestation even in face of admission. See MORTGAGE (GENERAL), No. 13, (1918) M.W.N. 853.*

(18) Ss. 58, 92, proviso 4—*Registered mortgage—Oral agreement to take less than due under mortgage—Agreement admitted in pleadings—Agreement if admissible in evidence.*

A subsequent agreement to take less than is due under a registered mortgage is clearly an agreement modifying the terms of a written contract and if it has to be proved oral evidence is inadmissible under proviso 4 to S. 92 of the Indian Evidence Act. But if the agreement is admitted by the other party, then the Court is not precluded from acting upon such admission, S. 58 of the Evidence Act, enables

Evidence Act (1872)—(Continued).

the Court to act on such an admission dispensing with proof of the agreement. *Mallappa v. Matam Naga Chetty*, 85 M.L.J. 555=8 L.W. 522=24 M.L.T. 400=(1918) M.W.N. 719 (F.B.).

WALLIS, C.J., OLDFIELD and SESHAGIRI
•AIYAB, JJ.

References:—26 M. 195; 30 M. 281; 27 Ind. Cas. 269; 27 M. 368, R.; 19 B. 369, Not F.; 6 Mow. 664, Dist.

(19) Ss. 58, 92—*Registered mortgage—Admissibility of subsequent oral agreement to accept less. See DOCUMENTARY EVIDENCE, No. 2, (1918) M.W.N. 680.*

(20) S. 67—*Registration endorsement, Evidentiary value of, in proof of execution of document. See DOCUMENT, No. 2, 46 Ind. Cas. 279.*

(21) S. 68—*Meaning of—Mortgage-deed—*
• *Attesting witness called but not examined.—Document not admissible independently as mortgage—Admissible as interpreting rights and obligations of parties—Identified in another document.*

A and B were members of a joint Hindu family with their father. They carried on saltpetre business and standing in need of money they executed what purported to be a mortgage-deed in favour of the plaintiffs on 15th May, 1909. It was duly signed and attested, but it was not registered till it was signed by their father on 31st May, 1909. The father's signature was not attested by either of the attesting witnesses. In this document the money was advanced on the security of property belonging to executants and it provided for interest at the rate of 8 per cent. per annum. The stipulation as to interest was a slip for 8 per cent. per mensem made by the scribe, and in order to rectify the error on 21st July, 1909, another document was executed signed by the plaintiff, A, B and their father and attested by two witnesses. It was also duly registered. Default having been made by the defendants the plaintiff brought a suit on foot of both the bonds. The document of 21st July, 1909, referred to and embodied certain clauses of the deed dated 15th May, 1909. One of the attesting witnesses was dead and the other, though summoned, was not examined. The Court of first instance held that the deed dated 15th May, 1909, was not proved and it was rejected as inadmissible in evidence. A simple money decree was granted by that Court. On appeal by the plaintiff held that the deed of 15th May, 1909, having been referred to and identified in the document of 21st July, 1909, was admissible in evidence for the purpose of interpreting the rights and obligations of the parties, even though as an independent legal document it was itself inadmissible.

By the terms of S. 68 of the Evidence Act, when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested; but this does not prevent it from

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being used in evidence as something else or for any other purpose. S. 68 is subject to the limitation, viz., that if the document were tendered in some other proceeding for the purpose of proving handwriting of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it, it could not be used in evidence at all (a). **Moti Chand v. Lalta Prasad**, 16 A.L.J. 121 = 40 A. 356 = 44 Ind. Cas. 596.

PIGGOTT and WALSH, JJ.

References:—(a) *Fishmongers' Company v. Dimdale*, 18 L.J.C.P. 65, R.

(22) S. 68—*Mortgage-deed—Attesting witness—Scribe, if and when an attester—Scribe deposing to execution of deed—Deed, if properly proved—Attestation of document, essence of.*

The essence of attestation of a document is that the person attesting must have seen the document executed by the executant.

The fact that a person calls himself a scribe in a certain document does not necessarily debar him from being an attesting witness thereto, and the question whether a scribe is also an attester and was intended to witness the execution of the document is a question of fact depending upon the facts of each case (a).

Where in a suit on a mortgage-deed which was attested by two witnesses and signed by the scribe as the writer thereof one of the attesters was dead and the other was not examined as a witness but the scribe was examined and he deposed to having seen the deed executed.

Held that the scribe in the circumstances of the case be regarded as an attesting witness and that the document and the attestation thereof was sufficiently proved by his evidence. **Parameswari Udayan v. Krishna Padayachi**, 7 L.W. 241 = 41 M. 535 = 49 Ind. Cas. 983.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 24 M.L.J. 534; 20 C.W.N. 699; 35 M. 607, R.

(23) Ss. 68, 70—*Admission of execution by persons claiming through executant.*

Admission of execution of an attested document by the executant or by a person representing his interests is sufficient proof of its execution against the person making such admission. As against other parties the document must be proved in accordance with S. 68, Evidence Act. **Niharan Chandra Sen v. Ram Chandra Sen**, 22 C.W.N. 444 = 44 Ind. Cas. 984.

N. R. CHATTERJEE and RICHARDSON, JJ.

References:—20 C.W.N. 1044; 7 C.W.N. 384, R.

(24) S. 70. See No. 23, *supra*.

(24-a) S. 70—*Mortgage-deed, Execution of, by two persons—Attestation in respect of one, Sufficiency of—Admission of execution, Question of attestation if arises in case of.* See ATTESTATION, 47 Ind. Cas. 9.

Evidence Act (1872)—(Continued).

(25) S. 73—"Purports," "alleged" in section, *Meaning of—Handwriting, Comparison of.*

The meaning to be given to the word "purports" in S. 73, Evidence Act, does not require the limitation of the scope of the section to documents which are signed or contain some intrinsic statement of the identity of the writer. The word "alleged" in the second portion of the section is used to express the same idea. **Yeararaghava Aiyangar v. Souril Aiyangar**, 35 M.L.J. 608 = 24 M.L.T. 447 = (1918) M.W.N. 715.

AYLING and KRISHNAN, JJ.

References:—14 Bom. L.R. 310, *Appr.*; 37 C. 467, *Not F.*

(26) Ss. 80, 91—*Admissibility of depositions.* See CIV. PRO. CODE (1908), No. 290, 7 L.W. 485.

(27) S. 90—*Ancient documents, not signed—Presumption under section, if arises.*

The presumption under S. 90 of the Evidence Act cannot arise in respect of a document which has not been signed and which does not purport to be in the handwriting of any particular person. **Janendra Mohun Choudhuri v. Gopal Chandra Har**, 40 Ind. Cas. 460.

CHITTY and BEAHCROFT, JJ.

(28) S. 90—*Presumption as to due execution of document not produced—Certified copy, if arises in respect of, when impossible to produce original.*

In cases of physical impossibility to produce the original document, Courts are entitled to raise a presumption as to due execution under S. 90, Evidence Act, on production of a certified copy. **Raj Bahadur Lal v. Bindeshri**, 46 Ind. Cas. 344.

LINDSAY, J.C.

(29) S. 90—*Presumption as to genuineness of ancient documents—Discretion of Court—Appellate Court, Interference by.*

Held that the question of making a presumption with regard to the genuineness of a document under S. 90 of the Evidence Act is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made, an appellate Court should be slow to interfere with such discretion (a). **Muhammad Usman v. Hafiz Rahim Bakhsh**, 57 P.W.R. 1918 = 44 Ind. Cas. 559.

CHEVIS, J.

References:—(a) 82 P.R. 1909, R.; 26 A. 581 = 9 C.W.N. 105 = 6 Bom. L.R. 750 = 7 O.C. 290 = 31 I.A. 217 = 8 Sar. P.O.J. 674 and 26 Ind. Cas. 117, F.

(30) S. 90. See No. 6, *supra*.

(31) S. 91—*Construction of contract—"Up to"—"Until," meaning of—Oral evidence to prove what was meant, if admissible.* The context and subject-matter have to be taken into account in determining whether the

Evidence Act (1872)—(Continued).

word "up to" is to be taken as exclusive or inclusive of the day to which it is applied.

Defendant offered to sell to the plaintiff his Mors Car in these words:—"Nevertheless I am quite willing to hand over the Mors Car to you against a cheque of Rs. 3,120, Rs. 3,000 being the cost of the Car, Rs. 120 interest. As I intend advertising the Car unless you wish to have it, please understand that my offer only holds good up to Wednesday next, as the time I have is limited." The plaintiff tendered Rs. 3,120 sometime on Wednesday next and asked for delivery of the Car. The defendant refused the tender contending that the offer expired at midnight on Tuesday:

Held—That the offer remained open until midnight on Wednesday.

That oral evidence to prove what the defendant meant by the words was inadmissible under S. 91 of the Evidence Act. *The Metropolitan Engineering Works v. Walter Eugene Debrunner*, 22 C.W.N. 416=45 C. 481=45 Ind. Cas. 305.

GREAVES, J.

(32) S. 91—Sub-lease granted by ryot for more than nine years after passing of Bengal Tenancy Act—Registration against provisions of S. 85 (2) of that Act—Admissibility of sub-lease to prove tenancy—Proof of sub-lease how else given. See BEN. ACT VIII OF 1885 (TENANCY), No. 22, 42 Ind. Cas. 621.

(33 & 34) Ss. 91 and 92—Mortgage—Arrangement by which one of the mortgagors secures release from personal liability—Covenant in the deed providing that payments should be endorsed thereon—Evidence of the arrangement

A term in the mortgage-deed that payments on account of the mortgage should be endorsed on the back of the mortgage-deed does not preclude one of the mortgagors from proving that by paying a sum of money he had secured a release of his personal liability in respect of the whole of the mortgage money, as this arrangement is a matter not covered by the terms of the mortgage. *Jadab Chandra Bhattacharjee v. Masjuddi*, 42 Ind. Cas. 615.

FLETCHER and NEWBOULD, JJ.

(35) S. 91. See No. 26, *supra*.

(36) S. 92—Oral evidence to contradict term of a document in writing—Plea of fraud—Sale or mortgage—Section applies only to parties or their representatives.

The plaintiff and his divided brother purported to sell certain properties to S in 1892. Portions of the property were sold by S to defendant No. 1 (who was the plaintiff's sister's son) on the 18th August 1898; and, on the 17th September 1904, the remaining portions were sold to the same person. The plaintiff sued in 1918 to have it declared that the transaction of 1892 was a mortgage. The trial Court held that the transaction of 1892 was a mortgage and that it was so known to defendant No. 1 both in 1898 and 1904; and

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decided that on payment the plaintiff was entitled to recover certain portions of the property from defendant No. 1. The lower appellate Court threw out his claim on the ground that the evidence to show that the conveyance of 1898 in favour of defendant No. 1 was a mortgage was inadmissible. On plaintiff's appeal:

Held, that S. 92 of the Indian Evidence Act had no application to the transactions of 1898 and 1904, as the plaintiff was not a party to either of them.

Held, by *Shah, J.*, that the plaintiff was entitled to show the real nature of the transaction of 1892, under proviso 1 to S. 92, his allegation in substance being one of fraud, namely, that though defendant No. 1 entered into the transactions of 1898 and 1904 with the full knowledge of the fact that S was really a mortgagee and not the owner of the property, he turned round and said that he had no such knowledge.

Held by *Marten, J.*, that assuming the transaction of 1892 must be taken to be a sale, there was nothing in S. 92 to prevent oral evidence of a subsequent agreement in 1898, to treat the 1892 deed as a mortgage, and to enter into the 1898 deed as a transfer of that mortgage.

Held, therefore, that the plaintiff was entitled to recover the property comprised in the 1898 transaction on payment of the moneys then paid by defendant to S and subsequent interest. *Ganu v. Bhau*, 20 Bom. L.R. 684=42 B. 512=46 Ind. Cas. 662.

SHAH and MARTEN, JJ.

Reference:—20 Bom. L.R. 278=44 I.A. 236, R.

(37) S. 92—Applicability of the section to persons who are not parties to deed.

The provisions of S. 92 of the Evidence Act which excludes oral evidence in regard to land covered in a sale-deed do not apply to persons who are not parties to the deed. *Sukumari Debi v. Kallpada Mukerji*, 45 Ind. Cas. 13.

TEUNON and NEWBOULD, JJ.

(37-a) S. 92—Subsequent waiver of suit for whole amount under a bond on failure of two consecutive instalments.

Waiver by creditors, by a subsequent oral agreement of their right of suit for the whole amount under the provisions of a registered bond on failure to pay two consecutive instalments is inadmissible evidence under S. 92 of the Act, being a variation of the original contract. *Hara Kumara Saha v. Ramchandra Pal*, 47 Ind. Cas. 943.

CHITTY and WALMSLEY, JJ.

(38) S. 92—Meaning and scope of—Deed purporting to be absolute conveyance—Oral evidence showing transaction to be mortgage, whether admissible—English Equity doctrine on the point—Whether applicable to India. *Maung Kyn v. Ma Shwe La*, 33 M.L.J. 648=6 L.W. 777=22 C.W.N. 257=(1918) M.W.N. 800=20 Bom. L.R. 278=27 C.L.J. 175=23 M.L.T. 26

Evidence Act (1872) — (Continued).

—8 Pat. L.W. 185—15 A.L.J. 825—45 O. 820
—9 L.B.R. 114 (P.C.). See Final Part, 1917,
Col. 412.

(39) S. 92 — Interpretation of ambiguous document—Admissibility of evidence of surrounding circumstances. See DOCUMENTS, No. 9, 21 O.C. 234.

(40) S. 92—Scope of section—Pre-emption suit by third party—Evidence to show real nature of transaction, Admissibility of. See ESTOPPEL, No. 6, 21 O.C. 165.

(41) S. 92—Execution of absolute sale-deed and registration thereof—Contemplation to execute agreement to reconvey—Parol evidence of contemporaneous oral agreement to vary sale deed — Admissibility. See PRE-EMPTION, No. 20, 74 P.R. 1918.

(42) S. 92—Document, sale or mortgage—Oral evidence, Admissibility of, to explain document See TRANSFER OF PROPERTY, No. 1, 45 Ind. Cas. 660.

(42-a) S. 92. See Nos. 18, 19 and 34, *supra*.

(43) S. 92, proviso 2—Award by some only of arbitrators if valid—Contemporaneous oral agreement validating majority award, if admissible. See ARBITRATION, No. 11, 47 Ind. Cas. 960.

(44) S. 92, proviso 4—Mortgagee making oral offer to forego interest if principal money be paid—Whether oral agreement admissible in evidence—Contract Act, S. 63—Applicability.

A mortgagee made an oral offer to mortgagors that he would accept the principal money in full satisfaction of the mortgage debt foregoing interest which had accrued thereon. The mortgagors did not pay the amount, nor did they tender it. On a suit by the mortgagee on the mortgage, *held* that the evidence as to the oral agreement offered by the mortgagee was inadmissible in view of the provisions of S. 92, proviso (4) of the Evidence Act. *Held*, also that the oral agreement to forego interest cannot be enforced under S. 63, Contract Act, as the payment of the principal amount was not made at the time of the offer. *Maung Shwe Min v. The Chetty Firm of A.M.*, 43 Ind. Cas. 918.

TWOMEY, C.J. and PARLETT, J.

(45) S. 91 — Construction of document—Admissibility of extrinsic evidence—Com promise.

The general rule is that, where the language of a document is clear and applies without difficulty to the facts of the case, no extrinsic evidence can be admitted for the purpose of affecting its interpretation.

Where, in a compromise-deed, it was stated that the defendants agreed to pay to the plaintiff a sum of Rs. 112-8-0 for payment to L in respect of her maintenance, *held* that the language was clear enough and that nothing more could have been contemplated than contribution to payments made to this lady in her

Evidence Act (1872) — (Continued).

lifetime, *Yar Muhammad Khan v. Bagar Khan*, 40 Ind. Cas. 491.

LINDSAY, J.C.

Reference:—22 A. 149, *Expi*.

(46) S. 97—Lands ambiguously described in mortgage—Ambiguity bearing analogy to that described in the illustration—Right of mortgagor to clear ambiguity.

Where a mortgagor described his mortgaged lands being in many ways analogous to the ambiguity described in the illustration to S. 97, Evidence Act, it is open to him to show what was actually mortgaged to the mortgagee. *Ram Charan Das v. Arsad Ali*, 43 Ind. Cas. 721.

COXE and CHATTERJEE, JJ.

(47) S. 106—Action for negligence against carriers for loss of goods in ship by fire—Onus of proof of negligence—Duty of defendant company to call chief witnesses at time of fire. See CONTRACT ACT, No. 71, 8 L.W. 4 (P.C.).

(48) S. 106—Principal and agent—Agent's authority, limits of—Burden of proof See PRINCIPAL AND AGENT, No. 4, 45 Ind. Cas. 822.

(49) S. 106 — Receipts for rent given by gomasta—Onus of proving that gomasta had no authority to recognise distribution of rent, lies on landlord. See BEN. ACT VIII of 1885 (TENANCY), No. 41, 45 Ind. Cas. 294.

(50) S. 108—Presumption, Nature of.

Held, that under S. 108, Evidence Act, it is not permissible for a Court to raise a presumption that a certain person died at a particular time anterior to the proceedings, in which the question of his death was in issue. The presumption can arise only in respect of the fact of his being dead or alive at the time of those proceedings. *Faqir Baksh Singh v. Dan Bahadur Singh*, 21 O.C. 148—46 Ind. Cas. 808.

LINDSAY, J.C.

References:—34 A. 36 (F.B.); 35 O. 25, *F*;
In re Phenes Trust, L.R. 5 Ch. 189 (O.A.), *Dist*.

(51) S. 109—Person not heard of for more than twenty years—Section if authorises presumption as to precise period of death—Presumption under section, Nature and scope of.

S. 109, Evidence Act, does not raise a presumption that a person who has not been heard of for more than seven years died at the end of the first seven years of the period. The only rule, which the section prescribes is, that a person, who has not been heard of for seven years by those who would naturally have heard of him if he had been alive, is presumed to be dead at the time when the question whether he is alive or dead is raised. There is no presumption as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. *Basharat v. Najib Khan*, 38 P.B.

Evidence Act (1872)—(Continued).

1918—128 P.L.R.; 1918—68 P.W.R.; 1918—45 Ind. Cas. 701.

SHADI LAL, J.

References:—84 A. 36; 97 C. 103, R.

(52) S. 110—Defendant in possession of land sued for—Title it should be proved by defendant. *See POSSESSION, SUIT FOR, No. 3, U.B. R. (1918), 4th Cr. 126.

(52-a) S. 112—Legitimacy, Presumption in favour of—If arises when child is born while order under S. 493, Crim. Pro. Code, is in force and access not proved. See CRIM. PRO. CODE (1898), No. 12, 46 Ind. Cas. 620.

(53) S. 112—Applicability of the section to the Muhammadans. See MUHAMMADAN LAW (LEGITIMACY), No. 1, 43 Ind. Cas. 883.

(54) Ss. 112, 114—Presumption of legitimacy—Burden of proof—Question of Law.

Where defendant admitted the paternity of plaintiff, the presumption would be that he is the legitimate son of the alleged father, and if defendant's case is that he was not a legitimate son, then it lay upon defendant to establish his

S. 112 has nothing to do with the general presumption of legitimacy which the law allows. The presumption arises under S. 112 and not under S. 112.

The adjustment of the burden of proof is a question of law. *Dularey Singh v. Suraj Ball Singh*, 43 Ind. Cas. 478—4 O.L.J. 556.

LINDSAY, J.C.

(55) S. 114—Presumption of law that official acts are properly conducted—Attempt at rebutting the presumption—Duty of Court.

There is a presumption under S. 114, Evidence Act, that an official act has been regularly performed, but, when an applicant before the Court is attempting to rebut that presumption, it is not for the Court itself to give assistance to the other side, or to deal with the matter otherwise than impartially.

When a Court-sale is challenged, it is not the business of the Court to collect materials upon which the sale may be supported for the sake of the reputation of the Court. *Mt. Sahagbati v. Sourendra Mohan Singh*, 44 Ind. Cas. 661—4 Pat. L.W. 296.

ROE and JWAHA PRASAD, JJ.

(56) S. 114—Court's proceedings, Legality of, Presumption in favour of, Rebuttal of. See APPEAL (SECOND APPEAL), No. 9, 46 Ind. Cas. 52.

(57) S. 114—Suit on mortgage—Plea of payment—Onus of proving plea—Initial onus in case on mortgagees—Shifting of burden. See BURDEN OF PROOF, No. 3, 22 O.W.N. 937.

(58) S. 114. See No. 54, *supra*.

(58-a) S. 114—Presumption—Mortgagor in possession of property in case of mortgage with possession—Satisfaction of mortgage-debt—Onus to rebut presumption. See PRESUMPTION, No. 3, 46 Ind. Cas. 676.

Evidence Act (1872)—(Continued).

(58-b) S. 114—Unregistered mortgage-bond, Suit on, 30 years after execution of bond—No demand for 30 years—Presumption as to amount having been repaid or forgiven—Onus of proof as to its still remaining due. See PRESUMPTION, No. 2, 46 Ind. Cas. 657.

(58-c) S. 114—Presumption under—Mortgage executed 36 years ago, Suit on—No demand or payment made during the interval—Genuineness of mortgage, Presumption as to—Burden of proof as to. See PRESUMPTION, No. 4, 46 Ind. Cas. 806.

(59) S. 115. See ESTOPPEL.

(60) S. 115—Estoppel, Plea of—Burden of proof in. See ESTOPPEL, No. 4, 46 Ind. Cas. 474.

(61) S. 115—Requisites of a binding estoppel under. See ESTOPPEL, No. 7, 75 P.L.R. 1918.

(61-a) S. 115—Conditions for operation of estoppel. See ESTOPPEL, No. 9-a, 47 Ind. Cas. 934.

(62) S. 115—Duty of a joint-mortgagee to inform his joint co-mortgagee as to any claim which he may have in respect of the mortgage, property prior to their joint mortgage—Failure to inform as to the claim—Estoppel. See MORTGAGE (GENERAL), No. 5, 44 Ind. Cas. 547.

(62 a) S. 115—Finding in prior suit between co-defendants on question raised *inter se*—Decrees in spite of finding—No *res judicata* or estoppel. See RES JUDICATA, No. 23-a, 83 M. L.J. 740—43 Ind. Cas. 860.

(63) S. 115. See RES JUDICATA, No. 43, 121 P.W.R. 1918.

(64) S. 116—Section if applicable to kancans. See MALABAR LAW, No. 11, 24 M.L.T. 473.

(65) S. 126—Communication made to pleader in course of his employment, Privilege as to—Admissibility. See PRIVILEGED COMMUNICATION, No. 1, 16 A.L.J. 987.

(66) S. 129—Statements of witnesses recorded for special purpose—Whether privileged. See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), No. 1, 43 Ind. Cas. 71.

(67) S. 182—Document, Summons to Government to produce, Discretion of Court in case of. See ADJOURNMENT, No. 1, 45 Ind. Cas. 898.

(68) Ss. 165, 33—Judgment based on evidence recorded before Registrar and treated by consent of parties as evidence in suit—Judgment if valid.

In a suit under S. 77, Registration Act, to enforce the registration of a will, which both Sub-Registrar and the District Registrar declined to register, the parties filed the evidence adduced before the registering authorities as evidence in the case by mutual consent on which the Court based its judgment entirely. There was nothing to show that the conditions prescribed by S. 33, Evidence Act, were found to exist to make it relevant, nor was it shown that it was relevant under any other section of the Evidence Act. *Held* that the stringent

Evidence Act (1872)—(Concluded).

provisions of S. 165, Evidence Act, rendered the judgment invalid and that it must be set aside. *Ponnusamy Pillai v. Singaram Pillai*, 34 M. L.J. 526=41 M. 731=(1918) M.W.N. 768=46 Ind. Cas. 849.

AYLING and SESHAGIRI AIYAR, JJ.

Reference :—38 M. 160, *Not F.*

Exchange.

(1) Landlord, giving up in favour of his occupancy tenant his proprietary right over part of such occupancy holding—Waiver by tenant in return of his occupancy rights in remaining part of holding—Transaction an exchange. Character of land received by tenant in exchange ancestral or self-acquired. See OUSTOMS—PUNJAB (ALIENATION), No. 6, 120 P.R. 1918.

(2) Property over hundred rupees—Bargain acted upon—No writing or registration. See TRANSFER OF PROPERTY ACT, No. 33, 26 A.L.J. 98.

Exclusion of Time.

Partial stay of execution—Stay if justifies exclusion of time. See STAY OF EXECUTION, No. 1, U.B.R. (1918), 1st Qr., 73.

Execution.

Judgment-debtor in possession of land under a contract of sale and having paid full consideration—Land whether can be sold in execution—Position of judgment-debtor. *Jnam Chandra Das v. Rajani Kanta Pal*, 41 Ind. Cas. 850=22 O.W.N. 522. See Final Part, 1917, Col. 416.

Execution of Decree.

- (1) *Transfer of Property Act*, S. 67—Civ. Pro. Code (1908), O. XXXIV, rr. 14 and 15—Decree in suit on security bond declaring lien over property mentioned in it—Inclusion of such property in mortgage bond—Decree is only money decree with lien—Sale of property without mortgage suit impossible.

A judgment-debtor executed a security bond and a mortgage bond on the same day, the security bond covering some of the properties included in the mortgage bond. In a suit, on the security bond, an *ex parte* decree was made, ordering the judgment-debtor to pay a certain sum to the plaintiff, declaring the plaintiff's lien to the properties mentioned in the security bond and refusing the plaintiff's prayer for a decree for sale of the properties mentioned in the security bond as those mortgaged. Held that the decree was a money decree, with a declaration of the plaintiff's lien on the properties, expressly refusing the mortgage sale asked for by the plaintiff, and that the decree, in effect, prevented a sale of the property without a suit under S. 67 of the Transfer of Property Act, which the decree-holder could not avoid by proceedings in execution, as rr. 14 and 15 of b...

Execution of Decree—(Continued).

O. XXXIV, Civ. Pro. Code, applied to the case. *Gobinda Chandra Pal v. Kallan Chandra Pal*, 45 C. 530.

BEACHROFT and WALMSLEY, JJ.

Reference :—8 C. 51, *Dist.*

- (2) *Limitation Act*, S. 21 and Art. 182—Payment towards decrees not certified—Such payment if sufficient to keep alive decrees—Payment by brother, if payment of lawful guardian, of minors under S. 21, *Limitation Act*—Mother lawful guardian in preference to brother.

An uncertified payment or adjustment towards a decree cannot, under O. XXI, r. 2 (8) of the Civ. Pro. Code of 1908, operate to prolong the period of limitation provided by Art. 182 of the Limitation Act for an application for the execution of a decree (a).

Payments made by the brother of an infant judgment-debtor towards the decree, while their mother is alive, cannot be said to have been made by a lawful guardian within the meaning of S. 21, Limitation Act, as it is well settled that, under the Hindu Law, in the absence of the father, the mother is entitled to be the guardian of her infant sons in preference to their brother (b). *Bireswar Mukerjee v. Ambika Charan Bhattacharjee*, 45 C. 630.

MOOKERJEE and WALMSLEY, JJ.

References :—(a) 19 C.L.J. 126; 13 Ind. Cas. 424; 12 A.L.J. 825, R. (b) (1854) Beng. S.D.A. 329, R.

- (3) *Mortgage—Misdescription of property in decree—Objector not deceived—Court had jurisdiction to correct error.*

In a decree for sale on a mortgage both the mortgage-deed and the decree misdescribed the property mortgaged and ordered to be sold as *muafi*. The property as a matter of fact was assessed to revenue. When the mortgagee applied for execution of his decree, the objector who had purchased the same property in execution of a simple money-decree pleaded that there was no *muafi*. The mortgagee's lien had been proclaimed at the time of his purchase. Held that the misdescription not having deceived the objector, when he purchased, the Court was not debarred from doing what was right by correcting the error in the decree. *Basanti v. Kunj Bihari Lal*, 16 A.L.J. 262=44 Ind. Cas. 998.

TUDBALL and RAFIQ, JJ.

- (4) *Decree passed against a deceased person—Representatives of the deceased can show in execution that decree is void—No question of jurisdiction in such a case.*

A decree made against a dead man is a nullity and cannot be executed by the executing Court. No question of the jurisdiction of the Court arises in such a case. It is open to the representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made and that such a decree is

Execution of Decree—(Continued).

void and incapable of execution as against the person so dead (a). *Sripat Narain Rai v. Tirbeni Misra*, 16 A.L.J. 327=40 A. 423=45 Ind. Cas. 21.

RICHARDS, C.J. and BANERJI, J

Reference:—(a) 17 A. 478, F.

- (5) *Civ. Pro. Code (Act V of 1908), Ss. 53, 2 (11)—Decree for injunction—Decree against adult members of the family—Death of the adult members—Execution against other members of the family not parties to the suit—Legal representative, meaning of.*

A decree for injunction was obtained against two members of a joint Hindu family, which consisted of other co-parceners. After the deaths of the defendant-members, the decree was sought to be executed against surviving co-parceners, who were not parties to the decree:

Held, that the decree could not be executed against the surviving co-parceners, for, on no construction of the words "legal representative" could the members of a joint Hindu family be brought within the definition of the term contained in S. 2 (11) of the Civ. Pro. Code, 1908.

Per *Beaman, J.*—"S. 53 of the Civ. Pro. Code has been enacted expressly to enforce one recognised rule of the Hindu Law, namely, that members of a joint Hindu family may not escape the payment, out of the joint family property, of any debt incurred and decreed against their father before his death, provided that such debt is not tainted by immorality. The object of the section is limitative, and is intended to give effect to a well-known rule of the Hindu law referable to a religious rather than legal sanction, which might otherwise have been rendered nugatory by the definition of "legal representative." *Chunilal v. Bai Mani*, 20 Bom. L.R. 660=42 B. 504=46 Ind. Cas. 745.

BEAMAN and HEATON, JJ.

Reference:—34 C. 642 (F.B.), *Dist.*

- (6) *Civ. Pro. Code (Act V of 1908), S. 70, O. XXI, r. 72—Bombay Civil Circulars, Chap. II, cl. 91, sub-cl. 16—Decree—Execution proceedings transferred to Collector—Application for leave to bid at auction-sale to be made to Collector and not to Court—Set-off cannot be allowed by Court.*

Where proceedings in execution of a decree have been transferred to a Collector, application for leave to bid at the auction-sale should be made to him, under cl. 91, sub-cl. 16 of the Bombay Civil Circulars, Chap. II. After such transfer, the Civil Court has no power to entertain the application under O. XXI, r. 72, of the Civ. Pro. Code, 1908; nor can it permit a set-off.

Per *Marten, J.*—Nor under the existing Civil Circulars, has the Collector any power to allow a set-off. *Shrinivas v. Jagadevappa*, 20 Bom. L.R. 708=42 B. 621=46 Ind. Cas. 653.

SEAH and MARTEN, JJ.

Execution of Decree—(Continued).

- (7) *Instalment decree—Whole amount becoming due on failure to pay one instalment when the second one became due—Limitation.*

A decree was passed in 1909, which made the decretal amount Rs. 860, payable by annual instalments and provided that, "in case of failure to pay any one instalment within the period fixed or until the period of next instalment, the plaintiff should recover in one sum the whole amount due at that time." The first instalment became due on the 6th June, 1910. It was not paid at all; nor was any other instalment paid. The decree-holder having applied, on the 6th September, 1915, to execute the whole decree:

Held, that the execution was barred by limitation, the decree-holder not having applied to execute the decree within three years of the first default in 1910. *Ralechand v. Dhondo*, 20 Bom. L.R. 773=42 B. 728=47 Ind. Cas. 313.

BEAMAN and HEATON, JJ.

Reference:—16 A. 371, *Diss.*

- (8) *Gujarat Talukdars' Act (Bom. Act VI of 1888), S. 29-E—Certificate of Managing Officer—Decree against Talukdar—Application to execute the decree—Exclusion of time from the date of decree to the date of application for certificate—Application to execute decree in absence of certificate—Application in accordance with law—Limitation Act (IX of 1908), Art. 182.*

A decree for instalments was passed against a Talukdar on the 16th September, 1910, with the proviso that, on failure to pay any one instalment in time, the whole amount of the decree became payable at once. The first instalment, which was payable on the 1st April 1911, was not paid. An application to execute the decree was made on the 1st April, 1914, but, as it was not accompanied by a certificate from the Managing Officer under S. 29-E of the Gujarat Talukdars' Act, 1888, it was rejected on the 15th June, 1914. The certificate was applied for in August, 1914, and obtained on the 29th August, 1914. A second application to execute the decree was made on the 28th February, 1916. In answer to the contention that the application was barred by limitation, it was urged, first, that the application of 1914 was in accordance with law within the meaning of Art. 182 of the Indian Limitation Act, 1908, in spite of the absence of the certificate under S. 29-E (1) of the Gujarat Talukdars' Act, 1888, and that accordingly time ran from the application of 1914, and, secondly, that, under S. 29-E (3) of that Act, the applicant was entitled to exclude the time from the date of the decree to the date of the application for the certificate. Both the lower Courts rejected the application as being time-barred. On appeal:

Held, allowing the appeal, that the application of 1916 was in time, as, by virtue of sub-S. 3 of S. 29-E of the Gujarat Talukdars' Act, 1888, the applicant was entitled to exclude the time from 16th September, 1910 (the date of the decree) to August, 1914, the date of the due

Execution of Decree—(Continued).

submission of the decretal claim to the Managing Officer, which was the date of the application for the certificate.

But the Court differed as to whether the appeal ought to be allowed, apart from S. 29 E (8) of the Gujarat Talukdars' Act, Shah, J., holding that it ought, as the application of 1914 was "in accordance with law" within the meaning of Art. 182 of the Indian Limitation Act, 1908, though no certificate of the Managing Officer under S. 29-E (1) of the Gujarat Talukdars' Act, 1888, was produced, and Marten J., being of a contrary opinion.

Semble, by Marten, J., that the application of 1914 was not made to "the proper Court," as defined in Expl. II to Art. 182 of the Indian Limitation Act, as, at its date, it was the duty of no Court to execute the decree or order, there having been no certificate from the Managing Officer. *Hargovind v. Naja Sura*, 20 Bom. L.R. 872=47 Ind. Cas. 726.

SHAH and MARTEN, JJ.

Reference:—10 B. 91, *Dist.*

(9) *Decree, execution of—Attachment of debt payable outside jurisdiction—Attachment, effect of—Money paid under an illegal order, where to be refunded. Surendra Nath Goswami v. Banglabadan Goswami*, 24 C.L.J. 533=36 Ind. Cas. 457=22 C.W.N. 160. See Final Part, 1916, Col. 679.

(10) *Decree, execution of—Transfer—Presidency Small Cause Court decree—Presidency Small Cause Courts Act (XV of 1882), S. 31 (b)—Transfer, if can be made direct to Munsif.*

A transfer of a decree of the Presidency Small Cause Court to the Munsif direct is good under S. 31 (b) of the Presidency Small Cause Courts Act (a). *Kedar Nath Manna v. Jogendra Nath Das*, 28 C.L.J. 264.

WALMSLEY and GREAVES, JJ.

Reference:—(a) 37 O. 574, *F.*

(11) *Civ. Pro. Code (Act XIV of 1882), Ss. 232, 248—Application for transmission of decree, whether application for execution—Order under S. 248, without notice, whether without jurisdiction.*

An order for execution made under S. 248 of the Civ. Pro. Code of 1882 (O. XXI, r. 22 of the Civ. Pro. Code of 1909) without notice is without jurisdiction and is a nullity.

Notice given to the representative of the judgment-debtor of the application for transmission of the decree, cannot be treated as notice given upon a previous application for execution within the meaning of S. 248 of the Code of 1882.

K obtained a decree on 19th June 1896 against D in the High Court. On 18th May 1907 an application was made by the son of K (K dying in the meantime) for transmission of the decree to the District Court of Murshidabad for the purpose of having the decree executed. On 23rd August 1907 order for transmission was made by the High Court in the presence of the judgment-debtor.

Execution of Decree—(Continued).

The decree was not transmitted. On 4th September 1907 an application was made by the son of K for the attachment and sale of certain premises in Calcutta, without notice to the representatives of D (D having died in the meantime). On 17th September 1907 an attachment was made of the property in Calcutta and on 29th July 1908 an order for sale was made. Both the orders were made without notice. On the 29th August 1916 the respondent who is the assignee of the decree made an application for leave that he might be allowed to proceed with the sale of the attached property in terms of the order of the 29th August 1908:

Held—That inasmuch as the application for attachment, dated 4th September 1907, was made without notice, the attachment of the 17th September 1907 and the order for sale of the 29th of July 1908 were made without jurisdiction and consequently no legal proceedings can be taken on the basis thereof (a).

Held further—That the order for transmission, dated 23rd August 1907, was not an order passed on a previous application for execution (b). *Moharaj Bahadur Singh v. Inder Chand Bothra*, 22 C.W.N. 390.

SANDERSON and MOOKERJEE, JJ.

References:—(a) 42 C. 72=18 C.W.N. 1058, *R.* (b) 43 C. 903=20 C.W.N. 889=28 C.L.J. 645; 15 C.W.N. 661=15 C.L.J. 128; 21 C.W.N. 162, *R.*

(12) *Limitation—Decree—Application for execution—Civ. Pro. Code (Act V of 1908), O. XXI, rr. 13 and 17, cl. (3)—Application in accordance with law—Properties specified in the list furnished under O. XXI, r. 13, not competent to be proceeded with in execution—Filing of supplementary list of properties, if to be taken as part of the original application under the provisions of O. XXI, r. 17 (2)—Fresh application for execution, if necessary—Such application if to be treated as made in continuation of the original application for execution.*

A decree was passed on the 25th November, 1911, and on the 23rd November, 1914, an application for execution was made which, on the face of it, was in accordance with law. Subsequently, on the objection of the judgment-debtor, it was discovered that, against the properties specified in the list furnished under O. XXI, r. 13, proceedings could not be taken, and, accordingly on the 14th January, 1915, the decree-holder made an application to the Court for acceptance of a further list of properties with a prayer that the execution should proceed by attachment and sale of those properties, and the lower appellate Court disallowed the prayer and held that the application for execution, having been admitted and registered, the proposed amendment could not be accepted and the decree-holder was to make a fresh application in execution:

Held—That the supplementary list should be taken as part of the original application under the provisions of O. XXI, r. 17 (2), or if a fresh application were at all necessary, then, the

Execution of Decree—(Continued).

subsequent application furnishing a supplementary list of properties should be treated as one made in continuation of the application first presented on the 28th November, 1914; that, in this view, no question of limitation arose and that the decree-holder would be at liberty to proceed in execution as on his application, dated 23rd November, 1914 (a). *Ghanendra Kumar Roy Choudry v. Bishendra Kumar Roy Choudry*, 22 O.W.N. 540=27 C.L.J. 998. **TEUNON and NEWBOULD, JJ.**

References:—(a) 17 C. 631, R.; 18 O.L.J. 598, *Dist.*

- (13) *Application for—Rent decree—Limitation—Bengal Tenancy Act (VIII of 1886), Sch. III, cl. 6—Execution sale set aside—Execution case dismissed for default—Fresh application for execution, if a continuation of the previous execution proceeding.*

A rent decree was obtained on the 14th June, 1911. Application for execution was made on the 6th March, 1914, and the sale took place on the 25th April, 1914. On the application of the judgment-debtor, the sale was set aside on the 16th September, 1914. On the 28th September, 1914, the execution case was dismissed in these terms: "Sale set aside, decree holder taken no further steps. Case dismissed for default." The decree-holder appealed from the order setting aside the sale, but the appeal was dismissed on the 2nd January, 1916. On the 16th February, 1916, the decree-holder filed a fresh application for execution.

Held:—That the application for execution made on the 16th February, 1916, was time-barred under cl. (6) of Sch. III of the Bengal Tenancy Act; that the previous application ended with the order of the 28th September, 1914, and there was no continuity between that application and the application made on the 16th February, 1916. *Midnapore Zemindari Company v. Dinanath Sahu*, 22 C.W.N. 766=45 Ind. Cas. 712.

RICHARDSON and WALMSLEY, JJ.

Reference:—13 C.W.N. 521, *Dist.*

- (14) *Execution—Sale of property not included in decree—Suit to repudiate part of sale—Maintainability.*

Where a plaintiff got the benefit by sale of properties in execution proceedings, held that he cannot take benefit of the transaction and at the same time repudiate a part of it when the transaction is one and indivisible. *Annapurna Bai v. Ramchandra*, 43 Ind. Cas. 178.

MITTRA, A.J.C.

- (15) *Rent Recovery suit—Tenure comprising several villages—Sale in execution of decree—What passes.*

Where a plaintiff brought a suit for recovery of arrears of rent due in respect of a tenure comprising five villages, obtained a decree and, in execution, caused certain property to be

Execution of Decree—(Continued).

sold, held that the whole tenure passed by the execution sale, as the rent has not been in any way distributed between the several villages comprised in the tenure. *Durga Prasad Nath Misir v. Dineshwar Nath Misir*, 43 Ind. Cas. 534=4 Pat. L.W. 347.

CHAMBER, C.J. and SHARFUDDIN, J.

- (16) *Inchoate contract between transferee decree-holder and judgment debtor—Execution by transferee decree-holder—Whether inchoate contract bars.*

An inchoate contract between the transferee decree-holder and the guardian of the legal representative of the deceased judgment-debtor would not give the judgment-debtor a right to plead against execution that a contract should be completed and that he should then be permitted to plead that the transferee was only his alias and has no *locus standi*. *Thirumalai Kandama Kondala Nagayya Ramakrishna Kadirvelusami Nalaker v. Eastern Development Corporation, Ltd.*, London, 49 Ind. Cas. 537.

SESHAGIRI AIYAR and BAKERWELL, JJ.

References:—19 M. 230=5 M.L.J. 218, *Dist.*; 14 M.L.T. 530=(1914) M.W.N. 157=26 M.L.J. 83, *Dist.*

- (17) *Execution application—Plea of limitation—Subsequent application—Res judicata—Limitation.*

Where an execution application was filed and the application was objected to amongst others, on the ground of limitation, and the application terminated without an adjudication on the point of limitation, **held**, that on a subsequent execution application, the objection of limitation can be again raised and the rule of *res judicata* cannot be pleaded in the case.

Where an execution application is made not in accordance with law as laid down under r. 11, O. XXI, Civ. Pro. Code, the application is of no avail to decree-holder to save limitation. *Ishan Chandra Samui v. Dulal Chandra De*, 44 Ind. Cas. 220.

RICHARDSON and BEACHCROFT, JJ.

- (18) *Allegation that defendant was of unsound mind—Trial Court decides the allegation against defendant—Execution decree—Whether that fact can be raised again in execution.*

Where in a suit the fact that one of the defendants was of unsound mind was brought to the notice of the trial Court and the Court insisted upon going on with the suit without appointing a next friend and passed a decree; **held**, that the fact having been taken in the trial of the suit and having been decided against the person alleged to be of unsound mind, the same question cannot possibly be raised in execution. *Jang Bahadur Lal v. Paltu Tewari*, 45 Ind. Cas. 218.

CHAMBER, C.J. and ROE, J.

Execution of Decree—(Continued).

- (19) *Full satisfaction of decree out of Court—Decree-holder withholds information from executing Court—Effect of such withholding—Fraud.*

Where a decree-holder obtained full satisfaction of the decree out of Court and failed to inform the Court of the fact and subsequently purchased a property in execution of the decree held that as the decree-holder withheld the information of the satisfaction of the decree, he had committed a fraud upon the executing Court and he could not be allowed to plead his own fraud and to take any benefit thereby. Fraud vitiates the most solemn transactions. *Ghosi Ram v. Dalei Singh*, 45 Ind. Cas. 222.

LINDSAY, J.C.

- (20) *Instalment decree—Default and subsequent payment—Whether acceptance means waiver of default provision.*

The mere acceptance of overdue instalments due under a decree is not of itself sufficient proof of waiver of the right to enforce the default provision embodied in the decree.

The question whether the acceptance of overdue instalments has the effect of extending the period of limitation is a question of fact. *Bhawandas Ferommal v. Manghraj*, 45 Ind. Cas. 324.

PRATT, J.C. and HAYWARD, A.J.C.

References :—27 B. 1; 25 Ind. Cas. 938, *Appr.*

- (21) *Res judicata in execution proceedings—Objection not taken in prior proceedings, cannot be taken in subsequent proceedings—Bengal Court of Wards Act (IX of 1879), S. 54—Notice.*

In execution proceedings, where a party fails to take an objection in the prior proceedings, he will be precluded from taking the same objection in subsequent proceedings by the law of *res judicata*.

In the case of a ward, who was a ward of the Court, S. 54 of Act IX of 1879 (Bengal Court of Wards), requires that notices be served upon the Manager of the Ward's estate through Collector and any notice served otherwise is void. *Janki Kuer v. Barwamalle Ramananjear*, 45 Ind. Cas. 404.

SHARFUDDIN and ROE, JJ.

- (21-a) *Security for amount of decree and costs—Stay of execution on pending appeal—Dismissal of appeal—Decree-holder, Right of, to enforce decree—Property pledged, if must be proceeded against.*

The fact that a security bond for payment of decree-amount and costs was given for stay of execution proceedings pending an appeal from the decree in no way affects the right of the decree-holder to execute his decree after the dismissal of the appeal in any way he thought fit in accordance with law. *Raj Bans Sahal v. Surja Lal*, 43 Ind. Cas. 454—3 Pat. L.J. 176—4 Pat. L.W. 216.

MULLICK and ATKINSON, JJ.

Execution of Decree—(Continued).

- (21-b) *Execution case, striking off of—Notice to parties, Necessity of.*

A Judge cannot, without giving notice to the parties, strike off execution cases or dismiss them.

Notice to the decree-holder is necessary before an execution case could be dismissed. *Kirti Chandra Daw v. Begim Behafi Pal Chaudhuri*, 46 Ind. Cas. 721.

FLETCHER and SHAMSUL HUDA, JJ.

- (21-c) *Order dismissing appeal for default, if decree within meaning of Civ. Pro. Code (1882), S. 2—Execution, Limitation for, Commencement of, from date of original decree, not from date of order dismissing appeal for default.*

An order passed under Civ. Pro. Code, 1882, by which an appeal was dismissed for default was not a decree within the meaning of the Code.

An appeal from a decree having been dismissed for default under the Civ. Pro. Code of 1882, on an application for execution of that decree:

Held, that the only decree which was capable of execution was the decree of the Court of first instance and that therefore limitation for execution of the decree commenced to run from the date of that decree, and not from the date of the order of the appellate Court dismissing for default the appeal from that decree. *Ram Adhin v. Ram Lot*, 47 Ind. Cas. 125.

LINDSAY, J.C.

- (22) *Civ. Pro. Code (Act V of 1908), S. 47 and O. XXI, r. 2—Agreement that no decree should be obtained—If can be gone into in execution.*

The question whether there was an agreement between the parties to a suit that no decree should be obtained therein, cannot be gone into in execution. *Dorasmami Mooppan v. Subbalakshmi Palayee Ammal*, 8 L.W. 205—(1918) M.W.N. 547—46 Ind. Cas. 880.

SADASIVA AIYAR and NAPIER, JJ.

Reference :—40 M. 233—5 L.W. 132 (F.B.), *Dist.*

- (23) *Step-in-aid of execution—Process-fee, payment of, whether step-in-aid of execution. Manna Lal v. Sardar Singh*, 20 O.C. 332—49 Ind. Cas. 342. See Final Part, 1917, Col. 424.

- (24) *Inconsistent positions taken by the party in different proceedings, if allowable—Execution application, dismissal of, and reference to suit—Order in suit, effect of—Former application, if bars fresh application—Res judicata.*

Where a suit to enforce a security bond, filed in a Privy Council appeal, was dismissed on the grounds (1) that the necessary parties had not been impleaded and (2) that the claim was barred by S. 47 of the Code of Civil Procedure and, on an application for execution to enforce the said security being made the decree-holder was met with the plea that the order passed

Execution of Decree—(Continued).

before the institution of the above suit in a previous execution proceeding, referring him to seek his remedy by suit operated as a bar to a fresh application for execution, held, that the order passed in the suit had the effect of nullifying the previous order passed in the execution proceeding.

A party should not be allowed to take up a position inconsistent with that on which he had succeeded in defeating a claim in a previous proceeding brought to enforce it. *Banti Begam v. Sajjad Mirza*, 21 O.C. 188—47 Ind. Cas. 558.

KANHAIYA LAL and DANIELS, J.CS.

References:—32 C. 494, *Not F.*; 9 O.C. 32; 13 A.L.J. 854; 15 O.W.N. 725; 17 O.W.N. 874; 14 C.L.J. 337; 37 A. 531; 36 B. 42; 19 C.W.N. 178; 30 C. 1060; 8 A.L.J. 409; 17 A. 174; 16 O.C. 178; 13 P.R. 1918, R.

(25) *Oudh Civil Digest, paragraph 172—Execution of decrees transferred from one Court to another—Competence of Court to persevere with execution, when first attempt to execute unsuccessful.*

A decree does not become incapable of execution within the meaning of paragraph 172 of the *Oudh Civil Digest*, merely because one attempt to execute it has proved unsuccessful. The Court, to which a decree is sent for execution, is competent to persevere with the execution, until it is made to appear either that satisfaction has been obtained or that execution is no longer possible. *Gur Dayal v. Messrs. Begg & Southerland*, 21 O.C. 261.

LINDSAY, J.C. and STUART, A.J.C.

(26) *Last application for, stayed by Court—Removal of bar of stay—Revival of last application stayed—Limitation for revival—Civ. Pro. Code, 1908, S. 48—Limitation Act, 1908, Art. 181.*

S. 48, *Civ. Pro. Code*, has application only to the case of a fresh application for leave to issue execution, but none whatsoever to the case of the revival of an antecedent application for execution which had been in suspense by reason of some bar, or which had been stayed pending the determination of subsequent litigation. For such a case Art. 181 of the *Limitation Act* provides a period of three years from the date when the bar is removed. *Sakina Bibi v. Ganesh Prasad Bhagat*, 3 Pat. L.J. 103—44 Ind. Cas. 560—5 Pat. L.W. 21.

MULLICK and ATKINSON, JJ.

(27) *Transfer of decrees to another Court for execution—Whole property covered by decrees not within jurisdiction of such another Court—Transfer order if invalid—Civ. Pro. Code, 1908, S. 39 (1) (c).*

Even where the whole of immoveable property covered by a decree, transferred to another Court for execution, is not, but only a part of it is, situated within the jurisdiction of this another Court, the latter Court would have, under S. 39 (1) (c), *Civ. Pro. Code*, jurisdiction to execute the decree upon a transfer

Execution of Decree—(Continued).

certificate being given by the Court passing the decrees. *Aziz Baksh v. Sultan Singh*, 43 P.R. 1918—46 Ind. Cas. 9.

SHAH DIN, C.J.

References:—22 C. 871, *Rel. on*; 14 C. 661, *Dist.*

(28) *Companies Act, Ss. 186, 200, 201—Order of liquidation Judge under S. 186—Transferee of such order if should apply for its execution to liquidation Judge or may apply to any other Judge—Civ. Pro. Code (1908), O. XXI, r. 13.*

An order of payment under S. 186, *Companies Act*, is a decree and must be enforced as such. The transferee of an order under S. 186 of the *Companies Act*, passed by the liquidation Judge in favour of a company in liquidation at Dera Ghazi Khan, applied in the Court of the District Judge at Dera Ghazi Khan for the execution of the said order. Held that Ss. 200 and 201 of the *Companies Act* are subject to the special provisions of r. 16, O. XXI, *Civ. Pro. Code*, that the transferee of the order must, in the first instance, apply to the Court which made the order that the District Judge of Dera Ghazi Khan had no jurisdiction to entertain such application. *Tharyaram v. Popat Ram*, 92 P.R. 1918—168 P.W.R. 1918—47 Ind. Cas. 997.

BROADWAY, J.

References:—25 C. 443; 27 C. 488, R.

(29) *Civ. Pro. Code, 1908—Execution of decrees—Sale of land—Sanction of Collector not necessary.*

Held, following P.R. 4 of 1910, Rev.—117 P.L.R. 1910, and 89 P.R. 1913—167 P.L.R. 1913, that the sanction of Revenue authorities was no longer necessary for sale of revenue paying land of the judgment-debtors. The Civil Court executing the decree is competent to decide the question of sale after hearing the objection of the parties and allowing them opportunity to produce evidence in support of their objection. *Barkat Rai v. Mirai Khan*, 69 P.L.R. 1918—143 P.W.R. 1918—46 Ind. Cas. 864.

SCOTT-SMITH, J.

Reference:—9 C. 290, *Ref. to.*

(30) *Execution—Duty of executing Court—Decree to be executed literally—Subject-matter of decrees altered materially—Decree, whether capable of execution.*

Held that an executing Court cannot tamper with decrees which must be executed literally. When a decree cannot be executed literally, it cannot be executed at all.

Plaintiff obtained a decree that he was entitled to share the water flowing through a certain *rajbaha* equally with the defendant. Subsequently the canal authorities made certain alterations, as a result of which the volume of water flowing through the *rajbaha* was increased and many other persons besides the plaintiff and the defendant became entitled to share in the water.

Execution of Decree—(Continued).

Held, that the decree in favour of the plaintiff was no longer capable of execution. **Khwaja Mahmud v. Ghulam Rasool**, 59 P.W.R. 1918 = 44 Ind. Cas. 550.

CHEVIS, J.

(31-33) Non-occupancy raiyat, for ejectment of—Judgment-debtor, Payment by, Necessity of—Under-raiyat, Payment by, Validity of—Bengal Tenancy Act (1885), S. 66, cl. (2). See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 33, 27 C.L.J. 478.

(34) By attachment of another decree—Attaching decree-holder's rights over decree so attached. See **APPEAL (GENERAL)**, No. 36, 86 P.W.R. 1918.

(35) Suit for possession decreed by Privy Council after determination of partition proceedings instituted before suit—No reference in Privy Council decree to shares allotted on partition—Execution applied for against share, not mentioned in plaint, but allotted on partition—Reference to separate suit by executing Court—Decision of High Court directing in execution proceedings to ascertain shares allotted on partition and to execute decree on such shares—Decision of High Court, if final order appealable to Privy Council. See **APPEAL (PRIVY COUNCIL)**, No. 11, 3 Pat. L.J. 339.

(36) Judgment debtor at time of application outside territorial jurisdiction of Court—Warrant of arrest if can be issued by Court. See **ARREST**, 3 Pat. L.J. 95.

(37) No objection raised in execution to sale of agriculturist's house—Sale by purchaser at execution sale for possession—Resistance to such sale on ground of exemption from liability to sale, if valid. See **AUCTION-PURCHASER**, No. 2, 16 A.L.J. 691.

(38) Order staying execution to be obtained by fraud on Court—Effect. See **CIV. PRO. CODE** (1908), No. 346, 16 A.L.J. 46.

(39) Grant of time by Court executing decree—Order, if given fresh starting period to decree-holder. See **CIV. PRO. CODE** (1908), No. 89, 16 A.L.J. 71.

(40) Objection to attachment dismissed—Suit not brought within one year from dismissal—Order conclusive. See **CIV. PRO. CODE** (1908), No. 325, 16 A.L.J. 256.

(41) Application for decree under O. XXXIV, r. 6, Civ. Pro. Code—Application not one for execution. See **CIV. PRO. CODE** (1908), No. 447, 16 A.L.J. 437.

(42) Collector effecting partition under Civ. Pro. Code in execution of decree—Jurisdiction of Civil Court to hear application for re-opening partition. See **CIV. PRO. CODE** (1908), No. 96, 20 Bom. L.R. 111.

(43) Application for decree absolute for sale—Accrual of right to apply. See **CIV. PRO. CODE** (1903), No. 92, 20 Bom. L.R. 181.

(44) Partition suit—Whether decree-holder can apply for execution to be put into actual possession of properties allotted to decree-holder.

Execution of Decree—(Continued).

See **CIV. PRO. CODE** (1908), No. 319, 45 Ind. Cas. 7.

(44-a) Transfer of—Transfer of jurisdiction of Court while proceedings pending, Effect of. See **CIV. PRO. CODE** (1908), No. 301-a, 33 M. L.J. 750.

(44-b) Joint decree in favour of four partners—Release by two of their interest in partnership in favour of the other two—Assignment of the other two to a third party—Assignee, Rights of, to assignee—Consideration for assignment, Absence of, Value of—Certificate of payment by two who released their interests, Effect of. See **CIV. PRO. CODE** (1908), No. 296-a, (1918) M.W.N. 507.

(45) By Collector by virtue of delegation under Civ. Pro. Code—Civ. Pro. Code, 1908, Sec. III, para 11, mortgage by judgment-debtor against prohibition contained in—Validity of mortgage. See **CIV. PRO. CODE** (1908), No. 561, 14 N.L.R. 181 (P.C.).

(46) Objection as to jurisdiction of Court passing decree if can be considered by executing Court—Objection as to decree being contrary to S. 10, Civ. Pro. Code. See **CIV. PRO. CODE** (1908), No. 10, 44 P.L.R. 1918.

(47) Decree on compromise—Plaintiff to execute decree on payment or deposit of sums of money—Money remitted by money order—No deposit as required by decree—Mortgage made by defendant as preliminary to sale of property provided in compromise—Decree if can be executed. See **COMPROMISE DECREE**, No. 1, 16 A.L.J. 472.

(48) Attachment of property in, but subsequent withdrawal and suit for declaration that property belongs to judgment debtor—Maintainability of suit—Specific Relief Act (I of 1877), S. 42, proviso, if applicable to such suit. See **DECLARATORY DECREE**, No. 2, 45 Ind. Cas. 972.

(48-a) Judgment-debtor, Compromise by, admitting liability in execution proceedings, Repudiation of, Validity—Estoppel, Fraudulent intention, if necessary to establish. See **ESTOPPEL**, No. 6-a, 3 Pat. L.J. 451.

(49) Purchase and possession of holding by landlord in execution of decree for arrears of rent against tenant—Fraudulent suppression of processes necessary to be served on judgment-debtor—Omission of service on notice under Civ. Pro. Code, 1908, O. XXI, r. 22 vitiates sale—Burden of proving knowledge of fraudulent suppression of facts and processes lies on party guilty of fraud—Remedy of person aggrieved by fraudulent suppression of processes if lies under S. 47, Civ. Pro. Code, 1908. See **EXECUTION SALE**, No. 1, 27 O.L.J. 528.

(50) Decree for perpetual injunction passed—Obstruction—Enforcement of decree through police. See **HEREDITARY OFFICE**, No. 1, 16 A.L.J. 700.

(50-a) At variance with intent and purport of decree—Inherent power of Court to interfere—Civ. Pro. Code (1908), S. 151—Calcutta High Court, Of—Patna High Court, successor

Execution of Decree—(Continued).

of. See **HIGH COURT, POWERS OF**, No. 2, 3 Pat. L.J. 485.

(51) Breach of permanent injunction, Remedy for—Separate suit or application for execution. See **INJUNCTION**, No. 1, 22 C. W.N. 851.

(52) Non-occupancy ryoti holding, Sale of, in execution of money decree—Tenant's right to object to sale. See **LANDLORD AND TENANT**, No. 1, 24 C.W.N. 792.

(53) Application for Limitation, fresh starting point of—Decree amount, Payment of portion of, by judgment-debtor—Limitation Act, 1908, Sec. I, Art. 182 (b). See **LIMITATION**, No. 4, 45 Ind. Cas. 903.

(54) Suit on mortgage—Decree passed by High Court in appeal—Application for decree absolute if application for execution—Limitation. See **LIMITATION ACT** (1908), No. 31, 16 A.L.J. 85.

(55) Application complying with Civ. Pro. Code, O. XXI, r. 11—Copy of decree not filed—Time given for filing copy—Copy not filed—Application struck off—Subsequent application within three years of first—Limitation saved. See **LIMITATION ACT** (1908), No. 215, 16 A.L.J. 87.

(56) Joint decree against several persons—Appeal by two out of three—Appeal dismissed with costs—Execution of decree for appellate costs against them—No further application within three years—Limitation. See **LIMITATION ACT** (1908), No. 235, 16 A.L.J. 109.

(57) Mortgage suit—Final decree in such suit is decree in suit itself—Application for final decree not an application for See **LIMITATION ACT** (1908), No. 205, 16 A.L.J. 143.

(58) Date of issue of notice—Time runs from date of order—Not from date of delivery to process server. See **LIMITATION ACT** (1908), No. 86, 16 A.L.J. 633.

(59) Application for—Notice ordered to be issued—Date on which notice issued and date on which notice ordered to be issued—Calculation of period. See **LIMITATION ACT** (1908), No. 230, 20 Bom. L.R. 351.

(60) Application for, effect of dismissal of application on subsistence of attachment. See **LIMITATION ACT** (1908), No. 204, 7 L.W. 16.

(61) Dismissal of suit for default—Application for re-hearing, Dismissal of—Costs of application, Limitation for execution of. See **LIMITATION ACT** (1908), No. 225, 3 Pat. L.J. 119.

(62) Appeal to Privy Council—Door against respondent given as security for costs—Accomplishment of security if operates as order staying execution during pendency of appeal—Time of pendency if may be excluded from limitation period. See **LIMITATION ACT** (1908), No. 24, 3 Pat. L.J. 182.

(63) Date of issue of notice—Construction. See **LIMITATION ACT** (1908), No. 231, 3 Pat. L.J. 285.

Execution of Decree—(Concluded).

(64-a) On mortgage not to be taken out against some only of owners of equity of redemption during pendency of case against others. See **LIMITATION ACT** (1908), 47 Ind. Cas. 907.

(64) Affirmation by Privy Council of first Court's decree awarding mesne profits—Date of decree to date of possession—Decree to be executed is that of Privy Council. See **MESNE PROFITS**, No. 2, 3 Pat. L.J. 116.

(65) Mortgage of entire zamindari by person who had previously bought shares in certain groves—Execution of decree against such person—Execution sale of zamindari if includes groves also. See **MORTGAGE (SALE)**, No. 2, 16 A.L.J. 900.

(65-a) Independent title if can be enforced, in—Civ. Pro. Code (1908), S. 47. See **MORTGAGE (SALE)**, No. 5-a, 47 Ind. Cas. 374.

(66) Limitation for application for, passed under S. 89 Transfer of Property Act, See **MORTGAGE (SALE)**, No. 7, 35 M.L.J. 124.

(67) Question concerning auction purchaser and also parties to suit—Question to be determined in execution—Separate suit unnecessary. See **MORTGAGE (SALE)**, No. 8, 23 M.L.J. 198 (P.C.)

(68) Pardanashin lady—Fraudulent conduct. See **PARDANASHIN WOMAN**, No. 3, 40 Ind. Cas. 399.

(69) Partition decree—Allotment between co-shares, principle of. See **PARTITION**, No. 6, 22 P.L.R. 1918.

(70) By arrest of insolvent during insolvency proceedings, whether excluded by Presidency Towns Insolvency Act. See **PRESIDENCY TOWNS INSOLVENCY ACT**, 47 Ind. Cas. 798.

(71) Civ. Pro. Code, S. 11, 47—First suit for redemption decreed—No execution applied for—Second mortgage to another—Subsequent mortgagee's suit barred. See **RES JUDICATA**, No. 7, 40 Bom. L.R. 164.

(72) Partial stay of, if justifies exclusion of time under S. 15, Limitation Act. See **STAY OF EXECUTION**, No. 1, U.B.R. (1918), 1st Cr., 73.

(73) Application to dismiss objections to—Application a step in aid of. See **STEP IN AID OF EXECUTION**, No. 1, 16 A.L.J. 704.

(74) One co-heir of decree holder obtaining succession certificate, By, Validity of—Judgment of court if can go behind certificate—Succession certificate, Conclusiveness of, under Succession Certificate Act (1959) S. 16. See **SUCCESSION CERTIFICATE**, No. 3, 46 Ind. Cas. 830.

Execution Proceedings.

(1) Res judicata in execution proceedings—Decision of the execution Court—Its finality.

Where in execution an objection is raised and gone into, the same objection cannot be considered on any subsequent application in execution. If it was decided against the

Execution Proceedings—(Continued).

judgment-debtors, it was decided for good and all against them, and, if decided in their favour, it is equally binding.

Where a decision of the execution Court is that no property of a judgment-debtor can be attached, that decision is final *Jadubans Panday v. Ekram Rai*, 44 Ind. Cas. 654 = 4 Pat. L.W. 279.

ROE and IMAM, JJ.

- (2) *Court conducting. Jurisdiction of—Decree, strict observance of terms of—Possessory decree in favour of mortgagee—Sale of mortgaged property for costs, Validity of.*

The jurisdiction of a Court conducting execution proceedings must be determined with reference to the directions contained in the decree, including any direction which the Court may give regarding the manner in which the relief granted by the decree is to be secured to the person entitled to it. The powers of the executing Court are circumscribed by any such directions set out in the decree and it has no jurisdiction to award relief in any other manner than the decree allows. It has no power to go behind the decree so as to question its legality or correctness.

Where, in accordance with the provisions in a decree in a mortgage-suit, which directed that the mortgagee should be put in possession of the mortgaged property on a certain date, on failure of the mortgagor to pay the mortgagee a fixed sum together with the costs of the suit, possession of the mortgaged property was delivered to the mortgagee on such default by the mortgagor and when, on a further application of the mortgagee for the realisation of costs, the mortgaged property in his possession was sold by the Court:

Held, that the sale for costs was a void sale, as there was absolutely no direction in the decree for realisation of the costs by sale of the property. *Sheodarnhan Lal v. Assessor Singh*, 46 Ind. Cas. 52 = 5 O.L.J. 179.

LINDSAY, J.C.

References:—11 I. A. 37 = 5 A. 269 = 4 Sar. P. C. J. 489 = 3 Ind. Dec. (N. S.) 719 (P. C.) and 11 I. A. 181 = 7 A. 102 = 4 Sar. P.C.J. 564 = 4 Ind. Dec. (N. S.) 138 (P. C.), *Dist.*

- (3) *Civ. Pro. Code (1908), O. IX, Provisions of, Applicability of, to—Dismissal for default of—Restoration of—Civ. Pro. Code (1908), O. IX or S. 151—Court executing decree. Jurisdiction of, to go into merits when decree-holder absent—Decision, Binding nature of.*

O. IX of the Civ. Pro. Code does not apply to execution proceedings.

An execution application dismissed for default can neither be restored under O. IX nor under the vague and extraordinary jurisdiction given under S. 151 of the Code of Civil Procedure.

There is nothing in the Civ. Pro. Code which ousts the jurisdiction of an execution Court to go into the merits of the judgment-debtor's objection even though the executing creditor is absent.

Execution Proceedings—(Concluded).

Rightly or wrongly, a Court with jurisdiction has disposed of the judgment-debtor's contention on the merits and has decided that the decree-holder was not competent by reason of a defect of parties to proceed with the execution. That decision being on the merits is binding on the decree holder till it is set aside. *Ritu Kuer v. Alakhdeo Narain Singha*, 47 Ind. Cas. 154.

MULLICK and THORNHILL, JJ.

- (4) *Appeal arising out of, Pendency of, Respondent, Death of one, during—Legal representative not brought on record—Appeal if abates as against other respondents also. See ABATEMENT OF APPEAL, No. 3, 46 Ind. Cas. 911.*

- (5) *Small Cause Court decree, of, Order in, if subject to second appeal—Civ. Pro. Code (1908), S. 102. See APPEAL (SECOND APPEAL), No. 6-a, 43 Ind. Cas. 15.*

- (6) *Decision in, as to fraudulent concealment of property by judgment-debtor declared insolvent—Person entitled to appeal against—Official Receiver not judgment-debtor. See APPEAL (GENERAL), No. 23-f, 47 Ind. Cas. 152.*

- (7) *Decree sent to Collector for execution—Order of Collector in—Civil Courts, Jurisdiction of, to interfere with such order. See JURISDICTION (CIVIL COURTS), No. 7, 46 Ind. Cas. 885.*

- (8) *Decree absolute in mortgage suit, if can be challenged in—Pendency of, when Civ. Pro. Code (1908) came into force, Applicability of S. 48 to. See MORTGAGE (GENERAL), No. 9-c, 47 Ind. Cas. 143.*

- (9) *Receiver appointed in, Order refusing to discharge a, if order under S. 47, Civ. Pro. Code (1908) and if appeal lies from. See RECEIVER, No. 7, 3 Pat. L.J. 513.*

- (10) *Delivery of possession, Order for, if order in—Review of such order—Appeal if lies from order passed on review. See REVIEW, No. 8, 3 Pat. L.J. 571.*

- (11) *Against non-transferable holding, when to be objected to, and effect of not objecting at the right time. See RES JUDICATA, 47 Ind. Cas. 790.*

Execution Sale.

- (1) *Execution sale—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3 'Dispossession'—Landlord purchaser—Omission to serve notice under O. XXI, r. 22 of the Code of Civil Procedure (Act V of 1908), Effect of—Process of execution fraudulently suppressed—Civ. Pro. Code (Act V of 1908), S. 47—Limitation Act (IX of 1908), S. 18. Sch. I, Art. 161—Burden of proof.*

Where a landlord, in execution of a decree for arrears of rent puts a holding to sale, purchases it himself, and obtains delivery through Court, such dispossession of the tenant is not dispossession within the meaning of Art. 3, Sch. III of the Bengal Tenancy Act (a).

The omission to serve a notice under O. XXI, r. 22 of the Code of Civil Procedure is by itself

Execution Sale—(Continued).

sufficient to render an execution sale void for want of jurisdiction, for the notice is the very foundation of the jurisdiction (b).

Where every process prescribed by the legislature with a view to appraise the judgment-debtors or their representatives that execution was to proceed against them had been fraudulently suppressed: *Held* that such a case was governed by S. 47 of the Code of Civil Procedure and the period of limitation was that provided by Art. 181 of the first schedule to the Limitation Act. To such a case, S. 18 of the Limitation Act applied.

The burden rests upon the person, who has committed a fraud, to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to seek the assistance of the Court (c). *Ram Kinkar v. Shilpi Ram*, 27 C.L.J. 528=46 Ind. Cas. 241.

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 17 C.W.N. 817, R. (b) 34 M. 292; 35 M. 678; 17 C.L.J. 316; 18 C.L.J. 274; 41 C. 1125, R.; 41 I.A. 251=42 C. 72=20 C.L.J. 555; 12 C.L.J. 6; 6 C. 103; 20 C. 370; 21 C. 19; 11 C.L.J. 489; 3 A. 424; 32 B. 572; 32 C. 296; 15 C.L.J. 3 & 446; 16 C.L.J. 318; 18 C.L.J. 13; 20 C.L.J. 469, F. (c) 20 I.A. 1=17 B. 341, R.

(1-a) *Setting aside of—Proclamation of sale, Irregularity in, On ground of—Right of fishery over a stream extending 30 to 40 miles and flowing over 133 villages, Sale of, Affixing copy of order directing sale in only one village, if irregular procedure—Civ. Pro. Code (1908), O. XXI, r. 54.*

An execution sale should be set aside when there is material irregularity in the sale-proclamation, both in the description and valuation of property. Under Civ. Pro. Code (1908), O. XXI, r. 54, the order should be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and a copy of the order should be affixed at some conspicuous part of the property.

Applying the principle of this rule to the case of a sale of a right of fishery over a stream extending to 30 or 40 miles and flowing over 133 villages, it would not be sufficient to affix a copy of the order in only one village but it must be displayed at various portions of the estate. *Chattarpatt Singh v. Surendra Nath Singh*, 44 Ind. Cas. 412.

CHAPMAN and JWALA PRASAD, JJ.

Reference:—30 A. 412, F.

(3) *Civ. Pro. Code (1908), O. XXI, rr. 22 and 17—Sale without notice to legal representative of one of the judgment-debtors, effect of, as against others—Subsequent sale when proceeds already realised enough to satisfy decree, Validity of.*

A decree for money was obtained against certain persons described as carrying on business under a particular style but each of

Execution Sale—(Continued).

the judgment-debtors was liable to pay the whole amount and execution could be taken out as against each for the whole amount. But in taking out execution, notice was not issued under O. XXI, r. 22, against the widow of one of the judgment-debtors who died subsequent to decree.

Held, that the mere fact that the sale might have been capable of being avoided or void against deceased judgment debtor's widow cannot affect the sale as against the other judgment-debtors.

Where the properties were sold in execution of a decree when the sale of the first two lots were more than sufficient to satisfy the decretal amount, *held* that O. XXI, r. 17, has nothing to do with the invalidity of a sale made to a stranger who bought without notice of the fact that the amount realized by the sale was more than sufficient to satisfy the decree in execution. *Surendra Nath Saba v. Bola Ram Poddar*, 45 Ind. Cas. 699.

FLETCHER and SHAMSUL HUDA, JJ.

(3) *Setting aside of—Sale, Publication of, Irregularity in—Effect of, where no substantial injury proved—Civ. Pro. Code (Act V of 1908), O. XXI, r. 90, proviso.*

Under the express terms of the proviso to

is barred from setting aside an execution sale, on the ground of there being no publication of the sale on the spot, without proof of the applicant having sustained substantial injury by reason of such irregularity. *Brij Chandra Ghose v. Sadhu Charan Routra*, 46 Ind. Cas. 84=5 Pat. L.W. 15.

CHAPMAN and ROE, JJ.

(3-a) *Money decree, Sale in execution of—Occupancy holding, Non-transferable, Sale of—Co-sharer raiyat, if can object.*

A non-transferable occupancy holding can be sold in execution of a money decree. One of the several raiyats who jointly hold such a holding can object to such a sale only to the extent of his share. *Felani Mondalani v. Mukunda Lal Mandal*, 46 Ind. Cas. 781.

WOODROFFE and SMITHER, JJ.

(4) *Rent decree by Revenue Court—Sale in execution of such decree—Sale if passes property free of all incumbrances thereon—Madras Estates Land Act, S. 125.*

A sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all incumbrances, except those specified in S. 125 of the Madras Estates Land Act. *Panangi Palli v. Sree Raja Datta Venkata Suryanarayana Jaghapathiraju Bahadur Garu*, 35 M. L.J. 443.

PHILLIPS and KUMARASWAMI SASTRI, JJ.

References:—32 C. 680; 33 C. 985; 41 C. 926 (P.C.); 9 C.L.J. 234; 15 C. 492, *Rel. on*; 25 M. 220, *Expl. and Dist.*; 17 C. 301, *Not F.*

Execution Sale—(Continued).

- (4-a) *Non-transferable occupancy holding, Purchaser of, if entitled to object to—Judgment-debtor, How far a representative of—* Civ. Pro. Code (1908), S. 47 and O. XXI, r. 100—*Proceedings under r. 100, Maintainability of, by such purchaser.*

The purchaser of the whole or part of an occupancy holding not transferable by custom is a representative of the judgment debtor and entitled to object to the sale under S. 47, and therefore not entitled to maintain proceedings under O. XXI, r. 100. **Panchratan Koeri v. Ram Bahay Singh**, 3 Pat. L.J. 573.

ROE and JWALA PRASAD, JJ.

Reference:—42 C. 172, Ref. to.

- (1-b) *Judgment-debtor's undertaking not to raise objection of illegality or irregularity and the consequent postponement of sale—* Civ. Pro. Code, O. XXI, r. 90.

After postponement of a sale in execution on judgment-debtor's undertaking not to raise the objection of illegality or irregularity, the judgment-debtor cannot seek to set aside the sale, when it actually takes place subsequently for any irregularity or illegality known to him at the time of his undertaking. **Lakshmi Prasanna Mojmudar v. Rajindra Poddar**, 47 Ind. Cas. 831.

FLETCHER and SHAMSUL HUDA, JJ.

- (5) *Auction-purchaser in a money decree—From whom does he derive his title.* See C.P. ACT XI OF 1898 (TENANCY), No. 7, 43 Ind. Cas. 907.

(5 a) *Application to set aside an Order refusing, Second appeal, if lies from—* Civ. Pro. Code (1908), Ss. 47, 104, O. XLIII, r. 1 (j). See APPEAL (SECOND APPEAL), No. 10-a, 46 Ind. Cas. 529.

(5-b) *Order setting aside, under S. 173, Bengal Tenancy Act (VIII of 1885)—Purchaser benamidar of judgment-debtor—Order if appealable—Benamidar, Civ. Pro. Code (1908), S. 47, Provisions of, inapplicable to a.* See APPEAL (GENERAL), No. 23-c, 46 Ind. Cas. 748.

(6) *No objection raised in execution to sale of agriculturist's house—Suit by purchaser at execution sale for possession—Resistance to such suit on ground of exemption from liability to sale, if valid.* See AUCTION-PURCHASER, No. 2, 16 A.L.J. 691.

(7) *Auction-purchaser at, if bound by mortgage executed prior to attachment.* See AUCTION-PURCHASER, No. 3, 45 Ind. Cas. 877=5 O.L.J. 114.

(8) *Setting aside of—Auction purchaser, withdrawal of purchase money by—Subsequent confirmation of sale—Refund of purchase-money.* See AUCTION-PURCHASER, No. 4, 46 Ind. Cas. 275.

(8-a) *Auction-purchaser, when can impugn validity of an—Damages, Suit for, when a proper remedy.* See AUCTION-PURCHASER, No. 5-a, 3 Pat. L.J. 516.

Execution Sale—(Concluded).

(9) *Purchaser at, if representative of judgment-debtor.* See CIV. PRO. CODE (1908), No. 61, 20 Bom. L.R. 495.

(10) *Irregularity in proceedings of sale—Whether sufficient to set aside.* See CIV. PRO. CODE (1908), No. 348, 45 Ind. Cas. 212.

(11) *Possessory decree in favour of mortgagee—Possession delivered to mortgagee—Sale of mortgaged property for costs. Validity of.* See EXECUTION PROCEEDINGS, No. 2, 46 Ind. Cas. 53.

(12) *Purchase by landlord at, for rent decree—Landlord if should annual purchase of portion of tenancy by another.* See LANDLORD AND TENANT, No. 6, 29 C.L.J. 266.

(13) *Whom may be treated as private alienation.* See LIMITATION ACT (1908), No. 367, 35 M.L.J. 364.

(13-a) *Minor, Property of, Of—Minor not properly represented in suit—Minor if can recover property sold—Suit for recovery, Limitation for—* Limitation Act (1908), Arts. 12 and 144. See MINOR, No. 5-b, 118 P.R. 1918.

(14) *Mortgage of entire zamindari by person who had previously bought shares in certain groves—Execution of decree against such person—Execution sale of zamindari if includes groves also.* See MORTGAGE (SALE), No. 2, 16 A.L.J. 900.

(15) *Malabar otti mortgagee if can enforce pre-emption against purchaser in compulsory sale.* See PRE-EMPTION, No. 15, 34 M.L.J. 412.

(16) *Rent, Sale and—Setting aside of—Amount to be deposited for—Bengal Tenancy Act (1885) S. 171—Civ. Pro. Code (1908), O. XXI, r. 59.* See RENT SALE, 47 Ind. Cas. 654.

(17) *Purchaser of non-transferable occupancy holding, a representative of judgment-debtor entitled to object to, under S. 47, Civ. Pro. Code (1908)—Not entitled to maintain proceedings under r. 100 of O. XXI.* See REPRESENTATIVE, 43 Ind. Cas. 969.

Executive Act.

See ADMINISTRATIVE ORDER.

Executor.

- (1) *Executor, power of—Effect of executor's assent to legacy—Power of executor to dispose of property—Succession Act (X of 1865), Ss. 269, 293.*

After the executor has given his assent to the legacy, he is not competent under S. 293 of the Indian Succession Act, to deal further with the property.

An executor, although he has the power to dispose of the property of the deceased in such manner as he thinks fit under S. 269 of the Indian Succession Act, must be able to give reasons for doing so. **Marle Penheiro v. Jotindra Mohan Sen**, 28 O.L.J. 141=47 Ind. Cas. 289.

WALMSLEY and PANTON, JJ.

Executor—(Concluded).**(2) Executor, duty of—Administration of estate.**

The duties of an executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf. (*a*). **Sankar Nath Makerji v. Biddulata Debi**, 28 C.L.J. 271.

N. R. CHATTERJEE and SMITHER, JJ.

Reference:—(a) 31 C. 89 (92), F.; 12 C. 375, Dist.

(3) *Under a Hindu will, carrying on family business—Debts incurred thereon—Creditor's remedy against executor personally—Executor's right to indemnify—Executor if sufficiently represents estate when his interest adverse to beneficiary's—Minor represented by nominee of party having adverse interest.* **Sudhir Chandra Das v. Gobinda Chandra Roy**, 21 C.W.N. 1043=41 Ind. Cas. 503=15 C. 502. See *Find Part*, 1917, col. 131.

(4) *Executor, Decree obtained by—Sale—Purchase by executor—Beneficial ownership in asset. Determination of—Effect of family arrangement.*

K died leaving four sons and a widow. He left a will appointing his widow as his executrix. The latter, in execution of a rent decree, purchased the property in arrears. Prior to the decree, one of the sons having died unmarried, his share had devolved upon the executrix as his mother, and a family arrangement had been executed between the members of the family before the auction of the property, by which the executrix released all her interest in the same and declared her son in favour of another son. The plaintiff acquired the entire interest of that son, and the other co-shares in the property.

Held, that under the terms of the family arrangement, the executrix had no interest in the property that she purchased as executrix in execution of the decree she obtained as executrix and thus the plaintiff was, therefore, entitled to the property; and that though the decree was obtained by the executrix, the beneficial owners of the estate were the real owners of the decree. **Krishna Promotha Das v. Kedar Nath Basu**, 41 Ind. Cas. 732.

FLETCHER and SMITHER, JJ.

(5) *Will, Of—Power of, to grant ijara lease—Permanent lease, Grant of, excluded by.*

The power of the executor to lease by way of *ijara* excludes by the very nature of it the right to grant a permanent lease. **Pran Krishna Das v. Satibala Sen**, 46 Ind. Cas. 852.

FLETCHER and SMITHER, JJ.

Executory Contract.

Mortgage by ghatwal—Restrictions on alienation of such property removed before institution of suit—Executory agreement. See **MORTGAGE (GENERAL)**, No. 1, 27 C.L.J. 289.

Ex-parte Application.

Party making an. **Duty of—Appeal, Filing of, Time for. Order granting, if can be cancelled by same Court.** See **APPEAL (GENERAL)**, No. 20, 45 Ind. Cas. 725.

Ex-parte Decree.

(1) Application to lower appellate Court to set aside its *ex parte* decree—Filing of second appeal also against *ex parte* decree—*Ex-parte* set aside before second appeal admitted—Second appeal, if maintainable. See **APPEAL (SECOND APPEAL)**, No. 12, 14 N.L.R. 30.

(2) When, should be set aside—Right of defendant. See **CIV. PRO. CODE (1909)**, No. 235, 47 Ind. Cas. 633.

Ex-parte Order.

Party when bound by. See **HINDU LAW (REVERSIONERS)**, No. 6, (1918) M.W.N. 888.

Expectant Heir.

Dealings by money lenders with expectant heirs—Non exercise of undue influence by money lender. Burden of proving—Conditions under which loan to such heir becomes unconscionable. See **UNCONSCIONABLE GAIN**, No. 1, 16 A.L.J. 905 (P.C.).

Extraordinary Jurisdiction.

Exercise of, discretionary—Considerations before such exercise. See **ELECTIONS**, No. 3, 22 C.W.N. 961.

Fair Comment.

Defamation—Facts commented on by journals must in substance be truly stated—Trivial misstatements of fact do not affect plea of. See **LIBEL**, No. 1, 20 Bom. L.R. 185.

Family Arrangement.

(1) *Executor, Decree obtained by—Sale—Purchase by executor—Beneficial ownership in decree, Determination of—Effect of family arrangement.* See **EXECUTOR**, No. 4, 41 Ind. Cas. 732.

(2) *Hindu law—Maheswari caste—Widow of separated brother entering into deeds with reference to her maintenance—Widow subsequently adopting son—Whether the deeds can be set up to bar the claims of adopted son to family property as family arrangements.* See **HINDU LAW (ADOPTION)**, No. 6, 44 Ind. Cas. 5.

Family Settlement.

When binds minor. See **MINOR**, No. 3, 23 C.W.N. 118.

Family Usage.

See **CUSTOM**.

Final Decree.

- (1) *Limitation Act (IX of 1908), Art. 181—Computation of time for application for final decree for sale under O. XXXIV, r. 5—Date of decree of the Court of final appeal.*

Held, that the period of limitation for an application for a final decree, for sale under O. XXXIV, r. 5 of the Civ. Pro. Code, should be computed from the date of the decree of the Court of final appeal. **Lallu Ram v. Jot Singh**, 21 O.C. 176=47 Ind. Cas. 206.

KANHAIYA LAL and DANIELS. J.Cs.

References:—13 A.L.J. 985; 20 O.C. 205; 38 A. 212, *Not P.*; 36 A. 250; 23 A. 151; 39 A. 641, *Rel. on*.

- (2) *Preliminary decree fixing time for redemption—Confirmation of such decree in appeal therefrom—Application for final decree, Computation of time for making. See LIMITATION ACT (1908), No. 219, 35 M.L.J. 507.*

(3) *Preliminary decree for partition set aside on appeal—Value of final decree passed during pendency of appeal from preliminary decree—Realization of money in execution of such final decree—Restitution of such money, right to. See RESTITUTION, No. 2, 27 G.L.J. 451.*

Final Judgment.

Reversal of decree and remand for further trial on merits—Remand if final judgment—Remand when can be regarded as final judgment. See APPEAL (TO PRIVY COUNCIL), No. 7, (1918) M.W.N. 844.

Final Order.

(1) *Dismissal of suit on ground of limitation—Reversal of same in appeal and remand for re-trial on merits—Order of remand, if final order. See APPEAL (TO PRIVY COUNCIL), No. 9, 21 O.C. 336.*

(2) *Application for execution of decree of Privy Council—Order of High Court directing first Court to execute Privy Council decree on shares allotted in partition proceedings terminating before Privy Council decree but not brought to notice of Privy Council—Order if final order or interlocutory directing procedure merely. See APPEAL (TO PRIVY COUNCIL), No. 11, 3 Pat. L.J. 339.*

Finding.

Judge, By—O. certain issues by a predecessor. Successor if bound to follow. See PRACTICE AND PROCEDURE, No. 2, 47 Ind. Cas. 555.

Finding of Fact.

- (1) *Lower appellate Court. Finding by—Status of person as tenure-holder—Second appeal, interference in—Tenancy, Area of, Mistake as to, if mistake of law.*

Except on the ground of some clear mistake on a point of law, the High Court ought not to

Finding of Fact—(Concluded).

interfere in second appeal with a finding of fact arrived at by the lower appellate Court as to a person being a tenure-holder.

A mistake as to the area of a holding can hardly be described as a mistake of law. Darpanarain Sarkar v. Girish Chandra Das, 45 Ind. Cas. 351.

RICHARDSON and WALMSLEY, JJ.

(1-a) *Interference with, in second appeal—Inference drawn from those facts, Correction of. See APPEAL (SECOND APPEAL), No. 6-b, 43 Ind. Cas. 49.*

(2) *Lower appellate Court, Of—Questioning of, where entire evidence not considered—Second appeal. See APPEAL (SECOND APPEAL), No. 9, 46 Ind. Cas. 52.*

(3) *Based on wrong assumption of facts and wrong principles open to second appeal. See APPEAL (SECOND APPEAL), No. 23, 27 P.W. R. 1918.*

(4) *Burden heavy on appellant seeking to upset finding of fact. See APPEAL (TO PRIVY COUNCIL), No. 8, 21 O.C. 101 (P.C.).*

Firm.

- (1) *Suit against firm—Right of plaintiff to know members of firm—Object of seeking such information—Partner if can be forced to appear in person—Effect of appearance out for partner—Civ. Pro. Code (1908), O. XXX rr. 1 and 6.*

*Under O. XXX, r. 1, Civ. Pro. Code, a plaintiff suing a firm is entitled to know who the persons are who constitute that firm and the information cannot be withheld, as it is necessary to enable the plaintiff to know who will be personally liable in execution for the satisfaction of his decree. The word "individually" in r. 6 is not synonymous with "in person." No partner can be forced under this rule to appear in person, but in his absence after service of summons, he will be dealt with *ex parte*; but if appearance is put in for him, it will be reckoned as his individual appearance. See **Dege & Co v. Shames Das & Co**, 73 P.R. 1913=105 P.L.R. 1915=155 P.W.R. 1918=17 Ind. Cas. 422.*

DE-ROSSIGNOL, J.

(2) *Known by the name of father and son, even after their death, Principles as to—Omission of name of son in plaint not a misdescription. See PARTNERSHIP, No. 7-b, 155 P.L.R. 1917=3 P.W.R. 1918=41 Ind. Cas. 283.*

Fishery.

(1) *Suit for declaration and injunction—Defendant claiming right of fisheries subject to payment—Long and continuous enjoyment by defendants established—Fishery right, if incidental to ownership. Subramanian Chetty v. Yijia Raghunatha Pillai 6 L.W. 769=24 M.L.T. 523=44 Ind. Cas. 419. See Final Part, 1917, Col. 436.*

Fishery—(Concluded).

- (2) *Right of fishery claimed in tank of certain mouza by residents of another mouza, if immoveable property—Suit for recovery of money alleged to be due for fishing in certain tank if a suit for rent not cognisable by Small Causes Court—Second appeal—Ss. 26, 27, Limitation Act, if applicable to Central Provinces—Easements Act, Ss. 3, 15—Right of fishing is profit a prendre in gross, Acquisition of—Civ. Pro. Code, 1908, S. 11, Expt. IV—Compromise decree when becomes res judicata.*

The right of fishing or *julkar* is always recognised as an interest in immoveable property (a).

- There being no definition of "rent" in the Provincial Small Causes Courts Act, it is to be taken in its ordinary sense as including compensation paid to the owner of immoveable property for its use or occupation. Therefore a suit to recover the consideration for a right of fishing in a tank is a suit for rent, so far as the right of fishery is concerned, and cannot be taken cognisable of, under Art. 9 of the Provincial Small Causes Courts Act, by a Court of Small Causes and a second appeal lies (b).

A hereditary and customary right of fishery in the tank of one mouza claimed by the residents of another mouza being a profit prendre in gross cannot in the Central Provinces be acquired under S. 15 of the Easements Act, S. 3 of which repeats, so far as the Provinces are concerned, Ss. 26 and 27 of the Limitation Act. But such a right may be acquired by grant, which should be presumed where user of forty years is proved (c).

To find out what it was that the parties to a compromise decree agreed to in the previous action, it would not be enough merely to see what was the relief granted in the decree of the Court, but it would be necessary also to examine the basis on which it was granted. Whatever is necessarily involved in the decree pronounced cannot be re-opened by either party. To this extent, Expt. IV to S. 11, Civ. Pro. Code of 1908 applies to compromise decrees. *Sitaram v. Peltia*, 41 N.L.R. 35=43 Ind. Cas. 962.

MITRA, A. J. C.

References:—(a) 67 R.R. 331 (836); 9 Q.B.D. 315; (1897) 2 Ch. 96; 24 C. 449; 19 C. 514; 31 C. 937. *F.*; 16 M. 280; 31 R.R. 469. (b) 164 P.R. 1889, *F.* (c) 6 C. 304, *M.*; 5 C. 915; 23 C. 55, *H.* (d) 35 M. 75, *F.*

(3) *Exclusive right of, as evidence of title in soil of river-bed. See ALLUVION AND DILUVION*, No. 1, 22 C.W.N. 872.

(4) *Co-owners, Lessees of, catching fish in a bil—Rights of other co-owners. See CO-OWNERS*, No. 1, 46 Ind. Cas. 280.

(5) *Right of, over a stream extending over 30 to 40 miles and flowing over 138 miles, Setting aside sale of, on ground of irregularity in proclamation of sale by affixing copy of order in only one village—Civ. Pro. Code (1908), O. XXI, r. 54. EXECUTION SALE*, No. 1-a, 44 Ind. Cas. 412.

Fixed Deposit.

In joint names of more than one—Dividends payable under deposit if payable to one or more holders thereof. See *COMPANY*, No. 6, 28 P.R. 1918.

Fixtures.

If pass to mortgagee. See *MORTGAGE (EQUITABLE MORTGAGE)*, No. 1, 22 C.W.N. 758.

Foreigner.

Suit against, non-resident foreigner if lies in British Courts. See *JURISDICTION (GENERAL)*, No. 8, 35 M.L.J. 189.

Foreign Judgment.

(1) *When not given on merits—When opposed to natural justice. See BURDEN OF PROOF*, No. 6, 34 M.L.J. 295.

(2) *Conditions under which quality of res judicata attaches to. See RES JUDICATA*, No. 45, 9 L.B.R. 103.

Forfeiture.

(1) *Enhancement of rent claimed by landlord—Denial by tenants of occupancy status and claim of proprietary right—Ejectment suit based on denial of occupancy tenure—Admission by tenants of occupancy tenure before judgment—Occupancy tenure if liable to forfeiture. See EJECTMENT*, No. 6, 32 P.R. 1918.

(2) *Tenant for life, Disclaimer of landlord's title by, if works—Conditions for—Relief against. See LANDLORD AND TENANT*, No. 1, 41 M. 629.

(3) *Forfeiture for non payment of rent under express covenant—Ejectment suit—Inclusion in suit of claim for rent for period subsequent to default—Failure of ejectment suit on account of claim made for rent—Forfeiture waived by such claim. See LANDLORD AND TENANT*, No. 21, 43 Ind. Cas. 611.

(4) *Permanent lease—Denial of title—Forfeiture, Doctrine of, extension of. See LANDLORD AND TENANT*, No. 56, 30 M.L.J. 647.

(5) *Agricultural lease—Incidental denial of landlord's title—Effect. See LANDLORD AND TENANT*, No. 59, 23 M.L.T. 178.

(6) *Effect of, on sub-lease. See LANDLORD AND TENANT*, No. 65, 14 N.L.R. 107.

(7) *Tenants from year to year—Ejectment after notice—Permanent tenants if liable to be ejected for forfeiture by denial of title. See LANDLORD AND TENANT*, No. 55, 8 L.W. 109.

(8) *Breach of condition involving forfeiture by tenant—Transfer by landlord of his right subsequent to breach—Transferee can enforce forfeiture. See LEASE*, No. 4, 20 Bom. L.R. 767.

Fraud.**(1) False recitals in deed—Fraud.**

False recitals in a deed undoubtedly amount to fraud. **Khadasingh v. Deepchand**, 43 Ind. Cas. 16.

BATTEN, A.J.C.

(1-a) Plea of—Court, Duty of, to consider when allegations not set forth in detail.

Even though the allegations on which the plea of fraud is based are not set forth in detail, a Court is bound to consider the plea when it is distinctly raised. **Amritabai v. Jabbanbi**, 46 Ind. Cas. 676.

STANYON, A.J.C.

(2) Allegations as to fraud to be specific—Acts of fraud to be clearly set out—Agreement to share profits and losses equally if partnership—Contract Act, S. 240.

Allegations of fraud must be specific. They must be definitely stated beyond doubt in what the fraud is alleged to have been consisted.

An agreement setting out that two persons, combining money and skill for the purpose of carrying on some business were to share any profits or losses equally is a partnership agreement; and the agreement to share losses takes it outside the scope of S. 240, Contract Act. **Manik Chand v. Girdhari Lal**, U.B.R. (1918), 150 Q.R., 69=46 Ind. Cas. 342.

SAUNDERS, J.C.

Reference:—1 A. 74, Diss.

(3) Suit for Declaration of, in rent decree—Burden to be discharged by plaintiff. See BURDEN OF PROOF, No. 1, 27 C.L.J. 137.

(4) Company—Liquidation—Shareholder's right to be removed from the list of contributors, Principles governing—Liability as contributory how far affected by fraud or misrepresentation—Shareholder when can have his contract to take shares set aside—Repudiation. See CONTRIBUTORY, No. 2, 42 P.R. 1918.

(5) Full satisfaction of decree out of Court—Decree-holder withholds information from executing Court—Fraud upon Court—Effect. See EXECUTION OF DECREE, No. 19, 45 Ind. Cas. 222.

(6) Knowledge of facts constituting fraud on part of person injured, Burden of proving lies on whom. See EXECUTION SALE, No. 1, 27 C.L.J. 528.

(7) Marriage, Ground for avoiding a. Nature of, requisite for. See HIGH COURT (JURISDICTION OF), No. 1, 47 Ind. Cas. 544.

(8) Title acquired at Court sale not challenged by judgment-debtor—Re-opening by his assignee of question after lapse of long time by plea of fraud, if desirable—Inherent powers as to, of Court. See LIS PENDENS, No. 1, 20 Bom.L.R. 929.

Fraudulent Preference.

Transfer of Property Act (IV of 1882), S. 53—Preference of one creditor over another, validity of.

Fraudulent Preference—(Concluded).

Held, that transactions made merely for the purpose of preferring one creditor over another are not void under S. 53 of the Transfer of Property Act (IV of 1882). In order to invoke the aid of that section, it must be proved that the transaction was entered into with the object of defeating all the creditors.

Held, further, that the fact that the person had made an extremely good bargain is no reason to conclude that the transaction is tainted with dishonesty. **Kalu Singh v. Randhir Singh**, 21 O.C. 97=46 Ind. Cas. 330.

LINDSAY, J.C.

References:—25 B. 202; 24 C. 825, R.

Fraudulent Transaction.

Mortgagee related to mortgagor—Execution of mortgage bond on mortgagee becoming aware of demand by other creditors—Mortgage bond if shows fraudulent preference. See MORTGAGE (GENERAL), No. 2, 22 C.W.N. 983.

Fraudulent Transfer.

(1) Voluntary transfer—Avoidance of—Transfer to wife—Insolvency—Provincial Insolvency Act (III of 1907), S. 36.

A transfer by an insolvent of a portion of his property within two years prior to his insolvency, to his wife, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, is void as against the official receiver and the property comprised in that transfer is liable to be distributed amongst the general body of creditors. **Bhut Nath Chatterjee v. Biraj Mohlal Debi**, 28 C.L.J. 536.

FLETCHER and SHAMSUL HUDA, JJ.

(2) Transfer to stranger in fraud of creditors—Payment of full value for transfer and liquidation of some debts if validate such transfer. See TRANSFER OF PROPERTY ACT, No. 26, 22 C.W.N. 427.

(3) Whether constituted by execution of conveyance with prospect of heavy decree to the executant's knowledge, and if so, whether voidable. See TRANSFER OF PROPERTY ACT, S. 53, 47 Ind. Cas. 932.

Freight.

Suit for refund of excess freight collected at place of short delivery of goods brought from another place to former place—Defendant non resident foreigner—Jurisdiction of British Courts. See JURISDICTION (GENERAL), No. 8, 35 M.L.J. 189.

Full Bench.

Division if bound to refer case to. See MORTGAGE AND MORTGAGEE, No. 1, 28 C. L.J. 161.

Further Enquiry.

Remand of case to lower appellate Court by Chief Court—Appellate Court, Power of, to order further enquiry by original Court. See CIV. PRO. CODE (1908), No. 505-a, 147 P.L.R. 1917.

Future Property.

Assignment of, Validity of—Transfer of Property Act (1882), S. 6—Construction of section. See CONTRACT, No. 8, 47 Ind. Cas. 563.

Gain of Science.

Earnings by, acquired at the expense of ancestral property, how far partible or self-acquired property. See HINDU LAW (JOINT FAMILY), No. 3, 20 Bom. L.R. 566.

Gaontia Tenure.

Succession to, is vested in eldest of several heirs of same status—Resignation by eldest heir to others, essentials of—Valu—Onus of proving resignation—Resignation of gaonthship with respect to part of estate if contemplated by statute—Estoppel, Law of, how far applies to transfers of gaonthship—Central Provinces Land Revenue Act (XVIII of 1881), Ss. 65 A, 132, 132 (4).

The object of the provisions enacted in S. 65-A of the Central Provinces Land Revenue Act was not to benefit the Zemindar; it was to retain it possible, certain selected families in the gaonthship of their villages and to protect them against transfers and subdivisions.

Under S. 65-A, sub S. 4 (b) the eldest heir of the last protected gaonthia shall succeed to the tenure unless at the time of succession he resigns his rights to inherit as gaonthia in favour of another heir of equal degree, the right of the eldest male protected gaonthia. If two or more villages form the protected tenure of a gaonthia even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages; there can be no splitting up of the estate or tenure into different parts having distinct entities. To permit of such a severance of the estate would be destructive of what appears to be the governing intention of S. 65-A, viz., the concentration of the ownership of the entire protected gaonthia tenure in one person only. When the election is once made by the person and he has entered as the heir of his father, it is not subsequently open to him under the Act to transfer it by sale, gift or otherwise in favour of a younger brother, the election being irrevocable in its operation and automatically one heir of equal being substituted for another.

Quere:—Whether the law of estoppel would operate as a bar in such an event having regard to the clear provisions of the statute (a)?

The provisions of S. 132 of the Central Provinces Land Revenue Act were drawn up with reference to S. 65-A and were intended to enable the Deputy Commissioner merely to determine

Gaonthia Tenure—(Concluded).

claims to protection under S. 65-A and to enforce the provisions of that section. It was never intended to empower the Deputy Commissioner to deal with a suit for ejectment or for the recovery of a gaonthship. S. 152 of the Act is hence no bar to the institution of a suit for the recovery of a gaonthship in a Civil Court.

In the absence of evidence of resignation of the gaonthship by the eldest son of the last protected gaonthia at the time of his succession, he would be entitled to it in preference to a younger brother, who would, therefore, not make any surrender of it to the Zemindar.

The name of a younger son of the last protected gaonthia was entered in the Record of Rights as gaonthia. In a suit for recovery of the gaonthship by the eldest son, held that, as the presumption attaching to the entry was only in regard to possession, the eldest son could succeed in the action if he should establish a better title than the younger and that the presumption had been sufficiently rebutted by evidence to the effect that, upon the death of his father, the eldest son was treated by the Zemindar and by the Government as the sole successor to the gaonthship.

Per Chapman, J. (Obiter)—A gaonthia is not entitled to make a surrender of gaonthship to his Zemindar (b).

Per Atkinson, J.—The right of election of the eldest male heir of the last protected gaonthia as to whether he should accept or resign the gaonthship must be exercised in respect of the entire estate which devolves on him. If two or more villages form the protected tenure of a gaonthia even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages; there can be no splitting up of the estate or tenure into different parts having distinct entities. To permit of such a severance of the estate would be destructive of what appears to be the governing intention of S. 65 A viz., the concentration of the ownership of the entire protected gaonthia tenure in one person only. The words "his rights" in S. 65 A, cl. 4 (b) mean all the rights which have devolved upon such eldest male heir and not merely some of them.

Per Atkinson, J.—The onus of establishing as indisputable the factum of resignation by such eldest male heir is on the person who alleges it. The term "resign" in S. 65-A really means in legal phraseology "release" which has an accepted legal meaning.

Per Imam, J.—There is nothing in S. 65-A to show that the protection afforded to the tenure of a gaonthia is to extend to a group of tenures and it is open to the eldest male heir to resign it entirely or partially. *Lal Nigraaj Singh Rai Bahadur v. Mohen Gaonthia*, 3 Pat. L.J. 229 = 4 Pat. L.W. 256 = 44 Ind. Cas. 817 (F.B.).

CHAPMAN, ATKINSON and IMAM, JJ.

References:—(a) 4 C.W.N. 679, R. (b) 1 Pat. L.J. 293, doubted.

General Clauses Act (1897).

- (1) S. 3 (25)—*Pugmill attached to the earth—Immoveable property.*

Where a pugmill is erected and affixed to the earth for the purpose of making a quantity of bricks, it should be regarded as immoveable property, under the General Clauses Act X of 1897. *U Thet v. Tola Ram*, 43 Ind. Cas. 625.

RIGG, J.

(2) S. 3 cl. 25 — Immoveable property, Sale-proceeds of, if immoveable property or any interest therein—Or if 'benefit to arise out of land' under. See **IMMOVEABLE PROPERTY**, No. 2, 3 Pat. L.J. 522.

(3) S. 3, cl. 45—"Registered" in Art. 116 of Limitation Act (1908), Meaning of. See **COMPANIES ACT (1882)**, No. 1, 8 L.W. 354.

(4) Ss. 9, 10—General principle contained in S. 9, application of, to appeals under Provincial Insolvency Act. See **PROVINCIAL INSOLVENCY ACT**, No. 37, 35 M.L.J. 531.

(5) S. 10. See No. 4, *supra*.

Ghatwali Tenure.

- (1) *Ghatwali chakran land—Auction sale, what passed at—Negotiation for resumption—Transferable right granted after auction sale.*

Defendant No. 1 was a ghatwal of the disputed lands, and on the 24th January, 1899, in execution of a decree for money against him, his right, title and interest in those lands were sold and purchased by the plaintiff. The plaintiff alleged that at that time defendant No. 1 had obtained a transferable right in those lands by virtue of a *kabuliat* executed by him in favour of Maharaja of Burdwan on the 5th September, 1896. The document recited that at the time of its execution, negotiations were proceeding between the Government, the zemindar and the Ghatwal for the resumption of those lands. A lease, which was the counterpart of the *kabuliat* and was executed on the 29th January, 1899, showed that even up to that time the resumption had not taken place:

Held, that the ghatwal judgment-debtor had no transferable right on the date when the execution sale took place and therefore the plaintiff had taken nothing by the purchase. *Purna Chandra Laha v. Soudamini Bala-nabi*, 28 C L J. 283.

HARINGTON and MOOKERJEE, JJ.

- (2) *Bengal Land Law—Ghatwali tenure—Rights of the Ghatwal and the family over property subject to the tenure.*

In the Zemindari of Karakapur in Bengal, the Ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the Zemindar approves as competent, and it is the right of the family, so long as they have male members competent to perform the duties, to have one or more of them appointed *ghatwals*, but the incidents of the tenure are not such as to give the family any rights over the property while it is in the hands of the *ghatwal*.

Ghatwali Tenure—(Concluded).

Where the Zemindar, on being released from the performance of *ghatwali* duties, gave the pottah to four *ghatwals*, members of a family, granting the lands (which were till then subject to the *ghatwali* tenure) in perpetuity at an annual fixed *juma*, *held*, that the members of the family, other than the four grantees, took no beneficiary interests in the lands granted. *Raja Durga Prashad Singh v. Trebini Singh*, 24 M.L.T. 407=28 C.L.J. 508=9 L.W. 60 (P.C.).

LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE and MR. AMBER ALL.

References:—6 M.I.A. 101; I.A. Sup. Vol. 181; 9 I.A. 104; 15 I.A. 18, R.

(3) Mortgage by ghatwal—Restrictions on alienation of such property removed before institution of suit—Executory agreement. See **MORTGAGE (GENERAL)**, No. 1, 27 C.L.J. 289.

(4) Tenants under, if can acquire occupancy right. See **OCCUPANCY TENURE**, No. 5, 22 C.W.N. 763.

Gift.

- (1) *Deed not in suit, proof of—Proof of deed filed for collateral purpose, nature of—Gift with possession postponed till donor's death, if can be treated as will—Mortgage by donee during widow's lifetime, validity of—Transfer of Property Act (IV of 1882), S. 6 (a), applicability of.*

It is well established that, where a deed is not in suit but is merely filed for a collateral purpose, it need not be proved with the same formalities as when it is sought to enforce its provisions in a suit.

Where a document purporting to be a deed of gift provided that the donee was not to obtain possession of a portion of the property till after the death of the donor and his wife, *held* that, the instrument with respect to that portion of the property of which possession was held over, should be treated as a will subject to a life interest in favour of the widow.

Held further, that the donee having acquired a vested interest, an alienation by him after the death of the donor and during the lifetime of the widow would not be invalid. S. 6 (a) of the Transfer of Property Act (IV of 1882) has no application to such a case. *Lachhman Prasad v. Baldeo Prasad*, 21 O.C. 312.

KANHAIYA LAL and DANIELS, A.J.Cs.

Reference:—20 O.C. 155, Dist.

- (2) *Registration—Deed of gift requiring registration even inadmissible for collateral purpose—S. 49, Registration Act, 1908.*

Held, that as an unregistered deed of gift is inadmissible in evidence for affecting the gifted property, it is equally inadmissible for a collateral purpose, *vis.*, for the purpose of proving that the donee took the possession of, and began to hold adversely, the donated property

Gift—(Concluded).

from the date of the gift. *Surjan Das v. Ganda Mal*, 13 P.W.R. 1918=44 Ind. Cas. 889.

SHAH DIN, J.

References:—102 P.R. 1900; 83 P.R. 1913=69 P.W.R. 1913, 35 P.R. 1916=52 P.W.R. 1916; 38 M. 1158 (1161).

(3) Ancestral property, Succession to, of daughter, Gift void where, allowed. See **CUSTOMS—PUNJAB (SUCCESSION)**, No. 5 a, 3 P.L.R. 1918.

(4) See **GRANT**.

(5) Repudiation of deed of, prior to registration—Donor if entitled to retract. See **TRANSFER OF PROPERTY ACT**, No. 100, 7 L.W. 339.

Good.

Whether Hindu. See **C.P. ACT XX OF 1875 (LAWS)**, No. 1, 44 Ind. Cas. 43b.

Goods.

Hypothecation of goods to another as security—Validity. See **MORTGAGE (EQUITABLE MORTGAGE)**, No. 1, 22 C.W.N. 758.

Government.

State Civil, Private water-courses from a, Dispute as to irrigation from—If a necessary party to Canal Department if can confer permanent right of irrigation without proceeding under S. 20 or 21 of the Indian Canal Act (1890) not can go against decision of Court. See **REMAND**, No. 5, 177 P.W.R. 1918.

Government of India Act, 1915.

(1) S. 101 (2)—Power to appoint additional Judges—Validity of appointments from time to time.

The appointment of Judges as Additional Judges from time to time but in cases in times for such period not exceeding two years is valid exercise of the power to appoint such Judges. *Kandasami Pillai v. Muthuvenkatachala Manlagar*, 33 M.L.J. 787—43 Ind. Cas. 800.

WALLIS, C.J. and KUMARASWAMI SASTRI, J.

(2) S. 106 (2)—Jurisdiction of High Court to try original suit relating to revenue. See **HIGH COURT (JURISDICTION OF)**, No. 2, 35 M.L.J. 93.

(3) S. 107. See **REVISION**.

(4) S. 107—Chota Nagpur Tenancy Act, S. 217—Powers of High Court—Revision. See **BEN. ACT VI OF 1908 (CHOTA NAGPUR TENANCY)**, No. 3, 43 Ind. Cas. 933.

(5) S. 107—Suit by administrator—Beneficiary, whether can be added as co plaintiff—Power of High Court to interfere with order refusing to add co-plaintiff. See **OIV. PRO. CODE (1908)**, No. 169, 44 Ind. Cas. 564.

Government of India Act, 1915—(Concluded).

(6) S. 107—Power of High Court to order irrelevant matter in subordinate Court's judgment to be expunged See **HIGH COURT, (POWERS OF)**, No. 1, 35 M.L.J. 869.

(7) S. 107—Order made by District Judge in administrative capacity, if liable to be interfered with under Act. See **REVISION**, No. 11, 27 C.L.J. 477.

(8) S. 107—Superintendence—Revision in case of mistake of fact committed by lower appellate Court re extent of land sold in execution. See **REVISION**, No. 12, 24 C.W.N. 627.

Governor-General.

Powers of, to create Courts. See **COUNCILS ACT (1861)**, No. 1, 44 Ind. Cas. 185.

Governor-General of India.

Power of, to create Courts—Councils Act, 1861 (24 and 25 Vict. c. 67), S. 22—*High Courts Act*, 1861 (24 and 25 Vict. c. 104), S. 9—*Defence of India (Criminal Law Amendment Act IV of 1915)*, S. 4—*Jurisdiction—High Court, power of, to declare an Act ultra vires*.

S. 22 of the Indian Councils Act, 1861, read with S. 9 of the Indian High Courts Act, 1861, in its terms amply wide to give the Governor-General of India in Council power to create new tribunals, such as those contemplated in S. 4 of the Defence of India (Criminal Law Amendment Act, 1915 (a)).

If an enactment of the Indian Legislature is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, the High Court has power in a proper proceeding to declare such an enactment *ultra vires* and of no force and effect, with all the consequences that may result therefrom.

Per *Chapman, J.*—A Court cannot be constituted otherwise than in the name of the Governor-General and before it can be held that the Indian Legislature can create a Court it must be clearly beyond doubt that the power to create a Court has been properly delegated.

The power conferred on the Governor-General in Council by S. 22 of the Councils Act of 1861 included the power to make laws and regulations for all persons and all Courts of Justice whatever and for all places and things whatever. This delegation of plenary power was assigned for the benefit of public interests of the greatest magnitude and whatever may fairly be regarded as incidental to or consequential to the main purpose ought not, unless judicially prohibited, to be held by judicial construction to be *ultra vires*. *Farmeshwar Ahir v. Emperor*, 19 Cr. L.J. 291=44 Ind. Cas. 185=3 Pat. L.J. 537=4 Pat. L.W. 157 (F.B.)

MILLER, C.J. CHAPMAN, ROE and ATKINSON, JJ.

Reference.—4 C. 172 (180)=5 I.A. 178=3 C.L.R. 197=3 Sar. P.C.J. 634=3 Suth. P.C.J. 556=2 Ind. Jur. 618=2 Shome L.R. 63=3 Ind. Dec. (N.S.) 110 (P.C.), 7.

Grant.

- (1) *Gift to Rani by Raja of Joutuk Ranian Britti lands—Recital of similar previous grants in family—Condition restraining alienation by future Ranis—Enjoyments of profits only for life ordained—Rule of succession to britti prescribed in grant—Custom—Family usage—Essentials for validity of usage creating family custom of succession—Hindu Law—Succession.*

A confirmatory *snad* said to have been granted by a Raja on the 4th February 1797 to his wife, and to his brother's wife recited: "My father gave Taraf Katia Nangla and others in Pargana Sahas to the late Rani as Ranian joutak britti for the performance of bratas and other charitable and pious acts confirming the aforesaid Katia Nangla and others included within my Zamindari. Pargana Sahas is again granted to you as joutak britti for your maintenance and the performance of pious acts. You or the future Ranis shall not be entitled to make a sale, gift or *hiba* of the aforesaid britti and shall be entitled only to enjoy the profits thereof. * I or my heirs shall have no claim to or concern with the aforesaid britti. If I or they should at any time make any claim, it shall be futile and of no effect." *Held*, that the grant in so far as it laid down a rule of succession, was absolutely void, as it prescribed a right of succession, unknown to Hindu Law; that it was also void as it purported to create successive life-estates in favour of unborn persons, the estate itself being undisposed of; and that, even if the rule of succession laid down in the *snad* of 1797 had actually been followed, it could not be treated as binding upon the family, unless it had ripened into a family custom.

On the contention that, for more than a century and a half, the Ranis of the family had been successively in possession of the property as Ranian britti, and that there was no evidence to show that any Raja was in possession of it, *held* that, in order to establish a custom, it must be shown that the custom had existed from time immemorial and where the custom set up was peculiar only to a single family, the rule was more strictly enforced than ever; that, though a family custom of proved antiquity was entitled to be recognised by the Courts, irrespective of the position and rank of the family, yet, when the origin of the alleged usage was known, it must be shown, even assuming, there could be a valid custom in such a case, that there had been a long line of succession, in accordance with the usage. *Ambalika Dasi v. Aparna Dasi*, 45 O. 835 = 23 C.W.N. 160 = 47 Ind. Cas. 402.

CHATTERJEE and WALMSLEY, JJ.

References:—(1814) 2 Sel. Rep. S.D.A. 116; (1818) 2 Sel. Rep. S.D.A. 249; 19 B.L.R. 396 = 14 M.I.A. 570; 23 A. 37 = 27 I.A. 238; 2 C.L.J. 20, R.

- (1-a) *Maintenance of grantee, For—Construction of—Perpetual or otherwise, Presumption as to.*

A grant for the maintenance of the grantee is *prima facie* intended to be for the

Grant—(Concluded).

Lifetime of the grantor or the grantee only. The use of the words "always" or "for ever" does not *per se* create an inheritable estate. The circumstances under which the instrument was made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Court to presume that the grant was perpetual or otherwise. *Mohammed Ali Khan v. Shujat Ali Khan*, 46 Ind. Cas. 913.

DRAKE-BROCKMAN, J.C.

- (2) *Arakan Waste Land Rules of 1839 and 1841, —Grant of land under r. 6—Assignment of remainder of term granted—Covenant for renewal in original grant if enures for benefit of assignee of term—Document of assignment, Construction of.*

Under the Arakan Waste Land Rules of 1839 and 1841, certain land was granted to a person for a period of thirty years from 9-7-1884, with a right of renewal for a further period of twenty years on the expiry of each period. The grantee transferred on 8-6-1897 the land to another, the document of transfer being drawn up in the form of an assignment of the remainder of the term or the thirty years computed from 9-7-1884, and reciting that the grantee had agreed with the assignee for the absolute sale to him of the (grant) land. After the assignee got a renewal in due course of the grant for the further period of twenty years, the original grantee sued for possession of the land and mesne profits on the ground that the land was sub-let to the assignee for the unexpired portion of the original term and claimed that the renewal was obtained by the assignee on her behalf. *Held*, that the document was intended, in the absence of an intention to retain for the transferor the right of renewal for herself, expressed or necessarily implied in the document of transfer, to transfer the whole interest of the transferor in the land.

A covenant for renewal is a covenant running with the land, not only in the case of ordinary leases, but also in the case of other tenures which are subject to periodical renewal. *Jogendra Lal Chowdhury v. Ml Asha*, 9 L.B. R. 268.

TWOMEY, C.J. and ORMOND, J.

- (3) *Construction of, to be in favour of grantee. See HINDU LAW (GIFT), No. 2, 16 A.L.J. 564.*

- (4) *Of inam—Royal share of revenue only if to be presumed to be granted. See INAM, No. 1, (1918) M.W.N. 859 (P.C.).*

- (5) *Grant of land bounded by non-navigable river—Grant if extends to half of bed of river. See RIVER BED, No. 1, 35 M.L.J. 159.*

Gratuitous Payment.

Money left with vendees for payment to mortgagee of vendor—Property mortgaged to secure sum different from property sold—Vendees paying interest to mortgagees owing to vendor's delay in registration of sale-deed—

Gratuitous Payment—(Concluded).

Vendor's suit for balance of unpaid purchase-money—Set off if claimable by vendees for interest paid by them. See **CONTRACT ACT**, No. 45, 16 A.L.J. 581.

Grazing Rights.

See **PASTURE**.

Guarantee.

See **INDEMNITY**.

Guardian.

(1) *Promissory note—Executed solely as executor—Estate of the deceased if liable thereon—Executor with power to manage and sell on behalf of the minors until age—If guardian for the minors—Power of guardian to acknowledge debt on behalf of minors—Validity of—Appointment of guardian to ancestral estate. Chidambaram Pillai v. Veerappa Chettiar, (1917) M.W.N. 744 = 22 M.L.T. 380 = 6 L.W. 640 = 43 Ind. Cas. 865. See Final Part, 1917, Col. 443.*

(1-a) Transfer by guardian *ad litem*—Compromise effected with permission of Court—No separate sanction necessary. See **GUARDIANS AND WARDS ACT**, No. 6, 61 P.W.R. 1918.

Guardian and Minor.

(1) *Civ. Pro. Code (Act V of 1908), O. XXXII, r. 7, Sch. II, cl. 20—Reference to arbitration out of Court—Minor plaintiff represented by his mother and guardian applying to Court for decree in terms of award—Decree passed without reference to O. XXXII, r. 7—Decree valid.*

A minor, represented by his mother, referred a dispute to arbitration out of Court. After the award was published, the mother, on behalf of her minor son, applied to the Court, under cl. 20 of the second schedule of the Civ. Pro. Code, 1908, that the award be filed in Court, in order that a decree be passed in terms of it. The Court accordingly passed a decree, but without certifying that it was for the benefit of the minor. The minor, by his mother, next filed a suit to have the decree set aside and contended that he was entitled to set aside the decree, as there was no certificate under O. XXXII, r. 7 of the Civ. Pro. Code:

Held, that O. XXXII, r. 7, had no application to the facts of the case, inasmuch as it could not be said that there had been an agreement on behalf of the minor with reference to the suit in which the next friend was acting:

There is no conflict between the two cases of *Mahadeo Balkrishna Kelkar v. Krishnabai*, (a) and *Vithaldas v. Dattaram* (b). *Hanmantram Radhakisan v. Shivanarayan Asuram*, 20 Bom. L.R. 970 (F.B.).

SCOTT, C.J., MACLEOD and SHAH, JJ.

References:—(a) (1896) Bom. P.J. 609 and (b) 26 B. 298, reconciled.

(2) *Sale—Mortgage—Uncle dealing with married nieces' property—Uncle and not husband managing the property—De facto guardian—Necessity.*

Guardian and Minor—(Continued).

Two brothers A and B borrowed certain amount from C to pay off debts due to various creditors: they mortgaged all their property in this deed. In the following year A died, leaving two minor daughters, as his heirs. They are minor plaintiffs-appellants in the present appeal. No part of the debt on the mortgage having been paid off, B executed two *kat kabalas* in favour of C. By the *kat kabalas* the principal of the original mortgage was satisfied. A *kistbandi* was also executed for the unpaid interest that had accrued. The *kistbandi* stipulated for compound interest at the rate of Re. 1-8 as per cent. per mensem and under its terms the creditor was to remain in possession until the sums mentioned were paid to him and to pay the rent due to the landlord from the usufruct and to take the balance as interest. A year after, B executed three conveyances, selling about 13 bighas of land to the defendants. With the purchase-money B paid off the sums due under the *kat kabalas* and the *kistbandi* bond. The plaintiffs-appellants were living with B when the conveyances were executed. B also managed the property. The plaintiffs' husbands never asserted any claim to the management of the property:

Held, that B as *de facto* guardian of the minors' property conveyed their interest by *kabalas* and the sales were binding on the minors (a). *Srimati Ishani Das v. Ganesh Chandra Rakshit*, 28 C.L.J. 250.

WALMSLEY and PANTON, JJ.

References:—(a) 6 M.I.A. 393 (423); 33 C.L.J. 432 = 20 C.W.N. 645 647, F.

(3) *Minor, Decree against—Guardian-ad-litem, Negligence of, in conduct of suit—Bad management of suit, not raising money by mortgage—Not applying to have ex parte decree set aside, if amount to gross negligence—Non-service of summons on guardian of minor, whether a sufficient ground to set aside decree—Civ. Pro. Code (Act V of 1908), O. IX, r. 13, O. XVII, r. 2—Audi alteram partem, Rule of, Applicability of.*

Gross negligence on the part of a guardian or next friend in conducting a suit on behalf of a minor is a good ground for the minor to file a suit for setting aside the decree (a).

But mere bad management of a suit by the guardian, such as, in not raising the money by mortgage, in not applying to have the *ex parte* decree against the minor set aside, in not appealing, is not a sufficient ground for setting aside a decree unless the conduct of the guardian amounts to fraud or gross negligence (b).

There is no exception to the rule *audi alteram partem*, unless such an exception is made by legislation.

The mere non-service of summons on a party to a suit is not a sufficient ground to set aside the decree in a fresh suit, unless such non-service is part of the scheme of fraud.

If an *ex parte* decree is passed against a minor under Civ. Pro. Code, O. XVII, r. 2, the remedy of the minor acting through his guardian lies in the provisions of O. IX, r. 13 of the

Guardian and Minor—(Continued).

Code, and he cannot obtain relief in a separate suit unless the absence of the guardian has resulted in such an injustice to the minor as would amount to gross negligence on the part of the guardian.

A minor once represented by a guardian does not cease to be so represented, merely because an *ex parte* decree is passed against him owing to the absence of his guardian. *Vithoba v. Sego*, 45 Ind. Cas. 882.

BATTEN, OFFG. J.C.

References:—(a) 22 C. 8; 39 C. 735; 27 M.L. J. 486. (b) A.W.N. (1894) 141, F.

(4) *Guardian appointed by competent authority. Power of, to act as guardian or next friend in suit—Civ. Pro. Code* (1908), O. XXXII, r. 4 (3)—*Guardian, Appointment of—Discretion of Court—Error in appointment—High Court, Interference by—Revision—Civ. Pro. Code*, S. 115.

O. XXXII, r. 4 (3) of the Civ. Pro. Code, requires that when a guardian has been appointed by a competent authority, that guardian alone is entitled to represent the minor unless the trial Court considers that the appointment of another guardian will be to the welfare of the minor.

The appointment of a guardian of a minor for purposes of suits is really a question of procedure and an error in matters of procedure is not generally reviewable under S. 115 of the Civ. Pro. Code. *Mohammad Abdus Salam v. Kamala Mukhl*, 46 Ind. Cas. 316.

MULLICK and THORNHILL, JJ.

(5) *Petition by guardian—Funds taken by surety—Jurisdiction to attach surety's property to recover sale—Civ. Pro. Code*, O. XXXII, r. 6 and S. 145. *Nadanallgi Kurugodeppa v. Angadil Soogamma*, (1917) M.W.N. 490=22 M.L.T. 320=39 Ind. Cas. 928=41 M. 40. See Final Part, 1917, Col. 445.

(6) *Evidence—Presumption of accuracy—Accounts filed by guardian, Acceptance by Court of—Guardian.*

After a guardian appointed by a Court has filed his accounts and they have been accepted by the Court as correct, a presumption as to their accuracy does certainly arise, if it is necessary to rely on them in subsequent proceedings between the guardian and his ward. *Gopal v. Sarju*, 21 O.C. 74=45 Ind. Cas. 599.

LANDSAY, J.C.

(7) *Transfer of minor's share of mortgage decree to a mortgagor—Leave of Court not obtained—Voidability of transfer—Parties entitled to avoid. See ASSIGNMENT OF DECREE*, No. 1, 27 C.L.J. 110.

(8) *Contract for purchase of immoveable property—Guardian incompetent to bind minor—Want of mutuality—Effect. See CIV. PRO. CODE* (1908), No. 420, 44 Ind. Cas. 164.

(9) *Guardian ad litem—Negligence to protect interests of minor—Decree not binding on minor. See CIV. PRO. CODE* (1908), No. 418, 45 Ind. Cas. 253.

Guardian and Minor—(Concluded).

(10) *Compromise of claim obtained from guardian by alleging false will—Claim not bona fide—Compromise not binding on minor. See COMPROMISE*, No. 1, 27 C.W.N. 463.

(11) *Compromise entered into on minor's behalf without obtaining leave of Court constituted under Land Revenue Act—Validity of compromise. See COMPROMISE*, No. 5, 21 O.C. 220.

(12) *Mother entitled to be guardian of infant sons in preference to brother—Payment by brother of infant when mother alive if keeps decree alive as payment by lawful guardian. See EXECUTION OF DECREE*, No. 1, 45 C. 630.

(13) *Guardian appointed by Court—Contract for sale by such guardian with Court's sanction of minor's property—Minor bound by contract. See GUARDIANS AND WARDS ACT*, No. 5, 40 Ind. Cas. 490.

(14) *Custody of child, Suit inter partes by father for. See GUARDIANS AND WARDS ACT*, No. 1, 10 Bur. L.T. 186.

(15) *Guardian's power to deal with ward's reversionary right. See HINDU LAW (REVERSIONERS)*, No. 4, 28 M.L.T. 142 (P.C.).

(16) *Minor, Contracts entered into by guardian on behalf of, how far binding on minor. See HINDU LAW (WIDOW)*, No. 11-b, 47 Ind. Cas. 55.

(17) *Burmese brother-in-law if guardian of minor sisters-in-law—Sale by brother-in-law as their guardian void—Ratification of void sale—S. 63 of Contract Act if applies to such a case. See POSSESSION, SUIT FOR*, No. 2, 9 L.B.R. 186.

(18) *Guardian acting illegally—If minor can repudiate act of guardian. See PROBATE AND ADMINISTRATION ACT*, No. 11, 46 Ind. Cas. 117.

(19) *Probate, if and when can be granted for portion of estate bequeathed—Revocation of illegal and limited grant, minor's rights to. See PROBATE AND ADMINISTRATION ACT*, No. 10, 3 Pat. L.J. 415.

(20) *Contract to sell property by certificated guardian on behalf of minor with Court's leave—Contract if specifically enforceable. See SPECIFIC PERFORMANCE*, No. 1, 22 C.W.N. 477.

(21) *Guardian's power to bind minor for expenses incurred in protecting title to property. See TRANSFER OF PROPERTY ACT*, No. 56, 34 M.L.J. 177.

(22) *Sale by guardian of minor's property with object of purchasing other properties—One of such properties not delivered to purchaser—Suit by minor for recovery of properties, except that not delivered, dismissed—Suit by purchaser for possession of property not delivered to him if can be resisted by minor on ground of voidability of sale—Property purchased by guardian not in same transaction as prior sale—Benefit under S. 64, Contract Act. See VENDOR AND PURCHASER*, No. 7, 85 L. 652.

Guardian and Ward.

- (1) *Agreement of transfer made by guardian—Specific performance, whether can be decreed against minor—C.P. Court of Wards Act—Interpretation of S. 16 (2) (b).*

The Court will not decree against a minor for specific performance of an agreement for transfer made by his guardian unless it be quite certain that that agreement was for the benefit of the minor and that it would be for his benefit that it should be so enforced.

The words "for the preservation or benefit of such property" are taken from S. 16 (2) (b) of the Court of Wards Act applicable to Central Provinces. In interpreting these words regard should be had to the usual powers of guardians to bind the estates of minors. *Puranlal v. Venkata Rao* Gujar 45 Ind. Cas. 192.

BATTEN, A J C

- (2) *Certificated guardian, Sale by, of minor's property with sanction of District Judge—Sale executed and registered—District Judge if has jurisdiction to order re sale—Appeal, if has from such order—District Judge, Duty of, to look after interest of minors—Guardians and Wards Act (VIII of 1890), Ss. 31, 47*

After an unconditional sanction has been given to the sale by the certificated guardian of the minor's property a District Judge has no jurisdiction to order a re sale of the property, when once the sale has been executed and registered.

It is the duty of District Judges to look after the interests of minors and to see that guardians do their duty and file proper accounts, and to see that when guardians are appointed they are in the majority of cases at least called upon to furnish security.

Quere.—Order of a District Judge directing re-sale of a property of a minor already sold under his order if appealable? *Prem Sukh Das v. Lachmi Tewari* 46 Ind Cas 542

RICHARDS, C J and BANERJI, J

- (3) *Guardian, Mortgage by, without sanction of Court—Subsequent sale with sanction of Court—Mortgages, Rights of, how affected—Guardians and Wards Act (VIII of 1890), S. 29*

In a suit to enforce a mortgage of a minor's property from his certificated guardian without the sanction of the Court, which property had subsequently been sold by that guardian to another with the sanction of the Court.

Held (1) that the purchaser got a regular and complete title unaffected by the inchoate right of the plaintiff,

(2) that the court's decree in the case should be that the mortgage money was liable to be repaid to the mortgagee by the guardian personally. *Rejani Kanta Roy v. Manmatha Nath Nandi*, 46 Ind Cas 665

FLETCHER and SHAMSUL HUDA, JJ

- (4) *Proper person to be appointed as guardian—General rule when a minor would be, bound by decree—Duty of guardian. See CIV. PRO. CODE (1908), No. 420, 43 Ind. Cas. 563.*

Guardian and Ward—(Concluded).

- (5) *Minor defendants—Court appointing mother as, without notice to minors—Whether sufficient. See CIV. PRO. CODE (1908), No. 417, 43 Ind. Cas. 728.*

(6) *Muhammadian law—Married girl who has not attained puberty—Whether husband proper guardian—Guardian of person guardian of property. See GUARDIANS AND WARDS ACT, No. 1-a, 43 Ind. Cas 849.*

(7) *Contract to sell property by certificated guardian on behalf of minor with Court's leave—Contract if specifically enforceable. See SPECIFIC PERFORMANCE, No. 1, 22 C W N. 477.*

Guardians and Wards Act (1890).

- (1) *Ss. 12 and 25—Suit inter partes for custody of a child.*

Except in cases in which the Guardians and Wards Act provides a remedy by an application, a suit *inter partes* for the custody of a minor son is the only remedy of the father (a) *Mathuraban v D Tewary*, 10 Bur L T. 186 = 44 Ind Cas. 753.

ROBINSON, J.

References—(a) 38 M. 807, D. 2 L B R. 140, F. 40 B 600, R. 8 Bur. L T 128, Diss.

- (1-a) *Ss. 17 (1) and 19 (a)—Mahomedan law—Appointment of guardian—Married girl who has not attained puberty*

In the matter of selecting under S. 17 (1) a guardian for a Mahomedan minor, the Court is bound to take the Mahomedan law into consideration.

With reference to S. 19 (a), the husband is the most unsuitable guardian for a girl who has not attained the age of puberty.

The paternal uncle has no legal right under the Mahomedan law to the guardianship even of the property of his immature virgin niece superior to that of her mother.

It is obviously desirable that the guardian of the person should also be the guardian of the property.

Under the Mahomedan law though it is a settled rule that the mother is the preferential guardian, if the minor be under 7 years, there does not appear to be anything to prevent the Court appointing the mother rather than the paternal uncle as guardian, if the minor be over 7. *Mahmad Khan v. Musammatt Sultan Begum* 43 Ind Cas 849.

BATTEN, A J C.

References—29 A. 10; 32 C 444, F

- (2) *Ss. 19 and 25—'Guardian' meaning of 'Custody', what it includes—Enquiry, duty of, can be delegated by Court*

Held that the Court has, subject to the explanations made in S. 19, Act VIII of 1890, no power to appoint a father the guardian of the person of his child en, and, where the Court does so, the order of appointment is without jurisdiction and can be called in question.

The expression 'Guardian' as used in S. 25, Act VIII of 1890, is not confined to statutory

Guardians and Wards Act (1890)—(Contd.).

guardians appointed under the Act, but includes any person having the care of the person of a minor, or, of his property, or, of both his person and property. Such a person need not necessarily be the *de facto* guardian of the minor.

Held, further, that the 'custody' referred to in S. 25 of the Guardians and Wards Act includes both actual and constructive custody.

The duty of inquiry under that section of the Act is cast upon the Court and cannot be delegated. *Mushaf Husain v. Muhammad Jawad*, 21 O. C. 194.

LINDSAY, J.C.

References:—38 M. 307 (P. C.); 33 Ind. Cas. 894, F.

(4) S. 19. A. See No. 1-a, *supra*.

(4) S. 25. See Nos. 1 and 2, *supra*.

(5) S. 29—*Contract to sell minor's property with sanction of Court—How far minor bound.*

A guardian, appointed as such by the Court, is authorised to sell the property of the minor with the sanction of the Court, and a contract for that purpose is binding on the minor. *Halsuddin Mian v. Janaki Nath Sircar*, 40 Ind. Cas. 490.

CHATTERJEA and NEWBOULD, JJ.

(6) S. 29. *Applicability of—Transfer by guardian ad litem—Sanction of Court whether necessary.*

Held that S. 29 of the Guardians and Wards Act does not apply to the transfer of property made on behalf of minors by their guardians *ad litem* by way of compromise effected with the permission of the Court. No separate sanction of the Court is, therefore, necessary in the case of such transfers. *Barkat v. Jamila*, 61 P.W.R. 1918=44 Ind. Cas. 554.

SHAH DIN and WILBERFORCE, JJ.

(6-a) S. 29—*Mortgage by guardian without permission of Court, subsequent sale with sanction—Purchaser, Rights of, if affected by rights of mortgagee.* See GUARDIAN AND WARD, No. 3, 46 Ind. Cas. 665.

(7) Ss. 29, 30—*Natural guardian appointed guardian under Act—Such guardian if entitled to ignore limitations imposed by S. 29—Alienation without leave of Court—Sale price entirely spent in benefiting minor—Right of minor to avoid sale.*

Once appointed a guardian under the Guardians and Wards Act, even a natural guardian, such as the mother, cannot claim to be free from the limitations imposed by S. 29 of the Act, S. 30 of which entitles the minor to avoid a sale made without previous permission of the Court even if the whole of the sale price was spent for his benefit. *Shit Lal v. Shan Das*, 61 P. R. 1918=110 P.L.R. 1918=164 P.W.R. 1918=47 Ind. Cas. 353.

CHEVIS, J.

References:—A. W. N. (1905) 123, F.; 25 A. 59, Not F.

Guardians and Wards Act (1890)—(Contd.).

(8) S. 30. See No. 7, *supra*.

(8-a) Ss. 31, 47—*Certificated guardian, Sale by, of minor's property with sanction of Court—Court if competent to order resale—Court, Duty of, to look after interest of minors.* See GUARDIAN AND WARD, No. 2, 46 Ind. Cas. 542..

(9) Ss. 32, 43—*Effect of suspension of guardian—Power of Court to suspend guardian.*

The words of S 32 of the Guardians and Wards Act are wide enough to cover an order of suspension of the guardian, for suspension is in effect a total restriction for a time of the powers of the guardian.

The effect of such a restriction of the guardian's powers is not to deprive the Court of the power to deal with the guardian. Until the guardian has actually been removed or discharged, he remains the guardian, even though his power may have been curtailed, and the Court has authority under the Act to pass such orders as are necessary for the production of the minor's property. *Urmila Sundari Das v. Rati Kanta Saha*, 40 Ind. Cas. 397.

BEACHROFT and WALMSLEY, JJ.

(10) S. 24, cl. (c)—*Civ. Pro. Code (1908), Ss. 12, 36—Order directing a guardian to pay a sum of money to petitioner, if executable as a decree. Parvathammal v. Chokkalinga Chetty*, (1917) M.W.N. 601=6 L.W. 526=41 M 449. See Final Part, 1917, Col. 449.

(11) Ss. 36, 37, 41 (3)—*Suit for accounts and for amount due after going through accounts of guardian—Suit if lies against legal representatives of guardian.*

A suit, by a ward against the legal representatives of his guardian appointed under the Guardians and Wards Act for accounts for recovery of whatever sum might be ascertained to be due to him after going through such accounts is maintainable; there being nothing in S. 41 (3) of the Act which can be construed as depriving a minor of his legal right to bring a suit especially when that right is expressly preserved by the preceding Sections (36 and 37) in the same Act. *Muhammad Jamil v. Musst Mehran Bibi*, 55 P. R. 1918=122 P.L. R. 1918=124 P.W.R. 1918=46 Ind. Cas. 457.

SHAH DIN and LESLIE-JONES, JJ

References:—78 P.L.R. 1911; 22 A. 332, Diss.; 18 Ind. Cas. 876; 96 P.R. 1886, R.

(12) S. 37. See No. 11, *supra*.

(13) S. 41 (3), See No. 11, *supra*.

(14) Ss. 41 (3), (1), (2)—*Minor—Death of guardian—Cessation of—If Court has power to give directions to guardian thereafter—For any cause, scope of.*

Where a Court on the death of a minor directed the handing over to a person who claimed as heir of the minor's property to which a guardian had been appointed under the Act,

Guardians and Wards Act (1889)—(Concluded).

Held, the action of the Court was within its power under S. 41, cl. 3.

The words 'for any cause' in S. 41, cl. 3 of the Act, is not confined to the causes mentioned in cls. 1 and 2 and that, when the death of a minor ward occurs, that is also a clause within the meaning of the expression 'any cause.' *Nataraja Pillai v. Subbaraya Pillai*, (1918) M W.N. 440.

OLDFIELD and SADASIVA AIYAR, JJ

Reference—33 B. 419, R

(15) S. 41 (4)—Order of discharge of guardian not express—Civil suit by ward for rendition of accounts of maintainable *Amar Nath v. Raghat Rai*, 108 P L R 1917—73 P W R 1917—25 P R 1918 See Final Part, 1917, Col. 450.

(16) S. 43. See No 9, *supra*.

(17) S. 47 See No 8 a, *supra*

Gujrat Taluqdars.

See BOM ACT VI OF 1888,

Gumasta.

Sharing losses as well as profits, a partner in firm See PARTNERSHIP, No. 7 b, 155 P L R 1917

Handwriting.

Proof by comparison of handwriting, Admissibility of condition for—Document selected for comparison if must be signed or contain intrinsic statement of identity of writer. See EVIDENCE ACT, No. 25, 95 M L J. 608.

Headman.

Number of persons who can hold office, it may be two—Selection of incumbent to new office created under S. 15, Madras Act II of 1894 See JURISDICTION (OF CIVIL COURTS), No. 10, 24 M L T 489.

Hereditary Office.

(1) Code of Civil Procedure (Act V of 1909), O XXI r 12—Injunction, decree for—Execution of decree—Decree passed in regard to a hereditary office—Right claimed as legal representative—Decree passed against defendants as legal representatives—Enforcement of obedience to decree through police

A decree for a perpetual injunction was passed in favour of plaintiff and certain other persons, called defendant of the third party, against persons who were called defendants of the second party. The right claimed in the suit was the right to perform "Arts" in a certain temple, the parties asserting their right thereto as descendants of the original founders. The defendants of the second party were restrained from interfering with the performance of the "Arts" by the plaintiff and defendants of the third party. The defendants of the second party having obstructed the performance of the "Arts," one of the defendants of the third party applied

Hereditary Office—(Concluded).

that the decree might be enforced through the Superintendent of Police. The application was granted.—**Held** that O XXI, r 34 of the Code of Civil Procedure, prescribed the mode of executing a decree for injunction and the Court was not justified in ordering the police to interfere in the matter, nor was it justified in appointing a Commissioner to see that the decree holder performed, without obstruction, the duties appertaining to his office. Cl (5) of r 34 of O XXI does not authorise the passing of such orders and provides for a different state of things.

Held, also, that the decree related to a hereditary office which the plaintiff claimed and which the defendants resisted and was not passed against the defendants as individuals but as descendants of the original founder *Goswami Gordhanlalji v. Goswami Maksudan Ballabh*, 16 A L J 700=40 A 648.

BANERJI and RYVES, JJ

(2) See BOM ACT III OF 1874

(3) See BOM ACT V OF 1886

Hereditary Village Offices.

See MAD ACT III OF 1895.

High Court.

Jurisdiction of, to declare an Act of legislature *ultra vires*. See COUNCILS ACT, 1861, 44 Ind. Cas. 185.

High Court Judge.

Sitting on Original side—Minutes of order, Power to modify, before drawing up of formal order See PRACTICE AND PROCEDURE, No. 3, 24 M L T 500

High Court, Jurisdiction of

(1) *Matrimonial—Divorce Act (1869), S. 4, of precludes Court from considering provisions of Ss 4 & 5 of Christian Marriage Act (1872)—Scope of two Acts, Difference between—Solemnized, meaning of in S 5 of latter Act—Scope of S 5 Consent—Deception, Degree of—Fraud Nature of, requisite for, avoiding marriage.*

S. 4 of the Divorce Act, which provides that the jurisdiction exercised by the High Court in all cause suits and matters matrimonial shall be exercised subject to the provisions of the Divorce Act and not otherwise, does not preclude the Court from considering the provisions of S. 4 of the Christian Marriage Act which declares that every marriage solemnized otherwise than in accordance with the provisions of S. 5 shall be void

The word "solemnized" in S. 5 of the Christian Marriage Act means "celebrated."

While the Divorce Act gives the external reasons and causes for which apart from the ceremony, a marriage may be declared null and void, the Christian Marriage Act, in Ss 4 and 5 deals with the ceremony and the ceremony only.

High Court, Jurisdiction of—(Concluded).

S. 5 of the Christian Marriage Act deals only with the ceremony and the person who may perform it, and not with the capacity of the persons on whom it is performed or with the capacity of the person who performs it, save as is expressed in the section, *vis.*, that he should have received episcopal ordination.

Unless the party imposed upon has been deceived as to the person and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made.

When fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. It does not also include fraud practised on a third party in order to procure a license to celebrate it. *Consterdine v. Smaile*, 47 Ind. Cas. 544.

YOUNG, J.

- (2) *Agreement under S. 31 of Income Tax Act of 1882—Suit to enforce agreement if lies on original side of Madras High Court—Right of Income Tax Collector to exemption from suit—Grounds of trial of suit on merits—Government of India Act (5 and 6 Geo. V, c. 61), S. 106 (2).*

In a suit by a firm against the Collector of Madras who, under the Income Tax Act (V of 1916) repudiated an agreement entered into by the firm with the Collector under S. 31 of the Income Tax Act (II of 1886) for a declaration that such agreement was binding on him, held that provision enacted in S. 106 (2) of the Government of India Act, 1915, was absolute and that the High Court had no jurisdiction to entertain it on its original side (a).

And that in the absence of any suggestion that the Collector of Madras acted *mala fide* or purported to seek the protection of the statute with the full knowledge that all that was done was to commit a mere act of aggression so long as he, rightly or wrongly, thought clearly and honestly that he was taking advantage of the provisions which the statute allowed him to take advantage of, in terminating the agreement, the High Court had no jurisdiction to entertain the suit on its merits (b). *Best & Co. v. Collector of Madras*, 35 M.L.J. 23.

COUTTS-TROTTER, J.

References:—(a) 1 M. 89, *Not F.* (b) 4 M.L.A. 353, *F.*

(3) Certificate by Collector that document was duly stamped—Reference by Board of Revenue to High Court—High Court, whether has jurisdiction. See STAMP ACT (II OF 1899), No. 10, 16 A.L.J. 49 (F.B.).

High Court (Patna).

Whether bound by view of Calcutta High Court in calculating period of limitation. See LIMITATION ACT (1908), No. 232, 45 Ind. Cas. 308.

High Court, Powers of.

- (1) *Government of India Act, 1915, S. 107—Civ. Pro. Code, 1908, S. 151—Expunging irrelevant and scandalous matter from judgment of Subordinate Court if order for, can be made by High Court under its powers of superintendence.*

Per *Abdur Rahim, J.*—The powers of superintendence vested in the High Court are of an extremely wide character, and where the High Court finds a case in which a Subordinate Court has gone out of its way to introduce matters in its judgment that are absolutely irrelevant and scandalous in their nature, it can remove those passages from the judgment, so that they may not be circulated and published to the prejudice of persons, who are or are not concerned in the suit either as parties or as witnesses, but such jurisdiction must be exercised only in extremely exceptional cases and with the greatest caution.

Per *Oldfield, J. (contra)*.—The High Court's power of superintendence, under S. 107, Government of India Act, does not include the power to expunge from the judgment of a Subordinate Court, irrelevant or scandalous matter, as the exercise of such a power is neither necessary nor desirable, being a novel one involving the High Court in the risk of grave inconvenience.

Where a *vakil*, who was not a party to the suit, applied to the High Court, in the exercise of its powers under S. 107, Government of India Act, to order that certain passages in the judgment of a Subordinate Court reflecting against him may be expunged, the High Court dismissed the petition. *In re Krishnaswamy Iyengar*, 35 M.L.J. 368=47 Ind. Cas. 931.

ABDUR RAHIM and OLDFIELD, JJ.

References:—C.R.P.S. No. 888 of 1916 (Mad. H.C.); Nos. 587, 588 and A.A. O. Nos. 205 and 206 of 1914 (Mad. H. C.), R.

- (2) *Civ. Pro. Code (1908), S. 151, Under—High Court's decree in partition suit, Execution of, at variance with intention and purport of decree—High Court if can interfere—High Court at Patna. Successor of High Court at Calcutta—Execution of Calcutta High Court decree.*

The High Court under its inherent powers of supervision which are expressly saved by S. 151 of the Civ. Pro. Code may, in a case where it is brought to its notice that its decree is being executed in a manner manifestly at variance with the purport and intention of that decree, take such action for the ends of justice as may be necessary to enforce the proper execution of the decree.

A decree of the Calcutta High Court must be regarded as a decree of the Patna High Court where it has succeeded to the jurisdiction of that Court. *Kulada Prasad Tewari v. Sadhu Charan Tewari*, 3 Pat. L. J. 435.

MILLER, C.J. and CHAPMAN, J.

(3) Power of Indian High Courts to declare enactments, made by Governor-General in Council *ultra vires* if proper case therefor exists. See DEFENCE OF INDIA ACT, 4 Pat. L.J. 587 (F.B.).

High Court, Powers of—(Concluded).

(4) High Court, 'if can interfere with decision of Chairman of Calcutta Corporation refusing to expunge names of certain persons from Municipal Election Roll. See ELECTIONS, No. 3, 22 C.W.N. 951.

(5) See CIV. PRO. CODE (1908), S. 115.

(6) See CIV. PRO. CODE (1908), S. 151.

High Court Rules (Allahabad).

Chap. III, r. 2—Limitation Act (IX of 1908); S. 12—Accompaniments of a memorandum of appeal. Narasingh Sahai v. Sheo Prasad, 15 A.L.J. 835=40 A. 1 (F.B). See Final Part, 1917, Col. 453.

High Court Rules (Calcutta).

* Framed for Presidency Towns if applicable to mofussil. See ACT IV OF 1912 (LUNACY), 27 C.L.J. 205.

High Courts Act, 1861 (24 and 25 Vict., c. 104).

S. 9. See COUNCILS ACT (1861), 44 Ind. Cas. 185.

Highway.

(1) Obstruction to, Removal of—Special damage need not be proved for. See CO-OWNERS, No 3, 176 P.W.R. 1918.

(2) Building erected on village shamilat—Right of some of proprietary body to sue for its removal without proof of special damage. See PUBLIC NUISANCE, No. 1, 176 P.W.R. 1918.

Hindu Law.

1.—GENERAL.

2.—ADOPTION.

3.—ALIENATION.

3-a.—ANCESTRAL PROPERTY.

4.—DEBTS.

5.—GIFT.

6.—GUARDIAN.

7.—GUARDIANSHIP.

8.—IMPARTIBLE ESTATES.

9.—IMPARTIBLE PROPERTY.

10.—INHERITANCE.

11.—JOINT FAMILY.

12 & 13.—MAINTENANCE.

14.—MARRIAGE.

15.—MINORITY AND GUARDIANSHIP.

16.—PARTITION.

17.—RELEASE

18.—RELIGIOUS ENDOWMENT.

19.—RE-MARRIAGE.

20.—RENUNCIATION.

21.—REVERSIONERS.

22.—SELF ACQUISITION.

23.—SEPARATION.

24.—STRIDHANAM.

25.—SUCCESSION.

25-a.—TEXTS.

26.—WIDOW.

27.—WILL.

—1.—General.

Hindu Law which is *lex loci* in Central Provinces. See ACT XX OF 1875 (C.P. LAWS ACT), No. 1, 44 Ind. Cas. 435.

Hindu Law—(Continued).**—2.—Adoption.**

(1) *Family arrangement—Agreement executed under a wrong view of facts and law—Not binding—Adoption by widow after estate has vested in an heir—Divesting of estate.*

N and P were brothers. N died leaving a widow L. Subsequently, P died leaving a widow D. Upon P's death, the two widows apportioned the whole property in equal shares between themselves. In the document which was executed for the purpose, it was stated that the two brothers were "joint in food, business and everything," but it was followed by the recital that the two widows were entitled to the property in equal shares. Disputes having broken out between the two widows, two cross suits were filed, one on behalf of L and the other on behalf of D. L alleged that she had been authorised by her husband to adopt a son, and that she intended to adopt one, whereupon a dispute arose between her and D which was referred to arbitration and that resulted in the former partition. She prayed for separate possession of her share allotted in the partition. D, in her suit, asserted that, on N's death, her husband, P, succeeded to the whole estate by right of survivorship, and on his death she acquired a Hindu widow's estate in the property and that the deed of partition was not binding on her, her signature thereto having been obtained by fraud and in ignorance of the nature of the deed and her legal rights. It was found by the Court below that N and P were members of a joint Hindu family, and, on the former dying without issue, P became owner of the whole by right of survivorship, and that the deed of partition was not binding on D. Held that the deed of partition, evidently, had been executed by D under the mistaken belief that she and L were equal owners of the property left by her husband and that she would be divested of her rights by an adoption made by L, and consequently it was not binding on D.

Held, also, that a widow's power to adopt a son is at an end when the estate has vested in the widow of a co-parcener, who had got the estate by survivorship after the death of the adopting widow's husband. *Lachmi Kunwar v. Durga Kunwar, 16 A.L.J. 646=46 Ind. Cas. 566.*

PIGGOTT and WALSH, JJ.

References:—14 D. 463; 33 M. 228, R.

(2) *Divesting of estate by adoption—Limitations of widow's power to adopt—Impartible raj—Whether the rule that adoption must be to last male-holder applies to it.*

Hindu Law recognises the validity of an authority given to a widow by her deceased husband to make a second, or even a third or fourth adoption, on failure of the previous adoption to attain the object for which the power is given, viz., the perpetuation of the husband's line to discharge the obligations that rest on a pious Hindu. Such a power comes to an end as soon as any such adopted son attains full legal capacity to continue the

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

line; nor does it subsequently revive on his death, whether or not he leaves a son of his own or a widow capable of adopting to him.

The rule that adoption must be made to the last full owner applies just as much to an impartible raj (which is joint family property subject to an exception) as it does to separate property. *Madana Mohana Deo Kesari v. Parushottama Ananga Bheema Deo*, 16 A. L. J. 725=35 M.L.J. 138=8 L.W. 167=24 M.L.T. 231=20 Bom. L.R. 1041=(1918) M.W.N. 621=41 M. 855=28 C.L.J. 403=46 Ind. Cas. 481 (P.C.).

LORDS HALDANE, DUNEDIN, SUMNER,
SIR JOHN EDGE and MR. AMEER ALI.

Reference:—26 B. 626 (F.B.), *Appr.*

- (3) *Dvyamushyayana form—Presumption—Limitation Act (IX of 1908), S. 7—Discharge by an adult brother on behalf of joint family consisting of minor co-parceners—Suit to recover arrears—Cash allowance.*

Under Hindu Law adoption must be presumed to be in the ordinary (kevala) form, except where there is an express agreement to the effect that the adoption is in the *Dvyamushyayana* form (a).

Where plaintiffs are jointly interested in a cash allowance, they can sue to recover arrears for three years only even though one of them is a minor at the date of the suit (b). *Huchrao Timmaj v. Bhimrao Gururao Deshpande*, 20 Bom. L.R. 161=42 B. 277=44 Ind. Cas. 851.

HEATON and SHAH, JJ.

References:—(a) 41 B. 315=19 Bom. L.R. 23, F. (c) 6 Bom. L.R. 647, D.

- (4) *Status of unborn son of the adopted son.*

Under Hindu Law, on the adoption of a person, his son, who is not born but is in the womb at the time, passes with him into the adoptive family, inasmuch as the legal entity of the after-born son must be taken to date from the date of his birth for all purposes of succession and inheritance. *Advi v. Fakirappa*, 20 Bom. L.R. 703=42 B. 547=46 Ind. Cas. 644.

BEAMAN and HEATON, JJ.

References:—33 B. 669; *In re Wilmer's Trusts* (1903) 72 L.J. Ch. 378; *Villar v. G. Ibay*, (1907) 76 L.J. Ch. 339, R.

- (5) *Ante-adoption agreement between adoptive mother and natural father, if binding on the minor—Contract, if void.*

Ante-adoption agreements by the adoptive mother with the natural father and operating in restriction of the rights of the adopted son are valid, only if they amount to fair and reasonable arrangements for the enjoyment of her husband's property by the widow during her lifetime, especially when there is authority from the husband in that connection. The contract is not, however, absolutely void and

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

can be ratified by the minor (a). *Panchanab Majumdar v. Bhooy Krishna Banerjee*, 27 C. L.J. 274=44 Ind. Cas. 538.

CHATTERJEE and WALMSLEY, JJ.

References:—(a) 27 M. 577; 37 B. 251, R.

- (6) *Mitakhshara Law—Maheswari caste—Widow of separated brother—Adopting son without authority from deceased husband—Custom—Validity.*

In accordance with a prevailing custom, a widow of separated brother, of Maheswari caste, who were governed by Mitakhshara Law, can adopt a son to her deceased husband, although she had no authority from her husband so to adopt.

The claim of such an adopted son to the family property cannot be barred by any deeds entered into by the adoptive mother, prior to adoption, with reference to her maintenance. *Mathura Das Karnati v. Sriklash Karnati*, 44 Ind. Cas. 5=27 C.L.J. 517.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—27 Ind. Cas. 701, R.

- (7) *Benares school of law—Adoption of married Sudra—Invalid.*

It is settled law that, in those parts of the country where Mitakhshara is interpreted according to the Benares school, a married Sudra cannot be adopted. *Krishna Mall v. Deolia*, 44 Ind. Cas. 928.

PRIDEAUX, A.J.C.

References:—11 C.P.L.R. 56; 35 A. 263, F.

- (8) *Datta Homa ceremony, Absence of, if renders adoption invalid among twice-born classes—Widow, Adoption by, Consent of husband in case of, Necessity of—Deed of adoption, Execution of, if confers rights of—Adoptive mother, Agreement conferring benefit on, at the expense of minor adopted son, Validity of.*

Amongst the twice-born castes, the absence of the *Datta Homa* ceremony would not invalidate an adoption otherwise valid.

In Benar for the validity of an adoption made by a widow, it is not necessary that the husband should have authorised it. The authority is presumed in the absence of a prohibition.

A mere execution and registration of a deed of adoption cannot confer the rights of an adopted son. There must be at least a giving and taking to constitute an adoption.

An agreement conferring a benefit on the widow at the expense of a minor adopted son must be a fair and reasonable one. *Chandrabhagabai v. Ramchand*, 46 Ind. Cas. 850.

MITTRA, A.J.C.

Reference:—27 M. 577, F.

- (9) *Baisi Chowrasi gaddis, Holders of, Hindus governed by—Lachimpur family governed by—Possession, Suit for, Defence of title by*

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

adoption in—Limitation for suit—Limitation Act (IX of 1908), Sch. I, Arts. 118, 141, Applicability of.

The holders of the Baisi Chowrahi gaddis are now a recognised community. The community though originally indigenous have become sufficiently Hindu to justify a Court in holding that the burden of proving that they have not assimilated the Hindu Law of adoption lies on the person asserting it.

The Laohimipur family has assimilated the Hindu Law of adoption and there is no custom in it to the contrary.

Obiter dicta—Where a suit is brought for the possession of immovable property and the defendant holds under a title by adoption, the suit is governed by Art. 141 and not by Art. 118 of Sch I of the Limitation Act. *Sah Deo Narain Deo v. Kusum Kumari*, 46 Ind. Cas 929.

CHAPMAN and ATKINSON, JJ.

(10) *Widow Power of, to adopt—Limit of time to exercise of*

There is no limit of time during which a Hindu widow may set upon the authority given to adopt a son to her deceased husband.

Where a Hindu son, whether natural or adopted, having inherited the property of his deceased father, dies leaving a son, or widow or any other person as his heir other than the widow of his father, any power to adopt held by his father's widow comes to an end. But this rule does not apply where the son dies leaving no heir other than his father's widow. *Narayan Ramrao v. Debidas Narasimh*, 47 Ind. Cas 41.

STAYNOR, A. J. C.

(11) *Subsequent consent of sapindas—Validity—Rule 17 of the Construction of a conveyance—Civil Procedure Code (V of 1908) O VI r 17—Adoption—Cause of action arising subsequent to suit, inclusion of—Power of Court—Practice*

The doctrine of the consent of the sapindas validating an adoption is based largely on custom and not on the text of Hindu Law, and in the absence of any evidence or authority to that effect, this doctrine cannot be extended to the case of consent given subsequent to the adoption.

Where the intention to transfer any right, which the executant of a document had is clear, there is no reason why the instrument should not be treated as a conveyance though it is called only a 'release'.

Plaintiff brought a suit for redemption of a mortgage and for a declaration of the invalidity of a lease granted by the widow of the last male holder of the property. Plaintiff based his title as the adopted son of the last male-holder. Subsequent to the filing of the suit plaintiff obtained a transfer of all rights in the

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

property from the person who but for the alleged adoption would be entitled to succeed to the property. Plaintiff then applied for an amendment of the plaint, so as to base his title to sue on the transfer as well.

Held that O VI, r 17 of the Civ. Pro. Code, was wide enough to authorize the amendment including a cause of action arising subsequent to the suit to be made especially when there was no prejudice to any of the parties but no such amendment should be allowed if a suit based on the new cause of action on the date of the amendment would be barred (a). *Dural-swami Pillai v. Chinna Goundan*, 7 L W. 335 = 22 M L T 538 = 34 M L J. 258 = (1918) M. W N 89 = 43 Ind. Cas 560.

WALLIS, C. J. and KUMARASWAMI SASTRI, J.

Reference—(a) 33 B. 644, *Rel. on.*

(12) *Adoption by widow with the consent of nearest sapinda—Consent arbitrarily withdrawn—Subsequent adoption by widow—Validity* *Sunkura Suryanarayana v. Sunkura Ramdoss*, 22 M L T. 501 = 7 L W. 74 = 11 M L J 87 = (1918) M W N 203 = 41 M. 601 = 43 Ind Cas 526 See Final Part, 1917, Col. 407.

(13) & (14) *Adoption by widow in the Dravidian country with assent of sapindas—Whose assent is necessary—Position of a widow in an undivided family—Case of a divided family—Assent of nearest kinsmen equally necessary—Rights to property not to be disregarded*

Under the Dravidian branch of the Mitakshara Law, in the absence of the authority from her deceased husband a widow may adopt a son with the assent of his male agnate. This was established in the Rinnad case.

In the case of an undivided family the consent must be obtained by the widow within this family if the father in law is alive, from him if not from the deceased husband's brothers. The assent of separate and remote kinsmen is insufficient.

The principle is the same if the husband dies separate from his kindred. The widow must still obtain the assent of her father-in-law; if he is dead, if he brothers or the other nearest sapindas. In constructing what assent is sufficient regard to property cannot be disregarded, and the widow cannot be allowed to adopt on the authority of remote relatives when there are near ones in existence. *Yeera Basavaraju Pantulu v. Balasuriya Prasada Rao Pantulu*, 25 M L T 1 = 17 A L J 31 = 23 C W N. 251 = 36 M L J 40 = 41 M 993 (P C).

LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE and MR AMEER ALI.

References :—11 M. I. A. 397 ; 4 I. A. 1 ; 3 I. A. 54, R.

Hindu Law—(Continued).**—2.—Adoption—(Concluded).**

inherited by her from her father. *Ramji Das v. Durga Prasad*, 6 P.R. 1918=45 Ind. Cas. 90.

SHAH DIN, C.J. and LE-ROSSIGNOL, J.

References:—(a) 7 Ind. Cas. 427, *Dist.* (b) 11 C. 463 (483); 28 A. 488; 23 B. 271 and 296; 19 C. 513, *Dist.*

(22) *Sarsut Brahmins of Delhi—Punjab—Custom—Formalities of adoption.*

The law requires from the adopter, a manifestation of his unequivocal intention to clothe the adoptee with the legal status of his son.

Such a manifestation of the adopter's intention can be made either by a formal document combined with a proper treatment or by a formal giving and taking of the child. But mere treatment, without this formal giving and taking, will not satisfy the conditions necessary for a legal adoption even in the Punjab, where no doubt the performance of an elaborate ritual or religious ceremony is quite unnecessary to the validity of an adoption. *Musat. Rattan Devl v. Munu*, 117 P.R. 1918.

LE-ROSSIGNOL and WILBERFORCE, JJ.

(23) Adoption of daughter's daughter's son—Validity. See CIV. PROC. CODE (1909), No. 277, 27 O.L.J. 112.

(24) Adoption of daughter's son, Validity of, among Aheras of Lahore—Custom as to—Presumption—Burden of proof See CUSTOMS—PUNJAB (ADOPTION), No. 1, 106 P.R. 1918.

(25) Gift by Hindu widow to one of two daughters without consent of other daughter—Subsequent adoption of son by widow—Validity of alienation. See HINDU LAW (WIDOW), No. 6, 20 Bom. L.R. 783.

(26) Widow, Agreement by, with natural parents of adopted child—Minor, if found by—Test, if for benefit of minor. See HINDU LAW (WIDOW), No. 11-b, 47 Ind. Cas. 55.

(27) Widow adopting son during pendency of suit to recover property from widow—Adoption having the effect of divesting a vested estate—Validity of adoption. See RES JUDICATA, No. 15, 43 Ind. Cas. 64.

(28) Adoption by widow—Postponement of adopted son's estate during widow's life—Transfer by adopted son of property forming part of estate in widow's lifetime—Validity of transfer. See SPES SUCCESSIONIS, No. 1, 16 A.L.J. 765.

—3.—Alienation.

(1) Leprosy—Whether disqualifies a person from dealing with his own property or ancestral property for legal necessity. *Man Singh v. Musammatt Gaini*, 15 A.L.J. 860=40 A. 77=48 Ind. Cas. 62. See Final Part, 1917, Col. 462.

(2) Grant of property to a priest and his heirs—Grant not in favour of idol—

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

Grantee capable of dealing with property as his own—One member of joint family alienating property—Other members may impeach—Stranger competent to do so.

A grant of property under a deed made to a priest of a temple and his heirs for his services in connection therewith is not grant in favour of the idol of the temple, and the grantees are competent to deal with such property as their private property.

Where a member of a joint family makes an alienation of property belonging to the family, purporting to act on behalf of the family, the other members can call it in question on the ground that it was made without authority or without valid necessity or not for their benefit. But a person who is a stranger to the family and does not claim through the joint family is not competent to do so. *Banarsee Das v. Sheodaran Das Shastri*, 16 A.L.J. 394=45 Ind. Cas. 451.

PIGGOTT and WALSH, JJ.

(3) Mortgage by father for necessity—Onerous interest—Position of mortgagee—Necessity for interest—Duty of Court—Decree on mortgage obtained against father alone—Right of sons.

Where a Hindu father makes a mortgage for necessity at an onerous rate of interest, the sons, though bound by the mortgage, are not bound by the rate of interest unless such higher rate was justified by the necessity of the family. If the mortgage fails to prove such necessity, Courts are under an obligation to reduce the rate of interest to a reasonable limit.

In such a case where a decree was obtained against the father alone, the sons, who were no parties to the decree, can be granted relief in a subsequent suit to the effect that, if they pay the principal amount together with a reasonable rate of interest and costs of suit by a certain date, the decree shall not be executed against the mortgaged property. *Sadho Charan Prasad v. Ram Ratan*, 40 Ind. Cas. 369.

STUART and KANHAIYA LAI, A.J.Cs.

(4) Alienation by manager, of minor's co-parcenary property, describing himself as minor's guardian—Suit for possession after minority—Limitation Act, Arts. 44 and 144—Guardian and ward.

It is a well established principle of Hindu Law that, in an undivided family, no guardian can be appointed for a minor co-parcener who has no separate property (a).

Art. 44 may apply to cases in which a person acts as guardian of a minor in respect of property in which he has individual rights of ownership.

A suit by a member of a joint family for possession of property alienated by the manager as the guardian of the minor is a suit governed

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

by Art. 144 and not by Art. 44 of the Limitation Act (b). *Koovuri Thirupathi Raju v. Koovuri Venkata Raja*, 40 Ind. Cas. 418.

SPENCER and KRISHNAN, JJ.

References:—(a) 45 A. 407; 30 B. 152, R. (b) 22 M.L.J. 404, Dist.; 29 Ind. Cas. 190, F.

(5) *Alienation by Hindu widow—Consent of next reversioner—Effect on actual reversioner—Presumption of legal necessity.*

An alienation made by way of mortgage by a Hindu widow of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable enquiry and honest belief as to his existence, but with the consent of the next reversioner for the time being, is valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof. Where the consent of the nearest reversioners is given to an alienation made by a Hindu female the consent is evidence to show either that there was legal necessity in fact, or that the transferee acted with circumspection and made inquiries which induced the honest belief that such legal necessity did in fact exist.

Merely attestation of the deed of transfer by the next reversioner is not sufficient proof of consent to the alienation by a Hindu widow. *Balwant v. Ram Dat*, 44 Ind. Cas. 611=4 O.L.J. 711.

LINDSAY, J.C.

Reference:—40 C. 721, F.

(6) *Widow. By—Maintenance, for purposes of—Of portion of estate, Validity of.*

A Hindu widow in order to defray her maintenance expenses to be subsequently incurred, may sell a small portion of her husband's estate when it would be more to the benefit of the estate. She is not bound to incur debts on that account. *Kilak Chandra Das v. Kula Chandra Das*, 46 Ind. Cas. 269.

CHITTY and SMITHER, JJ.

(7) *Widow. By—Legal necessity, Strict proof of, after long lapse of time—Legal necessity, Recital of, in document.*

In case of transfers by a Hindu female, it is very difficult after the lapse of a long period to establish a case of legal necessity. In these cases Courts have to assume the existence of such necessity from surrounding circumstances. Where money is advanced for a legal necessity, it is not necessary that the deed should recite the purpose for which the money was given. *Raj Bahadur Lal v. Bideshree*, 46 Ind. Cas. 344.

LINDSAY, J.C.

(8) *Mitakshara Law—Co-parcener in a joint family, Mortgage by, of his own share without legal necessity, Validity of—Hindu Law—Mitakshara—Alienation—Co-parcener, whether can mortgage his own share without legal necessity.*

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

Under the Mitakshara, as strictly interpreted, any mortgage granted by one co-parcener on his own account over the joint family property is invalid. The Madras and Bombay view followed in the Central Provinces, has been that a co-sharer can mortgage his own share without any such legal necessity as is binding on all the co-parceners. The law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. *Beharilal v. Hukumchand*, 46 Ind. Cas. 764.

BATTEN, OFFG. J.C.

(9) *Benares school—Mortgage by managing member—Validity—Necessity—Burden of proof—Transfer of Property Act (IV of 1882), S. 38.*

Under the Benares School of Hindu Law as administered in the United Provinces of Agra and Oudh, a mortgage of joint family property by the manager of the family who is not the father of the other members, is valid only when it is for family necessity.

The burden of establishing necessity as in the case of an alienation by a limited owner, e.g., widow, rests on the person seeking to claim benefits under the same (a).

If the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and if the transferee acted in good faith.

Where no such necessity is established, the mortgage is not, in the absence of special equities or circumstances, valid even to the extent of the share of the mortgagor in the joint family property (b). *Agant Ram v. The Collector of Etah*, 7 L.W. 323=23 M.L.J. 228=16 A.L.J. 245=34 M.L.J. 291=4 P.L.W. 226=40 A. 171=22 O.W.N. 481=34 M.L.J. 291=20 Bom. L.R. 524=(1915) M.W.N. 446=44 Ind. Cas. 290 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

References:—(a) 44 C. 186, F. (b) 6 L.W. 331, F.

(10) *Joint family—Prior mortgage by father over joint family property, v. antecedent debt making subsequent mortgage binding on sons—Father's alienation when binds sons—Antecedent debt, meaning of.*

An antecedent debt is a debt incurred on the father's sole responsibility, not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. Where, therefore, a prior mortgage over joint family property has been created by a father, but is not shown to have been created to pay off a debt antecedent of it, such prior mortgage cannot be treated as an antecedent debt for the purpose of binding his sons.

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

interest in co-parcenary property in a subsequent mortgage between the same parties. *Badagala Jogi Naidu v. Bendalam Papiah Naidu*, 35 M.L.J. 992.

SPENCER and KRISHNAN, JJ.

References:—33 M.L.J. 14=39 A. 437 (P.C.), F.; 33 M.L.J. 519, H.

- (11) *Joint family—Sale by father of family property for purposes not binding on family—Right of purchaser to charge son's share for consideration paid by purchaser—Previous suit by father for cancellation of sale on ground of fraud and other reasons, Dismissal of—Subsequent suit by sons to recover their shares, if barred—Res judicata.*

In a suit instituted by the sons for the cancellation of a sale of joint family property made by their father, not proved to have been for purposes binding on the family, held that the purchaser was not entitled to any charge on the sons' share for any portion of the consideration of such sale and that the present suit by the sons was not barred by a previous suit by the father to set aside his own alienation on the ground of fraud, undue influence and want of consideration, to which the sons were not parties, in which no question of necessity was considered and which was dismissed on the undertaking of the purchaser to pay the consideration. *Kilara Kotayya v. Palavarapu Durgayya*, 35 M.L.J. 451=41 Ind. Cas. 192.

ABDUR RAHIM and NAPIER, JJ.

References:—22 M. 312, F.; 39 A. 437; 41 M. 136; (1914) M.W.N. 16, R.

- (12) *By father as manager and guardian setting aside—Family necessity—Limitation Act, Arts. 44 and 126—Mesne profits.*

Where in a joint Hindu family the father as the manager and guardian of his sons together with other adult members of the family alienated family property 10 miles away from their home, in order to buy lands in the village where they resided, to start money lending transactions and to discharge small debts of the family and more than 3 years after attaining majority out within 12 years after the alienations the sons sued for partition after setting aside the alienations.

Held, that (1) article of the Limitation Act applicable is 126. The mere fact that the father described himself as guardian of the sons would not take the case out of the express terms of Art. 126 and bring it under Art. 44 (a).

(2) The family not being a trading family, the starting of prospective money lending transaction is not sufficient ground for alienating family properties. The sale or mortgage of ancestral lands to purchase other lands could only be justified if there was clear benefit for the family.

The fact that adult co-parceners joined in the sale would not give additional weight to

Hindu Law—(Continued).**—3.—Alienation—(Concluded).**

the transactions where there is clearly no justifying family necessity (b).

(3) The plaintiffs are not entitled to mesne profits from the date of alienation as of right. Mesne profits are in the nature of damages and each case must be dealt with on its own merits (c). *Gavasa Aiyar v. Amirthasami Odayar*, 23 M.L.T. 245=(1918) M.W.N. 892=44 Ind. Cas. 605.

WALLIS, C.J. & KUMARASWAMI SASTRI, J.

References:—(a) 38 A. 123; 40 C. 966, F.; 30 M.L.J. 592; 6 A.L.J. 94; 32 Ind. Cas. 242, R. (b) 40 M. 709; 11 M.L.T. 182; 25 M.L.J. 563; 40 M. 338, R. (c) 39 A. 61, F.

- (13) *Joint family—Sale of family property—Silence how far evidence of consent.*

Held, that silence for a long interval by members of a joint Hindu family entitled to avoid a sale of the family property by certain other members does not by itself amount to adequate evidence of implied consent to the sale. *Nadir Singh v. Inder Sen Singh*, 12 O.C. 156=46 Ind. Cas. 860.

LINDSAY, J.C.

Reference:—15 A.L.J. 437 (P.C.), R.

(14) *Ancestral property. Of, by father—After-born son, Right of, to question—Property inherited from maternal grandfather, how far ancestral in father's hands—Alienation of such property, Son's right to question. See HINDU LAW (ANCESTRAL PROPERTY), 43 Ind. Cas. 370.*

(15) *Property of Mitakshara family sold in execution of decree against father—Decree obtained for failure of father to deliver accounts as agent of plaintiff—Right of sons to question sale and to claim that their share was not affected by it—Debt not immoral—Sale if binds sons. See HINDU LAW (DEBTS), No. 12-a, 3 Pat. L.J. 533.*

(16) *Polhem on military tenure, Alienability of. See HINDU LAW (IMPARTIBLE ESTATES), No. 1, 7 L.W. 36.*

(17) *Aliance from co-parcener—Right to mesne profits. See MESNE PROFITS, No. 1, 7 L.W. 225.*

(18) *Demand for partition by Hindu co-parcener—No actual partition by moles and bounds—Determination of joint family status effected by demand—Sale by such co-parcener of his share—Right of purchaser to such share and profit from date of demand of partition. See VENDOR AND PURCHASER, No. 6, 35 M.L.J. 609.*

—3-a.—Ancestral Property.

What is—Alienation of, by father—After-born son, Right of, to question—Property inherited from maternal grandfather, how far ancestral property in father's hands—

Hindu Law—(Continued).**—3-a.—Ancestral Property—(Concluded).*****Alienation of such property, Son's rights to question.***

An alienation by the father of ancestral property cannot be called in question by a son born after such alienation, as no right accrues to him until his birth.

There is no right by birth in favour of a son in property inherited by his father from his (father's) maternal grandfather and the son cannot question any alienation of such property by the father on the ground of immorality.

Under Hindu Law property which a man inherits from a direct male ancestor not exceeding three degrees higher than himself and which is held by himself in co-parcenary with his own issue is ancestral property. It is not ancestral property, which a man inherits from a female or through a female, as for instance a daughter's son, or which he has taken from an ancestor more remote than three degrees or which he has taken as heir to a priest or fellow student (a).

Per Chapman, J.—A daughter's son is the equivalent of a son according to the Mitakshara. He is, therefore, a member of his mother's father's family, but a daughter's son's son is not in any practical sense regarded as a member of any family but his own. Any property inherited by a man from his maternal grandfather, therefore, is not ancestral property so far as his sons are concerned, and as his assets in the hands of his son and can be proceeded against in execution of a decree obtained against him. **Blawanath Prasad Sahu v. Gajadhar Prasad Sahu**, 43 Ind. Cas. 370=3 Pat. L. J. 168=3 L.W. 286.

CHAPMAN and JWALA PRASAD, JJ.

References:—(a) 6 Ind. Cas. 72=35 C. 1039; 128 P.W.R. 1908=35 I.A. 286; 8 C.L.J. 359; 12 C.W.N. 1019; 10 Bom. L.R. 720=18 M.L.J. 379=4 M.L.T. 107=42 P.R. 1910 (P.C.); 29 A. 667=4 A.L.J. 542=A.W.N. 1907) 211, F.; 25 M. 678=29 I.A. 156=7 C.W.N. 1=12 M.L.J. 299=4 Bom. L.R. 657=8 Bar. P.C.J. 286 (P.C.); 27 M. 38, *Dist.*

—4.—Debts

(1) *Bond executed by deceased father—Suit against his widow and brothers—Form of decree.* **Pahalwan Singh v. Janki**, 15 A.L.J. 849=40 A. 17. See Final Part, 1917, Col. 465.

(2) *Father's debt—Decree against father—Sought a party to the suit—Sale of partition of ancestral family property in execution of the decree—Son's interest in the property does not pass by the sale—Son can maintain a suit for partial partition of the property—Auction-purchaser directed to sue for general partition.*

Defendants Nos. 5 and 7 sued to recover a sum of money from defendant No. 5 in 1904 and obtained a decree. At that time, defendant No. 5 had a son (plaintiff) who was four years of age. In execution of the decree, two houses forming part of the ancestral family property of defendant No. 5 were sold at a Court sale and

Hindu Law—(Continued).**—5.—Debts—(Continued).**

purchased by defendants Nos. 1 to 4. The plaintiff sued in 1915 to have it declared that his half share in the properties did not pass to defendants Nos. 1 to 4 at the Court sale and to recover possession of his half share on equitable partition. Defendants Nos. 1 to 4 contested the suit on the grounds that the son's interest in the property passed at the Court sale and that the suit for a partial partition of the property was bad.

Held, that the son's share in the property did not pass to defendants Nos. 1 to 4 at the Court sale (a).

Held, further, that the objection of a partial partition did not apply to a suit by a co-parcener against a purchaser at a Court sale (b).

Held, also, that the defendants Nos. 1 to 4 should be given an opportunity of filing a suit against the plaintiffs for a general partition of the entire family property (c). **Haumandas Ramdayal v. Yalabhdas Shankardas**, 20 Bom. L.R. 472=46 Ind. Cas. 133.

BACHELOR, AG. C.J., and KEMP, J.

References:—(a) 37 B. 631; 15 Bom. L.R. 794, F. (b) 19 M. 267; 28 A. 50, F. (c) 4 I.A. 247; 11 I.A. 26, F.

(3-a) *Karta of joint family. By for family necessity. Legal necessity. Onus as to—Gratification of sentimental ambition, not a legal necessity.*

The creditor who lends money on a bond to a karta of a Hindu joint family with the intention of making the joint family property liable, together with all the joint members of the family, must prove the necessity for the money that it was for the benefit of the joint family and the members of it. This onus is heavier in cases where the lender has peculiar means of finding out the circumstances of the family.

Gratification of a sentimental ambition or speculation cannot be said to be a legal necessity. **Dip Narayan Choudhury v. Devendra Nath Dass**, 43 Ind. Cas. 193=3 Pat. L.W. 181.

ATKINSON and KINGSFORD, JJ.

(3) *Suit on debt for Hindu family purposes*

—*Whether minor sons necessary parties—*

Execution sale—How to ascertain what passes by such sale.

Where a debt is contracted for family purposes, it is not necessary to make minor sons of the family parties to the case.

In order to ascertain what passes upon an execution sale upon a decree made against the karta of a Mitakshara joint family, it is necessary to look firstly, at the circumstances in which the debt was contracted; secondly, at the form in which the plaintiff's claim was pressed; thirdly, at the decree made; fourthly, at the attachment; fifthly, at the sale proclamation; and lastly, at the certificate of sale. **Jagdish Narayan Pershad Singh v. Manmatha Nath Dey**, 45 Ind. Cas. 76.

ROE and IMAM, JJ.

References:—36 A. 883, F.; 13 C. 21, *Appr.*

Hindu Law—(Continued).**—5.—Debts—(Continued).****(4) Debt by father—Immoral nature—Son's share when not liable—Burden of proof.**

The burden of proof is on the son to show that the father's debt was incurred for immoral purposes in order to exempt the son's share of the family property from liability.

It is not sufficient to prove that the father was a man of extravagant and vicious habits. A definite connection has to be established between the debts incurred and the immoral expenditure.

The onus of proving that the debt incurred by the father was for immoral or illegal purpose, was not shifted on to the creditor by proof of immoral habits. *Bhika v. Harlal*, 45 Ind. Cas. 206.

MITRA, A.J.C.

References:—28 A. 508, R.; 31 A. 176, Dist.; 30 A. 156; 6 C.P.L.R. 140; 14 B. 320; 20 B. 534; 36 B. 68, Appr.

(4-a) Joint family—Debt by father—Son if bound to pay, during lifetime of father—Co-partner, Separate Debt, of Decree for—Sale of his interest during lifetime, Validity of.

So long as the father in a Hindu family is alive, the pious obligation to discharge his debts which is allowed by the Hindu Law upon his sons cannot be enforced.

Under a decree against any individual co-partner for his separate debt a creditor may during the life of the debtor seize and sell his undivided interest in the family property. *Manna Lal v. Bhagwandin*, 47 Ind. Cas. 679.

LINDSAY, J.C.

(5) Mitakshara school—Joint Hindu family consisting of father and sons—Decree obtained against father alone on pro-note executed by him only—Execution of decree—Sons' shares, if and when can be proceeded against—Property attached described as the father's—Sons' shares, if also included.

An execution creditor is entitled to sell the whole of the estates of a joint Hindu family consisting of a father and his sons and governed by the Mitakshara Law in execution of a decree obtained against the father alone unless it is shown that the debt, for which the decree was obtained, was incurred for illegal or immoral purposes, or solely for the purpose of enabling the father to sell the whole property including his sons' shares (a).

Where joint family property including the shares of two undivided sons was attached and sold in execution of a decree obtained against the father on a pro-note executed by him, and the sons preferred a claim for the release of their shares which was dismissed and subsequently brought a suit for a declaration that their share of the property could not be attached and sold in execution of the decree.

Held, that in the absence of proof that the debt in respect of which the decree was obtained was (i) incurred for illegal or immoral purposes

Hindu Law—(Continued).**—5.—Debts—(Continued).**

or (ii) borrowed by the father solely to enable him to sell the whole property including the sons' shares, the decree-holder was entitled in execution to proceed against the whole of the property including the shares of the sons.

Held, also, that although the property attached was described as the father's, the sons' shares also must be presumed to have been attached as the attachment was of the whole property and was not confined to the right, title and interest of the judgment-debtor, and as the sons' claim petition and suit for declaration proceeded on that understanding and would otherwise be unsustainable. *Subba Rao v. Swamia Pillai*, 7 L.W. 407=47 Ind. Cas. 834.

SPENCER and KRISHNAN, JJ.

References:—(1) 44 C. 524 (P.C.); 39 A. 437 (P.C.), R.

(6) Father's debts—Son's liability—Pro-note by father before partition—Subsequent pro-note by him in renewal of the former after partition—Whether son liable on subsequent note. *Vinjanampati Peda Venkanna v. Yadla-manati Sreenivasa Deekshatula*, 22 M.L.T. 231=33 M.L.J. 519=6 L.W. 649=(1918) M.W.N. 55=41 M. 136=43 Ind. Cas. 225. See Final Para., 1917, Col. 465.

(7) Partnership—Manager entering into partnership with a stranger—Debt incurred for partnership—If binding on family and family assets liable—Indian Contract Act, S. 217.

Where a manager on behalf of a joint Hindu family enters into a partnership with a stranger and carries on a trade and a debt is incurred in the course of the trade, it is binding on the family assets under the Hindu Law though according to S. 217 of the Contract Act, the family property cannot be regarded as an asset of the partnership. *Dhulipalla Kasakam v. Nadipalli Venkat-raju*, (1919) M.W.N. 41=7 L.W. 25=11 Ind. Cas. 76.

BESHAHARI ALVAR and NAPIER, JJ.

References:—24 M. 555, F.; (1911) M.W.N. 35, R.

(7-a) Kinds of suretyship—Darsana—Pratyaya dana—Distinction between—Father's surety debt—Son's liability—Texts discussed.

According to Hindu Law suretyship is one of three kinds: *darsana*, i.e., appearance, *pratyaya*, i.e., by assurance, *dana*, i.e., for payment; in the first two cases, the surety alone is liable in case of default, while in the third case, even the sons are liable.

Where a surety bond stated "I shall make the said V pay the amount due; in default of payment as aforesaid I shall pay the amount"; it is a definite promise to pay on the debtor's default and falls under the 3rd class of suretyship, that for payment and the sons are liable to pay out of the family assets in their hands.

It makes no difference that the money had already been lent to the debtor when the

Hindu Law—(Continued).**—1.—Debts—(Continued).**

surety executed the bond. *Thangathammal v. Arunachalam Chettiar*, (1918) M.W.N. 673=35 M.L.J. 229=41 M. 1011.

WALLIS, C. J. and SPENCER, J.

References:—Yagnavalkya placita, 53 and 54 quoted; 23 B. 454; 39 O. 843, *Rel. on.*

(8) *Mortgage of joint family property by father to secure advance then made to him and other old bond debts—No legal necessity for cash advance—Such advance if antecedent debt—Liability of son's share in suit to enforce mortgage—Defences open to son—Burden of proof—Plea of stipulation being penalty if may be taken in appeal for first time.*

A Hindu father, subject to the Mitakshara Law, mortgaged joint family property of himself and his son for a consideration consisting partly of an advance of cash then made to him for no proved legal necessity and partly of some old bond debts due to the mortgagee. In a suit by the mortgagee to enforce the mortgage making the son also a party thereto, held that, during the lifetime of the father, the mere circumstance of a pious obligation would not validate the mortgage against the son's share in respect of the cash advance, which, having been made to the father at the time of the mortgage transaction, was not an antecedent debt and was not also justified by any legal necessity (a); held, also, that it was open to the son to prove that the old bond debts were incurred for immoral purposes, but that he was not bound to prove the mortgagee's knowledge of the immoral purpose on the part of his father (b); though the son must prove more than that his father had long been addicted to immoral habits and must connect the debts with the immorality or illegality (c). A plea that a part of the stipulation for interest in a mortgage bond amounts to a penalty, being one of fact rather than of law, is not one which can ordinarily be raised for the first time in appeal (d). *Dhill Singh v. Bina*, 14 N.L.R. 41=44 Ind. Cas. 506.

DRAKE-BROCKMAN, J.C.

References:—(a) 39 A. 437 (P.C.); 9 N.L.R. 74. *Id.* 14 B.L.R. 187 (P.C.); 5 C. 148 (P.C.); 31 A. 176 (190). *R.*; 28 A. 503, *P.* (c) 6 C.P.L.R. 140; 14 B. 330; 20 B. 534; 36 B. 68, *J.* (d) 1 N.L.R. 9 (14), *P.*

(9) *Debt incurred by father personally—Execution of personal decree against father—Son's share, liability of, for sale.* *Bharath Singh v. Prag Singh*, 20 G.C. 311=5 O.L.J. 9=43 Ind. Cas. 251. See Final Part, 1917, Col. 465.

(10) *Antecedent debt—Personal covenant in simple mortgage, if can amount to antecedent debt—Joint family property—Sons' liability to pay father's debts.*

Held that, consistently with the dicta of their Lordships of the Privy Council in the case of 39 A. 437, the personal obligations to repay,

Hindu Law—(Continued).**—1.—Debts—(Continued).**

comprised in a simple mortgage, may amount to an antecedent debt, which the sons may be bound to discharge, if the debt was not incurred for an illegal or immoral purpose. *Ramman Lal v. Ram Gopal*, 21 O.O. 200=47 Ind. Cas. 987.

KANHAIYA LAL and DANIELS, J.Cs.

References:—20 O.O. 211 (P.C.); 2 O.C. 145; 18 O.C. 105, *P.*; 39 A. 437 (P.C.), *Expl.*

(11) *Interest, excessive or exorbitant—Debt contracted by Hindu father on the credit of family property—Discretion of Court, Reasonable exercise of—Appellate Court, interference by.*

In cases of debts contracted by Hindu fathers on the credit of the family property, Courts have a discretion to interfere, if the interest charged is excessive or exorbitant.

Held, further, that the appellate Court will be slow to interfere where it can be shown that such discretion has been exercised in a reasonable manner. *Dargahl v. Chaudhri Rajeshwar Pershad*, 21 O.C. 265.

LINDSAY, J.C.

References:—14 A.L.J. 772; 19 O.C. 159; 4 O.L.J. 337, *R.*

(12) *Debts contracted by Mitakshara Hindu under contracts of suretyship and indemnity—Liability of his sons and grandsons to pay same under rule of pious obligation—Test to find out their liability—Vyavaharika debts, meaning of—Civ. Pro. Code, 1908, s. 53—Contract Act, ss. 124, 126, 131—Contracts of indemnity and surety, difference between—Suretyship contracts now dealt with in Hindu Law and Indian Law of Contract.*

A landlord gave a mukurari patta of his lands at an annual rent of Rs. 303 to a person to whom he subsequently gave them also on *zurpeshq* mortgage for Rs. 5,050 stipulating that the mortgagee was to retain the whole of the mukurari rent as interest. This mukurari interest eventually went into the hands of one B. The *zurpeshq*dar's interest also went through many hands, the last of whom sold it for Rs. 5,000 to the father of the plaintiffs representing at that time that the vendor had been collecting rent at the rate of Rs. 335 per annum as recorded in the interim by the Survey and Settlement Authorities and executed an *ekranama* in which he agreed to indemnify the purchaser for the difference between Rs. 335 and Rs. 303 in the event of his failing to realise it from the mukurari lessee. On the failure of a suit to recover the enhancement from the lessee, the plaintiffs, the sons of the vendee, brought this suit against the defendants, the vendor's sons, as the legal representatives of their father, to recover a sum of money at the rate of Rs. 32 per annum for the period within limitation. Both parties seemed to have known that the true rent was Rs. 303 the purchaser's intention apparently being to

Hindu Law—(Continued).**—5.—Debts—(Continued).**

gamble on the chance of realising the enhancement recorded by the Revenue authorities. *Held*, that the contract in this case was not a contract of surety at all but a contract of indemnity, that the indemnity was no part of the consideration for the sale; that the indemnity in this case created a contractual liability to pay money on a certain contingency, it being immaterial that the sum to be paid was not an ascertained sum but depended upon the extent of mokurraridars failure, that the contract made by the defendants' father was enforceable against the defendants, his legal representatives; that if the vendor's representation about the rate of rent was intentionally false the liability created by the indemnity was immoral; that if it was not intentionally false, the liable was not usual or customary and therefore not enforceable against the sons as a pious obligation, to be discharged by them out of the ancestral property to which they had succeeded by survivorship; and that as there was a finding by the lower Court that there was no other property belonging to the vendor in the hands of the defendants, it was useless to give the plaintiffs a decree for execution against any other property (a).

A Hindu son or grandson governed by the Mitakshara Law is liable for the debt of his father or grandfather due on account of a suretyship for the payment of money. When the Hindu Law enforces liability for the suretyship debts of the father, it contemplates suretyship of the same kind as the Indian Contract Act. A contractual liability to pay money will constitute a debt which is enforceable against the son, provided the transaction is neither illegal nor immoral and comes within the meaning of the term *Vyavaharika*, which has been translated as lawful, customary or usual, that is to say, in a case of sale as here, one which an ordinary vendor might be expected to give (b).

Contracts of suretyship and indemnity distinguished. *Mahabir Prasad v. Sri Narayan*, 3 Pat. L.J. 396=4 Pat. L.W. 437=46 Ind. Cas. 27.

MULLICK and THORNHILL, JJ.

References:—(a) 32 B. 348; 30 C. 348; 24 C. 672 (b) 13 C.W.N. 9, *Not F.*; 26 A. 611; 39 C. 843, R; 39 C. 862, F. (c) *Harburg India Rubber Co. v. Martin*, (1902) L.R. 1 K.B. 778; *Guild Co. v. Conrad*, (1894) L.R. 2 Q.B. 585, R.

(12-a) *Decree against mitakshara father in suit for accounts against such father as agent of plaintiff for failure of father to appear and deliver accounts—Sale of family property in execution of such decree—Neither misappropriation nor dishonesty alleged against father—Debt if one for which sons are liable—Right of sons to sue for their share of ancestral property so sold.*

In a suit for accounts under the Orissa Tenancy Act against the plaintiff's agent, a mitakshara father, the decree-holder purchased

Hindu Law—(Continued).**—5.—Debts—(Continued).**

the family property in execution of the decree passed therein by reason of the father's failure to appear and deliver accounts. The sons then claimed that their share in the ancestral property, which was governed by the Mitakshara Law, was not affected by the sale. The facts did not disclose any criminal misappropriation on the part of the father or any dishonesty which could constitute an immoral act within the meaning of the Hindu Law. *Held* that the sons were bound by the sale of their property held in execution of the decree against their father, even if there was no legal necessity, as every civil debt did not necessarily involve a moral stigma. *Mohanta Gadadhar Ramanoj Das v. Ghana Shyam Das*, 3 Pat. L.J. 533=47 Ind. Cas. 212.

MULLICK and ATKINSON, JJ.

References:—6 I.A. 88; 31 A. 176; 26 C.L.J. 1; 25 C.L.J. 220, F.; 39 C. 862, R.

(13) *Money decree against father—Debt not tainted—Enforcement of decree in his lifetime against whole joint estate.*

A money decree against the father when the debt was neither illegal nor immoral, and whether he incurred expenses for family purposes or not, may be enforced in his lifetime by an execution sale of the entire coparcenary estate and his binding on the sons (a). *Amar Nath v. Rustanji*, 15 P.R. 1918=112 P.L.R. 1918=24 P.W.R. 1918=43 Ind. Cas. 678.

SHADI LAL and LE-ROSSIGNOL, JJ.

Reference:—(a) 39 A. 437 (P.C.), *Dist.*

(13-a) *Hindu joint family—Bond in favour of one member—Debt due to family—Competency of suit by the sole obligee without making other member party to the suit.*

Held, that where a loan is given out of the joint Hindu family funds and the bond for the amount is given only in the name of one of the members, that member being the sole obligee can sue alone and other members of the family are not necessary parties. *Sher Muhammad v. Ram Chand*, 8 P.L.R. 1918=87 P.R. 1917.

SCOTT SMITH and BROADWAY, JJ.

References:—127 P.R. 1906=10 P.W.R. 1907; 58 P.L.R. 1907; 22 M. 326; 20 B. 435; 32 A. 183, F.; 18 M. 33; 33 A. 272 (P.C.); 69 P.R. 1906=106 P.W.R. 1906; 118 P.L.R. 1906, *Dist.*; 43 M. 184, *Not Appr.*

(13-b) *Son's duty to pay just debts of his father but not incurred for immoral purposes—Burden of proof and how it is discharged.*

Held that a Hindu son is bound to discharge the debts contracted by his father, unless it is shown that they were contracted for illegal or immoral purposes; and where it is alleged by the son that a particular debt was contracted for such purpose, the burden lies on him to prove his allegation.

Although this burden is not generally discharged by showing that the father lived an extravagant or immoral life and without proof

Hindu Law—(Continued).**—4.—Debts—(Continued).**

of a direct connection between the debt and the father's alleged immorality; but if it is proved that the borrower, at the time of raising the loan was living a licentious life beyond his means, indulging in drink, riot, prostitution and debauchery and that at the same time he was without any business or occupation upon which the money might legitimately have been spent, the *onus* is shifted to the other side, the strong presumption arises that the debt is tainted with immorality and it becomes unnecessary to show for what particular act of immorality the money borrowed was used.

So where in a suit for possession by a mortgagee it appeared that the deceased mortgagor lived a licentious life far beyond his means, indulging in drink, rioting and prostitution, and the plaintiff-mortgagee lived in a portion of the same house which was occupied by the mortgagor and had full knowledge of the latter's modes of life and of the manner in which the was wasting his substance.

It was held that the mortgagor's son had sufficiently discharged the said burden and he was under no obligation to discharge the debts incurred by his father. **Musht. Jaswanti v. Tej Narain**, 120 P.W.R. 1917=10 P.R. 1918.

SHAH DIN, C.J. and LE-ROSSIGNOL, J.

(14) Joint family—Alienation by father—Suit by son for cancellation of mortgage-deed—Antecedent debt defined—Family necessity—Creditor bound to prove it.

Plaintiff sued for cancellation of two mortgage-deeds and a lease alleged to have been illegally executed by his father in favour of the defendants. The first Court holding that the alienations were tainted with immorality and were not for any family necessity, cancelled the alienations. On appeal the District Judge, holding that it was not proved that the executant was leading an immoral life and that the debts were tainted with immorality, dismissed the suit. On second appeal to the Chief Court: **Held**, that it was not necessary for the lower appellate Court to decide, whether the debts in question were raised by the executant for some family necessity or to meet antecedent debts and to see whether the antecedency of the debts was real or merely a cover for what was essentially a breach of trust. **Lajji Ram v. Narangan Lal**, 101 P.W.R. 1918=45 Ind. Cas. 989.

SCOTT SMITH, J.

References:—31 A. 176=6 A.L.J. 763=1 Ind. Cas. 479; 39 A. 437=21 C.W.N. 698=1 Pat. L. W. 557=5 A.L.J. 437=19 Bom. L.R. 498=26 C.L.J. 1=33 M.L.J. 14=(1917) M.W.N. 439=22 M.L.T. 22=6 L.W. 213=44 I.A. 126=39 Ind. Cas. 280 (P.C.), F.

(15) Joint Hindu family—Liability of minor member assisting in trade to be declared insolvent for debt contracted during minority—Personal liability. See **INSOLVENCY**, No. 4, 24 M.L.T. 216.

Hindu Law—(Continued).**—4.—Debts—(Concluded).**

(16) Ancestral, continued on behalf of minor—No personal liability—Interest though not stipulated for is recoverable as damages. See **MINOR**, No. 2, 22 C.W.N. 488.

(17) Antecedent debt incurred by managing brother—Whether and when binding on coparceners. See **OCCUPANCY HOLDING**, No. 2, 45 Ind. Cas. 546.

(18) *Avyavaharika* debts, meaning of, in Hindu Law. See **PUBLIC CHARITIES**, No. 1, 35 M.L.J. 661.

—5.—Gift.

(1) Mitakshara Law—Issue as to joint or separate estate—Blending of self-acquired and joint funds—Gift by managing member of joint family property.

A member of a Hindu joint family may convert his self-acquired property into ancestral family estate by throwing it into the common stock.

A Mitakshara family of five brothers separated in estate. D and K, two of the brothers, continued to live together, D acting as guardian of K, who was a minor. Later on a son R was born to D. Later still D and a third brother died, and property came to D and K from his estate. D kept only one account of the profits of this property, even after K came of age; and he kept only one account for all his receipts from this and other property and of all his expenditures. A *deork* partition (i.e., partition by metes and bounds) was later made between D and K and mutual exchanges made whereby D gave up his share in certain ancestral property for K's share in property acquired from DD's estate, and *vice versa*.

In a suit by D's son, R and grandsons (the appellants) after D's death to set aside deeds of gift made by D in favour of the respondents on the ground that the property given was ancestral property and the gifts in consequence invalid:

Held that, even assuming that the property coming from DD's estate was D's self-acquired property, yet, by blending the income of that property in the accounts with the income of the new joint family constituted on R's birth by D and R and by the mutual exchanges with K, D had shown his intention to treat what came to him from DD as joint property and had converted it into ancestral estate: that the properties included in the deeds of gift were therefore joint family properties of which D had not the right to dispose, and that the appellants were entitled to recover them. **Radha Kant Lal v. Musammat Nazma Begam**, 16 A.L.J. 537=20 Bom. L.R. 724=22 C.W.N. 649=33 M.L.T. 392=(1918) M.W.N. 386=35 M.L.J. 99=45 C. 733=27 C.L.J. 632=6 Pat. L.W. 72=45 Ind. Cas. 206 (P.C.).

LORD RUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI and SIR WALTER PHILLIMORE.

References:—34 I.A. 65=29 A. 244; 44 I.A. 201; 15 A.L.J. 684, F.

Hindu Law—(Continued).**—5.—Gift—(Concluded).**

- (2) *Gift to a Hindu female*—Malik mustaqil, meaning of—*Absolute-estate*.

The word *malik* alone used in a deed of gift executed by a Hindu in favour of a female unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression indicates an absolute estate.

Where D, a Hindu, executed a deed of gift in favour of his daughter-in-law and constituted her thereunder *malik mustaqil* in respect of the property gifted to her, held that in the absence of any surrounding circumstances to indicate that the donor intended the lady to take a mere life-estate, the lady must be deemed to have taken an absolute estate.

A grant should be construed in favour of the grantee rather than in favour of the grantor. *Naulkhi Kuar v. Jai Kishan Singh*, 16 A.L.J. 564=40 A. 575=46 Ind. Cas. 905.

RICHARDS, C.J. and BANERJI, J.

Reference:—30 A. 84 (P.C.), R.

- (3) *Religious purposes*—Widow can make a gift of only a reasonable portion—Commission to examine witnesses—Civ. Pro. Code (Act V of 1908), O. XXVI, r. 1.

Under Hindu Law, a religious gift by a widow for the religious benefit of her husband is invalid, if it be a gift of the whole or of practically the whole of the husband's property (a).

The Courts should not allow witnesses to be examined on commission without adequate reason. The grounds upon which Courts can issue commission to examine witnesses are ordinarily those specified in O. XXVI, r. 1 of the Civ. Pro. Code (b). *Panachand Chhotalal v. Manoharlal Nandlal*, 20 Bom. L.R. 1=42 B. 136=43 Ind. Cas. 729.

BACHELOR, O.C.J. and SHAH, J.

References:—(a) 6 B.H.C. (O.C.J.) 1; 22 C. 506; 43 C. 574; A.W.N. (1908) 209; 34 M. 298, F. (b) *Berdan v. Greenwood*, 20 Ch. D. 764 (766), R.

- (4) *Deed of gift—Construction*—Gift by a Hindu father to his daughter—Condition against alienation—If void. *Kanthammal v. Meenakshisundaram Iyer*, (1917) M.W.N. 867=7 L.W. 32=43 Ind. Cas. 15. See *Final Part*, 1917, Col. 466.

- (5) Suit challenging a, by Reversioners—Delay in filing, if amounts to acquiescence. See HINDU LAW (SUCCESSION), No. 2, 125 P.W.R. 1917.

—6.—Guardian.

Mother natural guardian of infant—Whether family joint or separate. See CIV. PRO. CODE (1908), No. 418, 46 Ind. Cas. 253.

Hindu Law—(Continued).**—7.—Guardianship.**

- (1) Mother entitled to be guardian of infant sons in preference to brother—Payment by brother of infant when mother alive if keeps decree alive as payment by lawful guardian. See EXECUTION OF DECREE, No. 2, 45 O. 630.

- (2) *Mitakshara joint family*, Minor a member of—Property of such minor, Guardian if can be appointed in respect of. See HINDU LAW (JOINT FAMILY), No. 5, 46 Ind. Cas. 815.

—8.—Impartible Estates.

- (1) *Alienability of—Police on military tenure*—Permanent settlement—Effect of, on succession and alienability—Inalienability based on tenure—Whether enures after its abolition—Custom of impartibility—Basis of—Custom merely following but not modifying the law—Whether can acquire the force of law—Custom of inalienability of a Zamindari—If and how far provable—Mere protests against alienation by son or brother—Protest not heeded by the holder and not respected by protestors themselves on their accession—Whether sufficient evidence of a custom of inalienability—Civ. Pro. Code (Act XIV of 1882), S. 257-A—Payment made to decree-holder for forbearance shown in execution—If valid—Interest—Penalty—Compound interest at an enhanced rate—How to be relieved against—Simple interest at the enhanced rate—If reasonable compensation—Usufructuary mortgage—Forest produce—Omission to make—Specific mention of—Whether included in the general word "income"—Mortgagee standing in a fiduciary position towards the mortgagor—Mortgage for sum due on accounts alleged to be settled—Plea in defence to reopen the accounts—If available—"Tanaka," meaning of—Whether denotes a mortgage or an assignment of land revenue.

The Zamindar of Karvetinagar was originally a semi-independent poligar holding an impartible Raj on the terms of paying an annual tribute to the Nawab of Arcot and supplying a military force. In 1792, the East India Company took over the control of Karvetinagar from the Nawab under a treaty and by a later treaty of 1801, the semi-independent kingdom became merged in British Territory. The peltier was settled in 1802 as a Zamindari and a Sanad was granted to the Zamindar which contained *inter alia* the following terms: "You shall be at full liberty to transfer without the previous consent of Government.....by sale, gift or otherwise, your proprietary right in the whole or any part of your Zamindari.....and such transfers shall be valid provided they be not repugnant to.....Hindu Law or to the Regulations of the British Government." Art. 8, "Your Zamindari shall be liable to be sold either wholly or in part in satisfaction of a decree of Court." Art. 10, "Although you

Hindu Law—(Continued).**—8.—Impartible Estates—(Continued).**

will have free right and liberty to transfer by sale, gift or otherwise, any part of your Zamindari it shall not be competent....." By the settlement the poligar was disarmed, the military services were dispensed with and a fixed money tribute was substituted in lieu thereof. In a suit for sale of the various portions of the Zamindari mortgaged to creditors by the holder thereof prior to the Madras Impartible Estates Act (1904), it was contended by the defendant, a succeeding Zamindar that the Karvettingar Zamindari was inalienable (1) because of its original military tenure and (2) because of the existence of a custom in the Zamindari by force whereof any holder for the time being was not entitled to alienate the same except for purposes for which the manager of a joint Hindu family, could as such manager alienate the joint family property. The Subordinate Judge of North Arcot held that the Zamindari was alienable. On appeal:

Held per curiam: (1) that during the period when the poligar was semi-independent under the Nawab, a restraint on alienation of the whole or a part of the Raj without the permission of the overlord was under the very circumstances of the tenure necessary. (2) that, however, as soon as the military tenure under which the properties were held, was put an end to and the British Government granted the lands to the Zamindar under a quite different tenure with express powers of alienation and after imposing a liability on the lands to be attached and sold in execution, the restraint on alienation came to an end.

Per Napier, J.—The language of Arts, 7, 8 and 10 of the settlement referred to above, was clear and it conclusively showed that the Government did by that Sanad create a new estate with the incident of alienability for the benefit of the Zamindar and the mere fact that similar language is also to be found in the Sanads of other Zamindaris on whose alienation, there was no such restraint under the prior Government, does not limit the effect of the words, when they do occur in Sanads of Zamindaris of the type in question.

Quere.—Whether after the decision of the Privy Council in *Secretary of State for India v. Bal Rajooi* (42 I.A. 229 = 2 L.W. 731), it would be correct to presume that the British Government did not by the permanent settlement intend to alter the tenure, unless the contrary is affirmatively shown.

Per Sudasana Aiyar, J.—The custom of impartibility, and of succession by a single owner or incidents attached not so much to the property held by a family as to the law governing that family.

Per curiam.—The evidence of custom is in its being some special usage modifying the law and a practice however longstanding which merely followed but did not modify the then existing law cannot be relied upon as a custom having the force of law (b).

Where the evidence disclosed that, from time to time, the son or brother of a Zamindar

Hindu Law—(Continued).**—8.—Impartible Estates—(Continued).**

protested against an alienation made by him not for necessity and set up a custom, but that each Zamindar on inheritance from his father continued his father's practices and never recognized any limit to his own powers of alienation.

Held that a family custom as to inalienability had not been made out.

Where a judgment-debtor paid a certain sum to the decree-holder for the forbearance shown by the latter in not proceeding with the execution of the decree on a former occasion and no sanction was obtained from the Court for any such payment.

Held that the sum paid was in contravention of the provisions of S. 257-A of the Code of 1882 and must therefore be applied to the satisfaction of the judgment-debt (c).

Where a mortgage provided for simple interest at 6 per cent. but on default the interest was to be at 12 per cent. compound from the date of default.

Held that the provisions as to compound interest at an enhanced rate was penal and that simple interest at the enhanced rate would be reasonable compensation.

Where a mortgage decree commenced by stating that the Court doth order and decree that the defendants do pay plaintiffs, etc.

Held that the decree was wrong in form as it might be construed as creating a personal obligation in the first instance and ought to have followed Form No. 4, Appendix D of the Civ. Pro. Code.

Where a deed of mortgage of 100 villages began by stating that one hundred villages with hamlets, tanks, kasams, channels, fruit trees, garden, forests, forest produce, etc., and then recited that 92 of the 100 villages were secured without possession and that the remaining eight were mortgaged usufructually but the addition of.....forest and forest produce "was not repeated though it was expressly stated that the mortgagee was to enjoy all the income realisable from the eight villages."

Held that the intention was clear to include forests and forest produce in respect of the eight villages also.

In a mortgage executed by the Zamindar to his Manager and Deputy Manager who were proved to have stood in fiduciary relations with him, one of the items of consideration was a sum of Rs. 16,000 due from the Zamindar on accounts in respect of a nominal lease of 106 villages which the Zamindar had executed to them, under which they had to make collections from the tenants, pay the peshkash and account to the Zamindar for the balance. In a suit on the mortgage, it was contended for the defendant, a succeeding Zamindar, that there was failure of consideration to the extent of that Rs. 16,000 as it would be found if accounts were taken, that instead of Rs. 16,000 being due from, there would be Rs. 38,000 due to the Zamindari. The Subordinate Judge held that it was not open to the defendant to raise it as a defence to the present suit but

Hindu Law—(Continued).**—8.—Impartible Estates—(Concluded).**

that he should bring a separate suit for accounts. On appeal:

Held that if the circumstances are proved which would entitle an obligor to go behind a settled account, he would be equally entitled to plead in defence to a suit based on an obligation alleged to flow from any such settled account, that the consideration based on that account has never been received; and

(2) that the mere fact that a mortgage has been taken by way of security for that obligation, does not in any way disentitle the defendant from raising the plea (d).

The word "Tanaka" occurring in a document evidencing a loan means a mortgage and not merely an assignment of land revenue (e). *Zamindar of Karvetinagar v. Subaraya Pillai*, 7 L.W. 36 = (1918) M.W.N. 146 = 43 Ind. Cas. 371.

SADASIVA AIYAR and PHILLIPS, JJ.

References:—(a) 12 M.I.A. 523; 2 M.I.A. 344; 23 M. 508 (P.C.), *F.*; 30 C. 843 (862); 36 C. 943; 11 B.H.C.R. 249 (272, 273), *R.* (b) 23 M. 383 (P.C.), *F.*; 18 M. 287, *doubled & D.* (c) 26 M. 19, *R.* (d) 2 M. 312; 35 M. 114 (117); 35 C. 1051, *R.* (e) 1 L.W. 96 (97); 39 M. 1010, *F.*

(2) Adoption by widow—Adoption to be to last male holder, Rule that, Applicability of, to Impartible Raj. See HINDU LAW (ADOPTION), No. 2, 16 A.L.J. 725.

—9.—Impartible Property.

Transfer of impartible property—Brother of transferor to recover share of transferred property for maintenance. See IMPARTIBLE PROPERTY, No. 1, 3 Pat. L.J. 648.

—10.—Inheritance.

(1) *Exclusion of unchaste female from inheritance.*

The rule as it obtains in the Bengal School of Hindu Law is that any female who was unchaste before the succession opened out is excluded from the inheritance. *Srimati Rajabala Das v. Shyama Charan Banerjee*, 22 C.W.N. 566 = 45 Ind. Cas. 714.

FLETCHER and SHAMSUL HUDA, JJ.

References:—4 C. 550; 22 C. 347, *R.*

(2) *Illegitimate son, right of father to inherit to.* *Subramania Iyer v. Rathnavelu Chetty*, 22 M.L.T. 94 = 6 L.W. 149 = 33 M.L.J. 224 = (1917) M.W.N. 688 = 41 M. 44. See Final Part, 1917, Col. 470.

(3) *Mitakshara—Permanent blindness after birth—Exclusion from a share of the family property.* *Musummat Gunjeelwar Kunwar v. Durga Prasad Singh*, 22 M.L.T. 403 = 22 C.W.N. 74 = 26 C.L.J. 557 = 7 L.W. 94 = 16 A.L.J. 1 = (1918) M.W.N. 16 = 20 Bom. L.R. 88 = 34 M.L.J. 1 = 4 Pat. L.W. 1 = 45 C. 17 (P.C.). See Final Part, 1917, Col. 470.

Hindu Law—(Continued);**—10.—Inheritance—(Continued).**

(4) *Gotraja sapindas, daughters of; if reversioners—Widows of gotraja sapindas—Male and female gotraja sapindas, Principles for deciding competition between.*

Under no school of Hindu Law can the daughters of *gotraja sapindas* of the *propositus* be included as his reversionary heirs (a).

As between a *gotraja sapinda* and the widow of his brother related in the same degree to the *propositus*, the widow ranks as inferior in the order of reversioners (b).

It is well established, under the Bombay School of Hindu Law which is the *lex loci* in Barar that the widow of the *gotraja sapinda* is herself a *gotraja sapinda* and therefore entitled to inherit; and where the contest lies between the female *gotraja sapinda* representing a nearer line, and a male *gotraja sapinda* representing a remoter line of *sapindas* the former inherits in preference over the latter (c).

Each line of the *sapindas* (leaving aside lineal descendants and ascendants of the *propositus*) includes all males within the limits of *gotraja* relationships lineally descended from the same ancestor common to them and the *propositus*. Hence, where the competition is between the widow of a *gotraja sapinda* and a male *gotraja sapinda* of the same *propositus* who is however more remote in degree than the husband of such widow, it has to be decided according as the two *sapindas* are or are not, in the same line, and, the male is a preferential heir to the widow. *Sadadheo v. Jalkrishna*, 14 N.L.R. 6 = 43 Ind. Cas. 475.

STANTON, A.J.C.

References:—(a) 7 N.L.R. 116, *R.* (b) 6 N.L.R. 39, *F.* (c) 5 B. 110 (P.C.); 9 B. 31; 16 B. 716; 24 A. 128; 35 B. 389; 13 M.I.A. 373, *Appr.*; 6 B.H.C. (A.O.J.) 152, *Disappr.*; 5 M. 291; 36 M. 152, *R.*

(5) *Bandhus, Principle of succession among—Religious efficacy—Sister's son and father's sister's son, Claims of—Step-sister's son—Females, Succession of, in Bombay—Step mother—Adverse possession, Transfer of title by—Limitation Act, 1908, Arts. 142, 144, Distinction between.*

The special rule of Hindu Law, under which females succeed in Bombay, has no application to a case governed by the Mitakshara as interpreted by the Benares School, which is the *lex loci* of the Central Provinces (a). Under the Benares School, the principle is that a female does not inherit unless her claim is supported by a special text or she is expressly placed in the order of succession. Under the Mitakshara as interpreted by the Benares School, neither the sister, nor the step-sister nor the step-mother is a heir (b). But the general principle of such law is that the nearer in consanguinity excludes the more remote, and that, under the Mitakshara at least, the order of succession does not follow religious efficacy. Therefore, the sister's son is superior to the father's sister's son, though both are *atma bandhus*, or cognates of the *propositus* and the position of the step-sister's son, as the

Hindu Law—(Continued).**—10.—Inheritance—(Continued).**

father's daughter's son, is the same as that of the sister's son, and is nearer than that of a grandfather's daughter's son (c).

Where the *propositus* dies in peaceful possession of his property and before his heirs have entered upon possession, it gets into the hands of a trespasser, a suit by his heirs to recover it is governed by Art. 144, not Art. 142, Limitation Act. Though a title by adverse possession, in course of acquisition, is heritable, transferable and devisable, a trespasser cannot add to his own adverse possession the adverse possession of another independent trespasser, who was not his predecessor-in-title and whom he does not represent by birth, transfer or devise (d).

In a suit governed by Art. 142 the question to be decided is whether the plaintiff, directly or constructively, has been in possession within twelve years of the suit, and it does not matter if within the period of his continuous exclusive possession adverse to him has been with one or a hundred successive trespassers. But in a case governed by Art. 144 the question is whether the defendant against whom the suit is brought has held adversely personally or by persons who represented him, or whom he represents, for more than twelve years continuously. Under the former article the plaintiff has to prove that his title has not been destroyed by lapse of time. Under the latter the defendant must prove that the plaintiff's title has been so extinguished. *Ganoo v. Beni*, 14 N.L.R. 82 = 43 Ind. Cas. 943.

STANYON, A.J.C.

References:—(a) 6 B.H.C. (A.C.) 152; 2 B. 388; 7 I.A. 212, R. (b) 5 N.L.R. 161, F; D.C.R., Part VIII, No. 102; 16 A. 221; W.R. Sp. No. 173; 5 M. 29 (33); 8 M. 107; 14 M.L. T. 596, R.; D.C.R., Part VIII, No. 30, Diss.; 8 M.H.C. 88. *doubted.* (c) 1 B.H.C. 118; 9 M. I.A. 520; 3 B. 363 (369); 36 B. 120; 15 M. 300, *Rel. on.* (d) 19 B. 620; 3 C. 224; 2 C.W. N. 315; 17 C.W.N. 748, R.; *Wallis v. Howe*, (1893) 2 C. 545, *Dist.*

(6) Re-marriage of Hindu widow—Death of son of first marriage after re-marriage—Re-married widow's right to succeed to son's property.

A re-married Hindu widow is entitled to succeed to the property left by her son by her first husband the son having died after the re-marriage. *Apa v. Damda*, 14 N.L.R. 149 = 47 Ind. Cas. 617.

DRAKE-BROCKMAN, J.O.

References:—5 C.P.J.R. 85; 16 C.P.L.R. 99; 6 N.L.R. 103, F; 6 N.L.R. 171, *Not Appr.*; 11 N.L.R. 116; 32 B. 26; 29 B. 91; 26 B. 388; 15 C.W.N. 579; 11 W.R. 82, R.

(7) Hindu Law—Immorality of Hindu woman, effect of—The of blood relationship. Severance of—Succession to property of unchaste Hindu woman.

Immorality on the part of a Hindu woman does not sever the tie of blood relationship and there appears to be no rule of Hindu Law which

Hindu Law—(Continued).**—10.—Inheritance—(Continued).**

would prevent the blood relations succeeding to the property on her death.

Held, further, that this mode of succession was also consonant with justice, equity and good conscience. *Satish Chandra Mukerji v. Pandit Mahaball Prasad*, 21 O.C. 272.

LINDSAY, J.O.

References:—40 C. 650; 14 O.C. 234, R.

(8) Mitakshara family—Sister's daughter's son and maternal uncle of last male holder. Rival claims of—Maternal uncle entitled to preference—Mitakshara and Viramitrodaya, respective authority of.

Held, by the majority of the Full Bench *Mullick, Jwala Prasad and Thornhill, JJ.* (*Dawson Miller, C.J. and Imam, J., dissenting*) that in a family governed by the Mitakshara School of Law, the maternal uncle of the *propositus* should be preferred to the sister's daughter's son.

Per Mullick, J.—So far as concerns the province to which the parties before us belong and the territories now subject to the authority of the Patna High Court, I am quite satisfied that the test of religious and spiritual benefit and should be applied to determine the preferential right, that is to say where the principle of affinity by blood relationship does not clearly indicate with which claimant the preference lies.

Per Jwala Prasad, J.—The reasons for preferring the maternal uncle to the sister's daughter's son are that (1) he is nearer in degree than the latter, (2) he confers spiritual benefit to the *propositus* whereas the latter confers none, (3) he is mentioned in certain texts of the Mitakshara as occupying a high position among heirs whereas the latter is not mentioned anywhere and (4) he is connected with the deceased through one female, whereas the latter is connected with the deceased through two females and is thus much more remote. The fact that the sister's daughter's son is related to the *propositus* through his father or that he is descended from a nearer ancestor does not give him any preferential right for the simple reason that these are not the tests mentioned in the *Smritis*, the Mitakshara or any authoritative commentary.

Per Thornhill, J.—On the ground of propinquity, the maternal uncle has preference over the sister's daughter's son.

Per Dawson Miller, C.J.—Clear evidence is to be found in the text of the Mitakshara itself that consanguinity and not funeral oblations is the guiding principle governing the Order of Succession and Colebrook's translation of the word *Sapinda* in the Mitakshara (by the phrase connected by funeral oblations) is a mistake.

Per Imam, J.—The capacity to offer oblations cannot be permitted in the present instance to influence the decision. On any point on which the principles of the Mitakshara are clear, the authority of the Viramitrodaya can have no place.

Hindu Law—(Continued).**—10.—Inheritance—(Continued).**

*Per Dawson Miller, C.J. and Imam, J. (dissentients).—*The sister's daughter's son has preference over the maternal uncles under the law of inheritance as laid down in the Mitakshara. **Umashankar Prasad Parasari v. Mussammat Nageswari Koer**, 3 Pat. L.J. 663 (F.B.).

DAWSON MILLER, C.J., MULLICK, JWAJA PRASAD, IMAM and THORNHILL, JJ.

*References:—*12 M.I.A. 81 (96); 397 (435—438) 448; 13 M.I.A. 373; 10 W.R. 76 (F.B.); 22 W.R. 264; 3 A. 45; 11 A. 194; 19 A. 215; 24 A. 128; 37 A. 601; 38 A. 416; 3 A.L.J. 461; 2 B. 318; 5 B. 110; 597; 17 B. 114; 19 B. 639; 26 B. 710; 30 B. 431; 9 Bom. L.R. 1129; 6 C. 119; 22 C. 339; 42 C. 394; 6 C.L.J. 190; 6 M. H.C. 279; 5 M. 243 (250); 5 M. 291; 13 M. 10; 14 M. 149; 16 M. 23; 17 M. 182; 18 M. 193; 19 M. 405; 20 M. 342; 29 M. 115; 30 M. 406; 33 M. 439; 35 M. 152; 36 Ind. Cas. 514 Nagpur; 34 Ind. Cas. 189; 1 Pat. L.J. 324, Disc.

(9) *Collaterals beyond fourteenth degree of deceased—Agnatic relationship to deceased not clearly established—Samanodakas—Collaterals if exclude sister's son.*

The collaterals of a deceased Hindu related to him beyond the fourteenth degree, whose agnatic relationship to the deceased is not clearly established and who cannot even be regarded as his *samanodakas*, have no right to exclude his sister's sons from succession to his estate. **Hira Singh v. Yis Singh**, 47 P.R. 1918=111 P.L.R. 1918=20 P.W.R. 1918=43 Ind. Cas. 460.

RATTIGAN, C.J. and SHAH DIN, J.

*Reference:—*32 A. 594, Dist.

(10) *Sadh Sanyasi—Hindu Law—Succession—Loss of right by renunciation of world and abandonment of property—Burden of proof.*

In a suit for possession of the plaintiff's half share in the family house, it appeared that, in 1883, the plaintiff mortgaged his share in the house and left the village, that he then adopted the life of an itinerant mendicant and attached himself *a chela to a guru*, that he never re-visited his village and that he had not married:

Held, (1) that, under the circumstances the inference was not unwarranted that the plaintiff had renounced the world and abandoned his property;

(2) that the burden of proving the contrary was on the plaintiff and he had failed to discharge it (*ant*). **Lachhman Gid v. Gopi**, 16 P. W.R. 1918=41 Ind. Cas. 167.

RATTIGAN C.J. and SHAH DIN, J.

Reference:—(a) 7 P.R. 1892, F.

(11) *Property purchased or inherited by Oudh talukdar—Accretion—Village transferred in exchange—Right of succession to estate—Primogeniture. See CROWN GRANT, No. 1, 22 M.L.T. 282 (P.C.).*

Hindu Law—(Continued).**—10.—Inheritance—(Concluded).**

(12) *Widow—Unchastity in husband's lifetime—Condonation by husband—Effect. See HINDU LAW (WIDOW), No. 1, 16 A.L.J. 91.*

—11.—Joint Family.

(1) *Mortgage—Money advanced by one member—Presumption—Onus of proof.*

If one member of a family advances money upon a mortgage, the presumption is that the amount came from the joint funds and the onus of showing the contrary lies on those who set up that the money advanced in the mortgage was his self-acquired property. **Panna v. Kousa**, 40 Ind. Cas. 463.

RICHARDS, C.J. and BANERJI, J.

(2) *Joint family property used for joint purposes—One member building on the joint land—Right of other members.*

Plaintiff and defendant's were members of a joint family and jointly owned a piece of land which had been used for certain specific purposes. During the absence of the plaintiff, defendant put a building on the joint land. *Held* that, as the portion of the land on which the building was put up was such that neither could have exclusive use without doing substantial injury to the other, the strict right of the plaintiff would be to have the building demolished and to have the places restored to its original position as it was before the defendant put up the building. **Jatindra Mohan Ray v. Ramesh Chandra Ray**, 40 Ind. Cas. 504.

FLETCHER and NEWBOULD, JJ.

(3) *Hindu Law—Mitakshara—Joint family—Self-acquired property—Gains obtained from science or learning.*

Although the Mitakshara lays down that "what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brethren and with the father" this does not apply to gains which are the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the contention that gains made personally and without the aid of the joint funds, by a member of a joint family who received an ordinary education suitable to his position as a member of a family to which he belonged should in law be regarded as partitionable and not as his self-acquired property. **Metharam v. Rewachand**, 20 Bom. L.R. 556=4 Pat. L.J. 197=34 M.L.J. 327=7 L.W. 361=28 M. L.T. 218=16 A.L.J. 281; 22 O.W.N. 377= (1918) M.W.N. 537=45 O. 666=44 Ind. Cas. 259 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE and SIR LAWRENCE JENKINS.

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

- (4) *Joint family, Re-union of, after partition, Essentials to establish—Burden of proof in case of, after separation.*

Once the members of a joint family have separated, the onus is heavy on any member who pleads re-union.

In order to establish a case of re-union, it is necessary to show not only that parties already divided, lived or traded together but that they did so with the intention of thereby altering their status and of forming a joint estate with its usual incidents. There must be a complete conjunction of estate with an intention to reunite and not a mere living together or joint enjoyment of the property. *Nand Lal Singh v. Bhagwati Koer*, 46 Ind. Cas. 529.

ROE and COUTTS, JJ.

- (5) *Minor, a member of—Property of minor, Guardian if can be appointed in respect of.*

An order appointing a guardian in respect of the property of a minor is illegal where the minor is a member of an undivided Mitakshara family and has no separate property of his own. *Mahanand Misal v. Dasrath Misal*, 46 Ind. Cas. 815.

MULLICK and THORNHILL, JJ.

Reference:—25 A. 407=30 I.A. 165=5 Bom. L.R. 478=7 C.W.N. 681=8 Sar. P.O.J. 483 (P.C.), F.

- (6) *Partition—Filing of plaint—Suit by one member—Determination of shares—Whether a general partition is effected—Decree, construction of—Arrangement for convenience of enjoyment—Provision in favour of stranger—Minor co-parcener not bound—Family settlement.*

Where in a suit for partition of a zemindari the parties agreed on a provision in favour of the plaintiff by way of allotment of lands to be enjoyed and a monthly allowance, no final partition is effected but the arrangement is only an arrangement for convenience of enjoyment keeping the property joint.

A suit by a junior member for partition making the manager alone party does not effect a severance among the other members.

Where in a suit by one co-parcener the Court goes into a consideration of the shares of the various members only as incidental to the determination of the property to be allotted to plaintiff and where there is nothing to show an intention to divide as among the others in the proceedings or the decree the other co-parceners continue united as before. But if the proceedings and the decree operate as a general division then unless there is anything to constitute a reunion the joint family is severed as regards all notwithstanding the further continuance of joint holding of the property.

The filing of a plaint does not necessarily operate to sever a co-parcenary, it is nevertheless open to the plaintiff to abandon the intention to divide before the suit proceeds to a

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

decree and to continue in a state of jointness (a). *Palaniammal v. Muthuvenkatachala Manlagarar*, 38 M.L.J. 759=43 Ind. Cas. 833.

WALLIS, C.J. and KUMARASWAMI SASTRI, J.

References:—(a) 20 M. 256 (P.C.), F.; 43 I.A. 151; 25 M. 149; 30 C. 725 (P.C.); 31 M. 482; 29 A. 93; 40 C. 906; 31 M.L.J. 472, R.

(7) *Mitakshara—Blending of self-acquired property with ancestral property—Effect of entries in account books as showing whether funds are joint or separate* *Suraj Narain v. Rattan Lal*, 22 M.L.T. 121=40 Ind. Cas. 968=33 M.L.J. 180=21 C.W.N. 1065=20 O.C. 211=15 A.L.J. 684=26 C.L.J. 267=19 Bom. L.R. 737=6 L.W. 509=40 A. 159 (P.C.). See Final Part, 1917, Col. 474.

(8) *Partnership with stranger by manager on behalf of family—Divided co-parcener, if can sue for dissolution of partnership.* *Grandhe Gangayya v. Grandhe Venkataramlah*, (1917) M.W.N. 805=6 L.W. 708=23 M.L.T. 527=34 M.L.J. 271=38 Ind. Cas. 111=41 M. 454=43 Ind. Cas. 9. See Final Part, 1917, Col. 476.

(9) *Joint Hindu family—Separation in mess and residence—Separate property—Burden of proof.* *Gobinday v. Ram Adhin*, 20 O.C. 398=44 Ind. Cas. 78. See Final Part, 1917, Col. 477.

(10) *Agra Tenancy Act how far modifies Hindu Law.* See U. P. ACT II OF 1901 (AGRA TENANCY), No. 3, 16 A.L.J. 225.

(11) *Money due on bond to Manager of joint Hindu family—Payment to junior member—Discharge if effected.* See CONTRACT ACT (IX OF 1872), No. 2, 7 L.W. 221.

(12) *Father, Debt incurred by—Son if bound to pay during father's lifetime—Separate debt by co-parcener, Decree for, Sale of co-parcenary interest during his lifetime, Validity of.* See HINDU LAW (DEBTS), No. 4-a, 47 Ind. Cas. 679.

(13) *Debt due to family—Bond in name of one member—Suit by that member, competency of—Other members of family if necessary parties to.* See HINDU LAW (DEBTS), No. 13-a, 8 P.L.R. 1918.

(14) *Partition, mere specification of shares if evidence of—Separation, Facts requisite to establish—Separation of one member if evidence of disruption of joint family.* See HINDU LAW (PARTITION), No. 5, 46 Ind. Cas. 252.

(15) *Joint family, Presumption as to—Partition suit, Burden of proof in, as to separation—Property, Acquisition of, in name of one member if his separate property.* See HINDU LAW (PARTITION), No. 6, 46 Ind. Cas. 255.

(16) *Partial partition—Effect of such partition on other co-parcenary property and on joint family status.* See HINDU LAW (PARTITION), No. 13, 121 P.R. 1918.

Hindu Law—(Continued).**—11.—Joint Family—(Concluded).**

(17) Release by co-parcener of his share of joint family property to two of his brothers—Effect. See **HINDU LAW (RELEASE)**, No. 1, 14 N.L.R. 56.

(18) Family living by cultivation—Father, Sub-lease by, Presumption arising from. See **LANDLORD AND TENANT**, No. 73-b, 3 Pat. L. J. 576.

(19) Father and son, Consisting of—Mortgage by father—Son, how far a debtor or agent of father, during the lifetime of his father. See **LIMITATION ACT (1908)**, No. 85-c, 47 Ind. Cas. 655.

(20) Manager of, Suit by, on mortgage without joining other members of the family—Manager head of the family and conducting family business—Maintainability of suit—Civ. Pro. Code (1908), O. XXXIV, r. 1. See **MORTGAGE SUIT**, No. 1, 46 Ind. Cas. 727.

(21) Father, sons and nephew comprising a—Mortgage in favour of father—Suit by sons after father's death—Statement by nephew of receipt of his share from sons—Deed of assignment, if necessary in case of, to give sons a right to sue—Succession certificate, Necessity of, to maintain suit. See **MORTGAGE SUIT**, No. 2, 47 Ind. Cas. 649.

(22) Demand by co-parcener for partition—No actual partition by metes and bounds—Severance of joint family status effected by demand—Sale by such co-parcener of his share—Right of purchaser to such share and profits from date of demand. See **VENDOR AND PURCHASER**, No. 6, 35 M.L.J. 609.

—12 & 13.—Maintenance.

(1) *Mitakshara—Joint Hindu family—Hypothecation of family property—Sale of family dwelling in execution of decree enforcing hypothecation—Widow's right of residence—Defence of invalidity of alienation.* **Ramzan v. Ram Dalva**, 15 A.L.J. 922=40 A. 96. See Final Part, 1917, Col. 481.

(2) *Hindu widow—Maintenance—Arrears—Discretion of Courts.*

The Courts, in dealing with claims for arrears of maintenance, possess a very large discretion to grant or withhold those arrears with special reference to the urgent need and necessities of the widow.

As soon as the widow satisfies the Court that she was in want at the time at which she was entitled to maintenance, provided that time is within the period of limitation, the Court might, in any given case, award her arrears to that extent, and that would be quite independent of any demand on her part. In other words, while a demand is allowed to be *prima facie* evidence of need on the widow's part, it is not in a demand that the right to obtain arrears of maintenance is rooted. Nor indeed is any demand necessary. **Karbasappa v. Kallava**, 30 Bom. L.R. 823=47 Ind. Cas. 623.

BRAMAN and HEATON, J.

Hindu Law—(Continued).**—12 & 13.—Maintenance—(Continued).**

(3) *Payment of maintenance for successive generations—Presumption—Determination of maintenance where grant is forthcoming—Rate of maintenance—How to determine.*

In cases where the grant was not forthcoming, the fact that payment of maintenance has been made for successive generations has been held to be evidence from which a permanent heritable grant might be presumed. But where a grant is forthcoming, the matter should be determined according to the provisions made in the grant.

So far as the rate of maintenance goes remote relations are entitled to smaller amounts of maintenance than their predecessors.

In fixing the amount of maintenance, what is to be regarded is the condition of the estate and the number of people who have claims upon it for maintenance. **Sugutur Immidy Pedda Chikka v. Sugutur Immidy Samba Sadasiva Chikka**, 43 Ind. Cas. 654.

WALLIS, C. J. and BESHAGIRI AIYAR, J.

*Reference:—*20 M.L.J. 394, R.

(4) *Impartible Zemindari—Right to maintenance of son of adopted son of late Zemindar claimed as against the sole devisees of Zemindar—Right to maintenance in impartible estate, if based on Hindu Law or custom—Co-parcenary.*

The right to maintenance of the junior member of a Mitakshara joint family, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases. Two other categories of persons have, however, by express texts a right to maintenance, viz.:—

1. Those who are debarred from inheriting by personal disqualifications, e.g., the idiot, the blind from birth, the madman, &c.

2. Certain near relations, viz., the widow, the parent and the infant child.

But these categories are exhaustive.

It is now definitely decided that in an impartible estate there is no co-parcenary; hence in such properties no one can claim maintenance on the ground that but for the custom of impartibility he could sue for partition.

Custom may and does affirm a right to maintenance out of an impartible raj in certain members of the family. In the case of sons this custom is so well recognised that proof of it in individual cases is unnecessary. But there is no invariable or certain custom that any one below the first generation from the late raja can claim maintenance as of right; any special custom to that effect must be pleaded and proved.

The grandson of the late Raja of Pittapur, an impartible raj, sued the devisees of the raj for maintenance on the ground that by birth he had a right to maintenance out of the property constituting the raj, which right followed the property into the hands of a third party:

Held, that there was no legal basis for any such claim. **Sri Rajah Rama Rao v. Rajah**

Hindu Law—(Continued).**—12 & 13.—Maintenance—(Concluded).**

of *Pittapur*, 35 M.L.J. 392=24 M.L.T. 276=28 C.L.J. 428=16 A.L.J. 893=(1918) M.W.N. 922=29 C.W.N. 179=20 Bom. L.R. 1056=16 A.L.J. 893=41 M. 778=47 Ind. Cas. 954 (P.C.).

VISCOUNT HALDANE, LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE, and MR. AMEER ALI.

References:—15 I.A. 51; 26 I.A. 83; 29 B. 58; 27 I.A. 157; 5 C. 259, R.

(5) Suit for maintenance—Custom alleged in defence—Fixing of maintenance and discretion of Court.

Where a family custom is set up in defence to a suit for maintenance, that unless the widow resides at the place appointed for her residence by the then Raja she forfeits her right to be maintained.

Held, that if even such a custom were established, it will not affect a case in which the absence from the appointed residence was due to just and reasonable causes.

It was pointed out that it be thought that residence away from the palace might throw an unfair burden upon the person upon whom the duty of maintenance was cast, the question of determining the amount of maintenance is always a question for the discretion of the Court and such discretion will be exercised, having regard to all the circumstances affecting the case. *Raja Braja Sundar Deb v. Srimati Swarna Manjeri Dei*, (1918) M.W.N. 313=47 Ind. Cas. 36=22 C.W.N. 443 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

(6) Alienation of portion of estate for purposes of—Widow, by—Validity of. See HINDU LAW (ALIENATION), No. 6, 46 Ind. Cas. 269.

(7) Transfer of impartible property—Brother of transferor to recover share of transferred property for maintenance. (See IMPARTIBLE PROPERTY, No. 1, 3 Pat. L.J. 648.

—14.—Marriage.**(1) Illegitimate issue, assimilation in the caste, Effect of—Mathur and Srivastava Kayasthas—Ishtkal—Teva—Evidence of birth—Horoscope.**

B, a son born of an illegitimate union between a Mathur and the widow of a Srivastava Kayasth, was treated and accepted by the Srivastava community as one of them. He married a Srivastava girl and had a son H.

Held that B having become assimilated in the caste there could be no objection to the marriage of H, with a girl of that caste.

Held that *Ishtkal* or *Teva* and a full horoscope prepared therefrom may be used as evidence of what had been said to the Pandit as to the age of the child, to whom the horoscope related. *Har Bahadur Lal v. Chand Raj Bahadur*, 21 O.C. 298.

STUART and KANHAIYA LAL, A.Js.

References:—18 O.C. 375; 18 O. 264, *Rel. on*

Hindu Law—(Continued).**—15.—Marriage—(Concluded).**

(2) Conversion of Hindu widow to Mahomedanism—Subsequent marriage with Mahomedan—Rights in first husband's estate. See HINDU LAW (WIDOW), No. 14, 35 M.L.J. 817.

—16.—Minority and Guardianship.**(1) Guardianship—Mitakshara family—Testamentary guardian for co-parcenary property, Appointment of.**

It is not competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary property of the minor co-parceners (a). *Chidambara Pillai v. Rangasamy Nalaker*, 28 M.L.T. 266=7 L.W. 454=(1918) M.W.N. 265=41 M. 561=34 M.L.J. 381=45 Ind. Cas. 905.

AYLING, COUTTS TROTTER and SESHAGIRI AIYAR, JJ.

References:—(a) 38 B. 94, *dissented from*; 7 W.R. 74; 13 M.I.A. 209, R.; 21 Ind. Cas. 848; 29 Ind. Cas. 475; 40 M. 672; 22 M.L.T. 980, F.

(2) Guardianship—Minor co-parcener, having no separate property. Whether a guardian can be appointed for his co-parcenary property. See HINDU LAW (ALIENATION), No. 4, 40 Ind. Cas. 418.

(3) Filing of plaint in suit for partition on behalf of minor—Minor's death—Mother's right to continue suit. See HINDU LAW (PARTITION), No. 8, 34 M.L.J. 213.

(4) Step-mother if can act as minor's guardian—Guardian's right to bind minor. See TRANSFER OF PROPERTY ACT, No. 56, 34 M.L.J. 177.

—16.—Partition.**(1) Division made by mutual mistake as to property subject thereof—Re-partition.**

Where, by mutual mistake, the parties to a partition included in the division certain property to which a third person was entitled and who got his share in the property by suit from the parties who had made the original division, *held* that the partition was liable to be reopened (a). *Ganeshi Lal v. Babu Lal*, 16 A.L.J. 339=40 A. 374=45 Ind. Cas. 4.

PIGGOTT and WALSH, JJ.

Reference:—21 B. 333, R.

(2) Mother's share on partition between her sons—Mother becomes entitled to share only on actual partition—Mother's death after preliminary decree for partition—Share lapses to her sons.

In a suit for partition, a preliminary decree was passed awarding one-third share each to the plaintiff, the defendant, and the widow of the *propositus* (as the mother's share). The widow having died before any final decree could be passed, the plaintiff applied to the Court, praying that owing to the widow's death,

Hindu Law—(Continued).

—16.—Partition—(Continued).

his share should be held to have increased to one moiety :

Held, that the plaintiff was entitled to succeed, for, under the preliminary decree, the widow took no share which she could transmit to her heirs, her right to a share accruing only when a partition has actually been made. **Raoji Bhikaji v. Anant Laxman**, 20 Bom. L.R. 671=42 B. 535=46 Ind. Cas. 750.

BATCHLOR, A.C.J. and SHAH, J.

References :—34 A. 234 (P.C.) ; 43 I.A. 151=18 Bom. L.R. 621, R.; 9 W.R. 61; 33 A. 118, F.

(3) *Mithila School—Partition between father and son—Grandmother entitled to share—Grandmother's share reverts to general property on her death and liable to partition among members—Birth of new member after filing partition suit—Plaintiff's share not diminished.*

In a suit of partition instituted by son against father governed by Mithila School, the mother of the father is entitled to an equal share with son and grandson. Where a grandmother gets a share in a partition between her grandson and son, that property reverts to the general estate on her death and should be divided amongst the co-sharers as part of the ancestral property.

Where a new member is born in a Hindu family long after the institution of a partition suit by a co-parcener, the plaintiff's share in the family property should not be diminished by reason of the birth of the new member as the plaintiff should be deemed to have separated from the joint family from the date when he instituted the suit. **Krishna Lal Jha v. Nandeshwar Jha**, 44 Ind. Cas. 146.

DAWSON MILLER and MULLICK, JJ.

References :—8 C. 649; 34 A. 234; 8 W.R. (P.C.) 1, F.; 34 A. 505 (F.B.), Diss.; 9 W.R. 61; 20 C.W.N. 1095; 17 C.W.N. 333; 10 W.R. 278, Appr.

(4) *Property not included in, Subsequent partition of—Mitakshara, S. 9, cl. 2, paras. 1 and 2—Provisions in, if rules of substantive law or procedure.*

Clas. 1 and 2 of S. 99 of the First Chapter of the Mitakshara refer to cases where the property which was not partitioned was discovered after partition.

Semble.—The provisions contained in cl. (1), S. 9, paras. 1 and 2, of the Mitakshara are not rules of substantive law but rules of procedure. **Harihar Dutta Tewari v. Bhim Sankar Dutta Tewari**, 46 Ind. Cas. 226.

WOODROFFE and SMITHEE, JJ.

(5) *Partition, mere specification of shares, if evidence of—Separation—Facts requisite to establish—Separation of one member, if evidence of separation of all.*

Mere specification of shares among members of a joint family does not amount to an

Hindu Law—(Continued).

—16.—Partition—(Continued).

assertion that the family has ceased to be joint.

In order to ascertain whether there has been a separation or not, the whole circumstances of each particular case must be investigated and the intention of the parties ascertained.

In a joint Hindu family, the facts that after the separation of certain members, the remaining members messed together, kept house together and held their property together raised the presumption that the family continued to be joint. **Rameswar Misser v. Sureshwar Misser**, 46 Ind. Cas. 252.

ROE and GOUTTS, JJ.

(6) *Joint family, Presumption as to—Suit for partition—Burden of proof of separation in—Property held jointly with strangers, if also must be included in—Property, Acquisition of, in name of one member if his separate acquisition.*

The presumption of the Hindu Law is that a Hindu family is joint unless the contrary is proved.

In a suit for partition, the onus of proving separation lies heavily on the defendants and unless that burden is discharged, the issue as to whether the family was joint or separate must be decided in favour of the plaintiffs.

The acquisition of a property bought in the name of one member of a joint family raises no presumption that it was bought as his separate property.

In a suit for partition of joint family properties, it is not necessary that the plaintiff should include in it properties held jointly with strangers. **Ramjaya Mahto v. Uttam Mahto**, 46 Ind. Cas. 255.

MILLER, C.J. and IMAM, J.

(7) *Suit for, by sons—Transferees from father, if proper and necessary parties—Liability of sons, determination of, Court's power, re.*

The object of a suit for partition of a joint family is to determine the share of the joint property which is due to each co-sharer, and for that purpose all the liabilities of the family must also be taken into account. If the liabilities bind the whole family, the debts must be distributed at the time of partition. If, on the other hand, the debts are contracted by only one member and are personal to him and not binding on the others they must be charged against his share. A purchaser or a mortgagee of a co-parcener's share in a joint property is a proper and even a necessary party in a suit for partition.

In case of a transfer by a father, the transferees are necessary parties to a suit for partition by his sons, in which suit the validity of some of the transfers are questioned by the sons. It is also within the competence of the Court to determine in such suit the extent of the sons' liability in such transfers. **Mahadeo Singh v. Bhawani Bikh Singh**, 46 Ind. Cas. 281.

LINDSAY, J.C.

Hindu Law—(Continued).

—16.—Partition—(Continued).

(8) *Suit for partition on behalf of minor by minor's next friend—Death of minor after institution of suit but before filing of written statement—Application by minor's mother as legal representative to be brought on record and permitted to continue suit—Cause of action if survives to mother—Filing of plaint if effected severance of status.*

A suit was instituted on behalf of a minor member of a Hindu family for partition. The minor plaintiff died after the institution of the suit but before the written statement was filed. The mother of the plaintiff applied to be brought on the record and for permission to continue the suit as his legal representative. *Held* that the filing of the plaint on behalf of the minor did not constitute a severance of the joint family status and that the mother could not be permitted to continue the suit. The option which the law lodges in every member of a joint Hindu family to say whether he shall continue to remain joint or whether he shall ask for a division is not one which other persons can also exercise purporting to act on his behalf when he is a minor (a). *Chellmi Chetty v. Subbanna*, 34 M.L.J. 213 = (1917) M.W.N. 792 = 22 M.L.T. 432 = 41 M. 442.

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 43 O. 1031; 39 M. 159 (F.B.); 31 B. 373; 3 M.H.O. 94, R.

(9) *Deed of partition including only some items of property—Whether effects division of status—Intention—Presumption—Construction.* *Subba Reddi v. Alagammal*, 18 M.L.T. 545 = 31 Ind. Cas. 674 = 8 L.W. 34 = 34 M.L.J. 596 = 47 Ind. Cas. 552. See Final Part, 1915, Col. 797, and Final Part, 1916, Col. 800.

(10) *Recital of division in a sale-deed—Recital not communicated to the co-parceners—If effects severance in status* *Kamepalli Aylamma v. Mannem Venkatasawmy*, 22 M.L.T. 503 = 33 M.L.J. 746 = (1918) M.W.N. 136 = 43 Ind. Cas. 130 = 8 L.W. 24. See Final Part, 1917, Col. 483.

(11 & 12) *Mitakshara—Right of son to demand partition during father's lifetime—Khatris of Amritsar City—Onus probandi—Punjab Civil Code, S. 9, Para 7.* *Hari Kishan v. Chandu Lal*, 105 P.R. 1917 = 43 Ind. Cas. 667 (F.B.). See Final Part, 1917, Col. 483.

(13) *Joint Hindu family—Partial partition—Status of the members of the family in regard to property left undivided.*

Where co-parceners of a joint Hindu family effect a partition of part of co-parcenary property, leaving a portion of immovable property undivided, *held* that the partition effects a disruption of the joint family, with the result that they continue to hold the undivided property as tenants-in-common and not as joint

Hindu Law—(Continued).

—16.—Partition—(Concluded).

tenants, with benefit of survivorship. *Musat. Bhole Devi v. Mokhan Chaud*, 121 P.R. 1918.

SCOTT-SMITH and MARTINEAU, JJ.

References:—32 M. 191; 26 Ind. Cas. 514, Rel. on; 2 M. 317; 4 M.I.A. 137; 18 M. 418; 18 B. 511, *Nof F.*

(13-a) *Severance of joint family by agreement and declaration to hold property in definite shares.*

An agreement and declaration to hold property in certain definite shares at once destroys the joint nature of a Hindu family, making the parties thenceforward tenants-in-common, even in the absence of any actual division of property. *Chaubar Singh v. Bakhtawar Singh*, 47 Ind. Cas. 897.

LINDSAY, J.C. and DANIELS, A.J.C.

(14) *Joint family—Filing of plaint by one member—Determination of shares, whether a general partition is effected—Agreement for provision of plaintiff, no final partition but arrangement for convenience of enjoyment.* See HINDU LAW (JOINT FAMILY), No. 6, 38 M.L.J. 759.

(15) *Release by co-parcener of his share of joint family property to two of his brothers—Effect.* See HINDU LAW (RELEASE), No. 1, 14 N.L.R. 56.

(16) *Power of father to enforce partition between sons—Powers, fraud on.* See REGISTRATION ACT, No. 27, 23 M.L.T. 307.

(16-a) *Jointness, Presumption to—Onus, Question of, when immaterial—Partition—Presumption as to disruption.* See RES JUDICATA, No. 40-a, 122 P.W.R. 1917.

(17) *Demand for partition by Hindu co-parcener—No actual partition by metes and bounds—Severance of joint family status effected by demand—Sale by such co-parcener of his share—Purchaser's right to share sold and for profits from date of demand of partition.* See VENDOR AND PURCHASER, No. 6, 35 M.L.J. 609.

—17.—Release.

Co-parcener's right to relinquish his share—Such relinquishment if benefits only co-parceners to whom it is relinquished—Relinquishment by co-parcener has same effect as his death

Under the Mitakshara School of Hindu Law, one co-parcener may relinquish his share of the co-parcenary property the effect of such relinquishment, renunciation or release would be similar to that of the renouncing co-parcener's death. It will enure to the benefit of all the members of that branch of the co-parcenary to which he belongs, and not merely for the peculiar benefit of some of them, even though it might be expressly released in favour of

Hindu Law—(Continued).**—17.—Release—(Concluded).**

somed. Vinayaka Row v. Laxman, 14 N.L.R. 56=44 Ind. Cas. 51.

DRAKE-BROOKMAN, J.O.

References:—11 M. 406, *doubted*; 27 M.L.J. 279, *Dist.*; 89 A. 437; 12 C.P.L.R. 63; 2 N.L.R. 53; 16 A. 969; 83 B. 267; 9 Bom. L.R. 595; 84 M. 263; 33 A. 234, *R.*

—18.—Religious Endowments.

- (1) *Debutter-property*—*Asthal or Math*—*Incidents of property belonging to asthals*—*Alienation of property of asthal*—*Mahant of asthal, Powers of, to contract debts to sell property—Necessity.*

The *Mahant* of a Hindu *asthal* or *math* holds the property in trust of the institution itself. He can only alienate it in case of necessity.

Acquisitions with the income of an *asthal* are subject to the same trust as the original property.

In the absence of a necessity which would render the debts contracted by him binding on the institution, the *mahant* has no power to alienate its properties for the purpose of discharging those debts, and if the *asthal* was not liable for such debts, his successor is entitled to have the sales set aside.

J, a *Mahant*, appointed the first respondent, a minor, his successor and left a will whereby he appointed O, guardian of the 1st respondent J had mortgaged the *asthal* property. The mortgages after his death brought or threatened proceedings on the mortgages. To pay off these liabilities O obtained from the District Judge leave to sell certain of the *asthal* properties.

Held that O's powers could not be larger than those of the actual *Mahant*. In the absence of proof that the original debts were binding on the *asthal*, the sales were set aside. *Basudeo Roy v. Jagal Klawar Das*, 35 M.L.J. 5=8 L.W. 130=16 A.L.J. 601=28 C.L.J. 476=24 M.L.T. 305=22 C.W.N. 841=(1918) M.W.N. 431=20 Bom. L.R. 1088=5 Pat. L.W. 57=45 Ind. Cas. 818 (P.C.).

VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI and SIR WALTER PHILLIMORE.

Reference:—43 I.A. 73=43 C. 707, *R.*

- (2) *Religious office—Widow's right to succeed to office and emoluments thereof.*

Held, by the majority (*Sadasiva Aiyar, J., dissenting*).—A widow is not debarred from succeeding to a religious office (*archakaship*) and the emoluments attached to it on the ground that she is incompetent by reason of her sex to discharge the duties of an *Archaka*.

(*Sadasiva Aiyar, J., dissenting*).—So long as a Hindu widow is held incompetent by reason of her sex from doing the duty of a priestly

Hindu Law—(Continued).**—18.—Religious Endowments—(Concluded).**

office, she is also incompetent to inherit the service and emoluments of the office. *Annaya Tantri v. Ammakka Hengsu*, 36 M.L.J. 126=24 M.L.T. 163=(1918) M.W.N. 569=8 L.W. 801=41 M. 886=47 Ind. Cas. 341.

VPALLIS, C.J., SADASIVA AIYAR and SPENCER, JJ.

Reference:—38 M. 850, *Diss. from*.

(3) *Lease by manager of Hindu temple—Validity. Principles to test. See SERVICE GRANTS*, No. 1, 14 N.L.R. 12.

—19.—Re-marriage.

Re-marriage of Hindu widow—Life interest held by such widow as mother of deceased son who survived her husband, if forfeited by such re-marriage.

Held, that a Hindu widow on re-marriage forfeited the life interest held by her as the mother of a deceased son who had survived her husband. *Sheobaran Mahto v. Musammamat Bhogea*, 3 Pat. L.J. 639=46 Ind. Cas. 884.

ROE and COUTTS, JJ.

References:—19 C. 289; 22 C. 589; 8 C.W. N. 542; 14 C.W.N. 346; 22 B. 321, *F.*

—20.—Renunciation.

Departure from village after mortgage of property—Adoption of itinerant mendicant life of chela—No return to village nor marriage—Abandonment of property and renunciation to be inferred. See HINDU LAW (INHERITANCE), No. 10, 18 P.W.R. 1918.

—21.—Reversioners.

- (1) *Acts and representations by, prior to reversion falling in—Widow induced thereby to alter her position to her own detriment—Reversioner, if estopped from going behind, when reversion opens.*

R, the widow of the last surviving brother of a joint Hindu family which originally consisted of three brothers, brought a suit for the recovery of the whole family properties against P and K, the widows of the two predeceased brothers who both alleged that the brothers died separate, and one L who obtained the whole estate as the adopted son of P and her husband, agreeing with R's contention that her husband died undivided. The adoption set up by L was questioned by R and K and the division set up by P and K was questioned by R and L. A compromise was entered into whereby R consented to take a fourth of the estate absolutely for herself and a fourth absolutely for her only daughter who was then alive. P and K each got a fourth absolutely for themselves and L's adoption was recognised but he was to take P's one-fourth. Subsequently L also got himself registered as the proprietor of P's one-fourth with her consent. Subsequently on R's death

Hindu Law—(Continued).**—21.—Reversioners—(Continued).**

which was preceded by that of her daughter, L brought two suits against those who claimed under R and her daughter and against K and those who claimed under her respectively claiming the properties respectively in their possession.

Held, (1) that L had by his part in the compromise induced R to change her position to her own detriment and to L's substantial benefit and that L was, therefore, estopped from claiming as a reversioner, and

(2) that for the same reason, the suit against K and those claiming under her must also fail. *Lala Kanhai Lal v. Lala Brij Lal*, 8 L.W. 912=28 C.L.J. 394=24 M.L.T. 286=22 C.W.N. 914=35 M.L.J. 459=(1918) M.W.N. 709=16 A.L.J. 825=20 B.M.L.R. 1048=47 Ind. Cas. 207=40 A. 487 (P.C.).

VISCOUNT HALDANE, SIR JOHN EDGE, MR AMER ALI and SIR WALTER PHILLIMORE.

Reference:—31 B. 165, *Dist.*

(2) *Alienation by widow—Suit by reversioners questioning it as representative—Decision in such suit if binding on afterborn reversioner—Failure to bring such suit—Effect of—Limitation for such suit—Limitation Act, Art. 125.*

When a reversionary heir appeals to the Court for the conservation of the property by seeking a declaration that an alienation or adoption by the widow is invalid, he does so in a representative capacity. If a reversioner who is competent to do so challenges an alienation or an adoption unsuccessfully or fails to challenge it within the period allowed by the law of limitation, the result is binding on the successors in the reversion so far as the right to declaratory relief is concerned.

Where therefore the presumptive reversioner did not impeach the alienation by a declaratory suit within 12 years as prescribed by Art. 125 of the Limitation Act and such a suit was brought by a reversioner born after the lapse of 12 years from the date of alienation within 6 years of his birth.

Held the suit was barred by limitation. *Yaramma v. Gopaladas Ayya*, 35 M.L.J. 57=24 M.L.T. 115=41 M. 659=8 L.W. 62=(1918) M.W.N. 461=46 Ind. Cas. 202 (F.B.).

AYLING, OLDFIELD, SADASIVA AIYAR, COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

(3) *Suit by one reversioner against alienee of Hindu widow impleading other reversioners as defendants—No steps taken by such other reversioners to disclaim position as defendants and to be made plaintiffs—Right of such reversioners to claim benefit of relief given to plaintiff by offering proper Court-fee—*

Hindu Law—(Continued).**—21.—Reversioners—(Continued).*****Partition suits, Procedure in, applicability of.***

When a reversioner, in a suit against the alienee from a Hindu widow, sues for his own share alone and not as representing his co-reversioners, who are also impleaded as defendants, nothing regarding the latter's share can, in the same suit, be legitimately decided; such other reversioners cannot, on the analogy of the procedure in suits for partition of joint property, claim in this suit a decree for their share by offering to pay the necessary Court fee thereon, as the scope of the two suits is different; they should disclaim their position as defendants and seek to be made plaintiffs paying duty on their claim in the ordinary way, before they can claim such a right. *Adhikari Vishnurmithi-ayya v. Authaiya*, 35 M.L.J. 153=47 Ind. Cas. 533.

OLDFIELD and BAKEWELL, JJ.

References:—37 Ind. Cas. 384; 44 C. 759, *Dist.*; 12 A. 506; 20 A. 81; 22 M. 494; 28 M. 457, R.

(4) *Nature of a reversioner's right—Guardian cannot deal with his ward's reversionary right.*

A Hindu reversioner has no right or interest in *presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. *Amrit Narain Singh v. Gaya Singh*, 23 M.L.T. 144=34 M.L.J. 298=27 C.L.J. 296=4 Pat. L.W. 221=22 C.W.N. 409=(1918) M.W.N. 306=16 A.L.J. 265=7 L.W. 581=20 Bom. L.R. 546=45 O. 590=44 Ind. Cas. 408 (P.C.).

LORD PARKER of WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMER ALI and SIR LAWRENCE JENKINS.

Reference:—9 M.I.A. 539, R.

(5) *Mitakshara—Suit for ejectment—Form of suit—Claim as the nearest reversioners—Proof.*

Those, who claim the property of a separated deceased Mitakshara Hindu as his reversionary heirs, must show that they are both his next heirs and within fourteen degrees.

Their Lordships accordingly condemned the plan of an ejectment suit, where there were fifty-nine plaintiffs, and nearly twenty other parties, in addition to the persons in possession of the property left by a separated Mitakshara Hindu were joined *pro forma*, as being members of the family, though they advanced no

Hindu Law—(Continued).**—21.—Reversioners—(Continued).**

claim, and the scheme of the action had been to bring into Court a large number of persons, more or less remotely akin in blood, in the hope of ousting the defendants in possession by a mass of attack and afterwards to assign the fruits of victory to the parties entitled by further litigation *inter se*: **Mewa Singh v. Basant Singh**, 24 M.L.T. 429—28 C.L.J. 530 (P.C.).

VISCOUNT HALDANE, LORD DUNEDIN.
LORD SUMNER, SIR JOHN EDGE and
MR. AMER ALI.

(6) *Widow's alienation—Nearest reversioner—Declaratory suit—Nature of—Whether representative suit or suit in representative character—Death of plaintiff—Next reversioner—Whether legal representative's right to continue suit—O. I, rr. 1 and 8, cl. 2 apply—Ex parte order of abatement—Next reversioner not heard—Effect of—Application to continue suit—Period of limitation—Art. 181—O. XXI, r. 9, Civ. Pro. Code, Applicability of—Excusing delay—Discretion whether revisable—S. 115, Civ. Pro. Code*

The nearest reversioner to the estate of a deceased Hindu instituted a suit to declare certain alienations by a widow as void beyond her lifetime, and died pending the hearing. Within six months of his death and without hearing any others among the surviving body of reversioners, the lower Court passed an order declaring that the suit had abated. Within two years of the said order, the appellant, the next reversioner or one of the next set of reversioners, applied to set aside the abatement, to be brought on record as the legal representative of the deceased plaintiff and to be allowed to continue the suit.

Held per curiam:—A suit by the next reversioner is one really brought on behalf of the entire body of reversioners; if the reversioner conducting the suit dies, the next reversioner can come in and continue the conduct of the suit, as he is already a party thereto (a).

An application to continue the suit is governed by Art. 181 of the Limitation Act; if the suit had been treated as having abated, it must be made within three years of the order so declaring (b).

In the absence of any statutory provision, whether substantive or procedural, a party is not bound by any order passed behind his back. Such an order may be treated as a nullity and need not be set aside (c).

The High Court should not, under S. 115, Civ. Pro. Code, revise the lower Court's discretion in regard to excusing the delay in applying under O. XXI, r. 9, or, for a review. The present application is properly one under O. I, rr. 1 and 8, cl. 2.

Hindu Law—(Continued).**—21.—Reversioners—(Continued).**

Sadasiva Aiyar, J.—The next reversioner entitled to continue the suit does not fall within the definition of legal representative in S. 2, sub-S. 11, Civ. Pro. Code.

A representative suit is one brought by a person on behalf of himself and others having the same interest and must be distinguished from a suit brought in representative capacity, i. e., as executor, administrator, guardian or trustee for some other person having the legal or beneficial interest.

Spencer, J. (contra).—A suit brought by a reversioner is not only a representative suit but is also one brought in a representative capacity (d). **Krishnaswamy Iyer v. Seetalakshmi Ammal**, (1918) M.W.N. 888.

SADASIVA AIYAR and SPENCER, JJ.

References:—(a) (1915) M.W.N. 555; 38 M. 408 (P.C.). *Rel. on.* (b) (1912) M.W.N. 105, *doubted.* (c) (1916) M.W.N. 301; 38 Ind. Cas. 4, *Dist.* (d) 7 B. 467, R.

(7) *Reversioner's deed of relinquishment to widow—Effect thereof—Estoppel.*

A deed of agreement by reversioner relinquishing his interest in a portion of estate to widow in consideration of her relinquishing to him her interest in the remaining portion, estops the reversioner and claimants through him from questioning the operation of the relinquishment to widow. **Jogendranath Bhunya v. Mohindra Ghora**, 47 Ind. Cas. 978.

FLETCHER and SHAMSUL HUDA, JJ.

(8) *Mortgage by Hindu female—Reversioners joining in mortgage—Reversioners if can subsequently maintain recitals therein to be untrue. See APPEAL (GENERAL), No. 9, 28 C.L.J. 123.*

(8-a) *Declaratory suit for title by survivorship, Decision on—Declaratory suit that alienations not binding on reversioner if barred by—Declaratory suit that kot kobala and solonama decrees not binding on reversioner—Limitation Act (1908), Arts. 93, 95 and 130, article applicable to—Starting point of limitation. See CIV. PRO. CODE (1908), No. 45-a, 47 Ind. Cas. 2.*

(9) *Competition between widow of sapinda and male sapinda of same propositus—Both sapindas in same line, but male sapinda more remote in degree than husband of widow—Male sapinda entitled to inherit. See HINDU LAW (INHERITANCE), No. 4, 14 N.L.R. 6.*

(9-a) *Gift, Suit challenging a, delay in filing if amounts to acquiescence. See HINDU LAW (SUCCESSION), No. 2, 125 P.W.R. 1917.*

(10) *Hindu widow—Gift—Suit by remote reversioner—Declaration that gift invalid—Minority of presumptive reversioner—Suit not maintainable. See HINDU LAW (WIDOW), No. 8, 16 A.L.J. 465.*

Hindu Law—(Continued).**—21.—Reversioners—(Continued).**

(11) Widow in possession of husband's estate—Gift in favour of daughter's son—Daughter alive—Suit by reversioner for declaration of invalidity of alienation by widow, maintainability of. See HINDU LAW (WIDOW), No. 4, 16 A.L.J. 498.

(12) Gift by widow to one of two reversioners without consent of the other—Validity of such alienation by gift. See HINDU LAW (WIDOW), No. 6, 20 Bom. L.R. 783.

(13) Reversioners how far bound by decrees, compromise decrees or award decrees against Hindu widows—Principles governing disoussed. See HINDU LAW (WIDOW), No. 7, 20 Bom. L.R. 947.

(14) Alienation by widow with consent of reversioner of part of estate, Effect of. See HINDU LAW (WIDOW), No. 8, 22 C.W.N. 846.

(15) Ijara granted by Hindu widow to her manager forty years before suit—Value of recitals of legal necessity in deed—Alienation if may bind reversioner apart from legal necessity—Acquisition by widow out of income if part of corpus. See HINDU LAW (WIDOW), No. 9, 23 C.W.N. 64.

(16) Surrender by Hindu widow to the second reversioner, immediate female reversioner consenting—Validity of surrender—Provision for maintenance of the two reversioners—If vitiates surrender—Doctrine of civil death of widow after surrender. See HINDU LAW (WIDOW), No. 15, 35 M.L.J. 512.

(17) Execution of mortgage by widow and next reversioner—Decree against both—Application for execution also against both—Objection to award of interest after period of grace made by widow if may be continued by reversioner on her death during execution—Application for amendment of decrees if may also be filed by reversioner—Proper period for allowing further interest after period of grace. See INTEREST, No. 2, 27 C.L.J. 576.

(18) Suit to set aside alienation by widow—Plaintiff to prove doing by widow of act necessarily resulting in transfer—Defence of mortgage suit abandoned by widow after slight contest—Execution sale by Court if amounts to private alienation—Auction or Court sale when may be considered as private sale. See LIMITATION ACT (1908), No. 167, 35 M.L.J. 364.

(19) Act governing suit by reversioner after death of alienor's widow—Death of alienor after Punjab Limitation Act came into force. See LIMITATION ACT (1908), No. 183, 95 P.R. 1918.

(20) Reversioner to whom Hindu widow has surrendered possession in lieu of maintenance—Such reversioner if may redeem mortgage created by widow—Position of such person. See MORTGAGE (REDEMPTION), No. 23, 178 P.W.R. 1918.

Hindu Law—(Continued).**—21.—Reversioners—(Concluded).**

(21) Consent given by—Legal necessity, Existence of, Presumption as to, raised by. See PARDANASHIN LADZ, 22 C.W.N. 236.

(22) Representation of estate by widow—Estoppel against widow—Decree against widow when binds reversioners. See RES JUDICATA, No. 28, 24 M.L.T. 861 (P.C.).

—22.—Self-acquisition.**(1) Self-acquired property—Conversion into joint family property—Succession.**

A Hindu, who was living with his two sons, obtained certain self-acquired property which he treated as joint family property. One of the sons next separated from the family; and the father and the other son lived joint as before. On their death, the separated son claimed to recover the property on the footing that it was the self-acquired property of his father:

Held, that the property was the joint family property of the father and his united son; that, on the father's death, the united son took it by survivorship; and that on the latter's death his widow had a life-estate, to which the reversionary interest of the separated son had been postponed.

Per *Beaman, J.*—A member of a joint Hindu family who has acquired property of his own may convert it into joint family property in the ordinary sense of the term; and thereafter all the members of the family will have the same rights in it as though it had been acquired originally by their joint exertions or descended to them from a common ancestor. *Rangbhat Ramchandrabhat v. Sitabal Bandbhat*, 20 Bom. L.R. 338=45 Ind. Cas. 584.

BEAMAN and HEATON, JJ.

References:—10. Bom. L.R. 175; 17 C. 33, R.

(2) Lands purchased out of endowments of Patwari—Self acquired property. See O.P. BERAR PATELS AND PATWARIS LAW, No. 1, 43 Ind. Cas. 137.

(3) Issue as to joint or separate estate—Blending of self-acquired and joint funds—Gift by managing member of joint family property, if valid. See HINDU LAW (GIFT), No. 1, 16 A.L.J. 537.

—23.—Separation.

Mitakshara family—Separation of member, his intention—Will admitted to probate—Whether valid document.

Any member of a Mitakshara family may exercise his intention without the assent of the other members to go out of the family and to have his share of the property and, at any rate, that intention is communicated to the other members of the family, the same should be a

Hindu Law—(Continued).**—23.—Separation—(Concluded).**

good separation. Where a will was established in probate proceedings, there can be no doubt that the will was properly executed in the manner required by law and it must be taken to be a valid document. *Sashi Bushun Panigrahi v. Labanyabahi Debya*, 48 Ind. Cas. 981.

FLETCHER and SHAMSUL HUDA, JJ.

Reference :—48 O. 1031, F.

—24.—Stridhanam.

- (1) *Dhayabhaga school—Ajautuka stridhan, succession to—Son or married daughter—Property whether jautuka or ajautuka—Onus.*

The commonly accepted view of the succession of *ajautuka* property of a *Dhayabhaga* Hindu woman is that the sons and the maiden daughters are entitled to it in equal shares, but the married daughters are postponed to the sons. *P. J. Delaney v. Fran Harl Guha*, 22 C.W.N. 990=45 Ind. Cas 879

RICHARDSON and BEACHCROFT, JJ.

- (2) *Tie of blood if severed by immorality of Hindu woman—Right of her blood relations and heirs of her husband to succeed to her property.* See HINDU LAW (INHERITANCE), No. 7, 21 O.C. 472.

—25.—Succession.

- (1) *Dancing girl's property—Its devolution—Daughter's daughter preferred to son.*

The property of a dancing girl will pass to her female issue first and then to her male issue. The devolution is by custom similar to the devolution of *stridhanam*, and consequently a daughter's daughter must be preferred to a son. *Nagalingam Pillai v. Yaduganatha Aaral*, 45 Ind. Cas. 672=24 M.L.T. 81.

BAKEWELL and PHILLIPS, JJ.

Reference :—5 M.H.O.R. 161, F.

- (2) *Mitakshara—Sister's son and grandson, whether landhus—Delay in filing suit—Acquiescence—Limitation Act (IX of 1908), Sch. I, Art. 120—Suit for declaration of plaintiff's right to manage dharamsala.*

Held, that :—

- (1) According to the *Mitakshara* School of Hindu Law, a sister's son and grandson are *bandhus* and can succeed to the property of the deceased as his heirs (a).

Quare :—Whether sanction of the Collector under S. 92, Civ. Pro. Code, is necessary in such a case (b) ?

- (2) The mere fact that a suit by the reverendioners challenging a gift is not brought till ten or eleven years after the death of the donor does not show that the plaintiffs acquiesced in the gift or that are thereby estopped from bringing the suit.

Hindu Law—(Continued).**—25.—Succession—(Concluded).**

Plaintiffs sued for possession of certain property and a *dharamsala*, but subsequently amended the plaint and asked for a decree for possession of the property and a declaration to the effect that they were entitled to be managers and supervisors of the *dharamsala*. In the amended plaint it was stated that the person last in possession died in April, 1898, and that the cause of action accrued then.

Held, that the suit was governed by Art. 120 of the Limitation Act and having been filed more than six years after the last owner's death was barred by time. *Bhag Mal v. Bhagwan Das*, 125 P.W.R. 1917=11 P.R. 1918.

SCOTT-SMITH and LESLIE JONES, JJ.

References :—(a) 20 A. 191; 163 P.W.R. 1915, F. (b) 33 C. 789; 33 B. 509, R.; 28 A. 307; 22 A. 338; 51 P.R. 1916, D.

- (3) *Gift by Raja to Rani of joutak raniau britti recoling similar previous grants—Condition restraining alienation by future Rani and giving enjoyment only of profits—Creation of successive life estates in favour of unborn persons—Rule of succession unknown to Hindu Law prescribed—Validity of grant—Essentials of valid custom—Validity of usage creating family custom of succession.* See GRANT, No. 1, 45 O. 935.

—25-a.—Texts.

Suretyship, kinds of—Father's surety debt—Son's liability—Texts, Discussion of. See HINDU LAW (DEBTS), No. 7 a, (1918) M.W.N. 673.

—26.—Widow.

- (1) *Unchastity in husband's lifetime—Condonation by husband—Husband and wife.*

Under the Hindu Law a widow is not debarred from inheriting to her husband on the ground that she had become unchaste in her husband's lifetime, if the husband condoned her unchastity (a). *Radhey Lal v. Bhawan Ram*, 16 A.L.J. 91=40 A. 178=43 Ind. Cas. 553.

PIGGOTT and WALSH, JJ.

References :—(a) 36 B. 133, Comm. bn; 14 W.R. (A O.J.) 29; 5 O. 776, R.

- (2) *Hindu widow—Sale of husband's estate in her possession in lieu of debt of husband—Debt extinguished by contract where under liability was taken over by another person—Legal necessity—Whether sale valid.*

Where a Hindu widow in possession of her husband's estate as heiress executed sale-deeds to third persons in lieu of her husband's debt, which had been agreed to be discharged by a relative of the husband with the creditor's consent, but the obligation was not fulfilled by

Hindu Law—(Continued).**—26.—Widow—(Continued).**

the relative, *held* that, since the date when the liability to discharge the debt was undertaken by the relative, the debt had ceased to be the debt of either the husband or the widow, and the non-fulfilment of the obligation would not revive the debt so as to make it a good consideration for the alienation of the property. *Nathu v. Musammatt Tulsha*, 16 A.L.J. 448—45 Ind. Cas. 728.

RICHARDS, C.J. and BANERJI, J.

(3) *Hindu widow—Gift—Suit by remote reversioner—Declaration that gift invalid—Minority of presumptive reversioner—Suit not maintainable.*

The right to maintain a suit, that a gift made by a Hindu widow in possession of her husband's estate as heir is not binding upon the heirs of her husband, does not belong to any one having a possibility of succeeding to the estate of inheritance held by the widow for her life. As a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir if those nearer in the line of succession, are in collusion with the widow or have precluded themselves from interfering. The minority of the presumptive reversioner does not enable a remoter heir to bring such a suit. *Gumanan v. Jahan-gira*, 16 A.L.J. 465=40 A. 518=46 Ind. Cas. 186.

PIGOTT and WALSH, JJ.

References:—6 C. 764; 11 A.L.J. 382, F.; 34 A. 207, Dist.

(4) *Widow in possession of husband's estate—Gift in favour of daughter's son—Daughter alive—Suit by remote reversioner for declaration of invalidity of alienation by widow—Suit maintainable.*

Held, that a decree, declaring that a gift in favour of a daughter's son made by the widow of the last male owner was of no effect after her death, might be given to a remote reversioner, even though the daughter herself was alive at the date of the suit (a). *Jalut Singh v. Gosain*, 16 A.L.J. 493=46 Ind. Cas. 85.

RICHARDS, C.J. and BANERJI, J.

Reference:—34 A. 207, F.

(5) *Alienation by widow—Spiritual benefit of husband—To what extent alienation permissible—Whether spiritual benefit equivalent to *śradh* of the deceased.*

A Hindu widow succeeded to certain property as heir to her sons. She went on a pilgrimage to Jagannath, and there made an oral gift of a portion of the property in her possession in favour of the *Pandas* of the temple. On her return home, she executed a formal deed of gift, in which, after alluding to the oral gift, she stated that she had made the gift and *shankalap* "for the salvation of her husband and his family members and for her own salvation."

Hindu Law—(Continued).**—26.—Widow—(Continued).**

The partitioned constituted no more than 1/80th part of the entire estate. After her death, the next reversioner to her husband brought a suit for recovery of possession of the property from the donees and his lessees by cancellation of the deed of gift:—*Held* that the gift was valid, having been made with a view to the spiritual benefit of the widow's husband and her sons, who were included in the expression "husband's family members." An alienation made by a Hindu widow for the spiritual benefit of the deceased will not be set aside, merely because it was not made in connexion with a *śradh* ceremony of the deceased.

There are ceremonies and duties incumbent upon a widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform, and these ceremonies she must carry out, and, for this purpose, she has a power of alienation in respect of the corpus of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be, what proportion does the property alienated bear to the entire estate, but only, whether the alienation was a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. There may be alienations made by a Hindu widow for the purpose of doing pious acts for the benefit of her late husband, which are not in the nature of spiritual necessities; and with regard to such alienations, the question of the proportion borne by the property alienated to the value of the entire estate becomes pertinent. *Kunj Behari Lal v. Laltu Singh*, 16 A.L.J. 996.

PIGOTT and WALSH, JJ.

References:—8 M.I.A. 529; 43 C. 574; 11 M. 288; 34 M. 288; 8 M. 553; 22 C. 506; 42 B. 136; 4 A. 482; A.W.N. (1909) 202; 2 Morley's Digest, 198, R and Expl.

(6) *Acceleration of widow's estate—Acceleration to be of the whole estate—Consent of the next reversioners to alienation not supported by necessity*

A Hindu widow made a gift of the whole of her husband's estate to one of her daughters without the consent of the other, the two daughters being the next reversioners. Subsequently, she adopted the plaintiff as son to her husband. The plaintiff having sued to recover possession of the property gifted away by the widow:

Held, decreeing the suit, that the gift was not binding on the plaintiff, since the surrender of the entire estate of the widow in favour of one of the two persons constituting the next reversion without the consent of the other was

Hindu Law—(Continued).**—26.—Widow—(Continued).**

not valid. *Dodbasappa v. Baswanappa*, 20 Bom. L.R. 783=42 B. 719=46 Ind. Cas. 239.

SEAH and MARTEN, JJ.

References:—19 I.A. 30; 25 B. 129; 9 Bom. L.R. 1848; 34 B. 165; 25 B. 129; 17 O. 896; 40 C. 721; 41 B. 93, R.

(7) Decree against widow binds reversioner—Award or compromise decrees not so binding—Res judicata.

A decree fairly obtained against a Hindu widow binds the reversioners. This principle does not apply either to a compromise or an award decree. The above limitation of the principle has been found upon the necessity of determining in each case whether the decrees can properly be said to have been fairly obtained against the widow, as representing the whole estate, including the rights of the reversioners, and upon the necessity of proceeding with special caution, where the decree is a compromise or award decree, on the same grounds upon which it has been held that legal necessity must definitely be proved in the case of purchases from Hindu widows and that transactions must definitely be shown to have been explained and fully understood in the case of *purdah* ladies. *Rama Santu Randive v. Daji Naru Randive*, 20 Bom. L.R. 947.

HEATON and HAYWARD, JJ.

References:—5 Bom. L.R. 385, F.; 9 M.I.A. 539; 2 I.A. 256; 11 I.A. 66; 20 I.A. 183; 29 A. 487; 30 A. 75; 38 C. 639; 35 M. 560; 14 Bom. L.R. 1142; 31 B. 165, R.

(8) Widow's estate—Alienation by widow with consent of reversioner of part of estate—Effect—Presumption of necessity when defeated—Several limited owners, arrangement between, how long effective—Alienation by one of her separated share for legal necessity—Legal necessity if to be determined with reference to the whole estate or the share.

The Full Bench in 40 C. 721=17 C.W.N. 701 has decided that the doctrine of relinquishment and acceleration cannot apply to partial transfers by a limited owner, which can be supported only by legal necessity. The consent of the next reversioner is merely strong presumptive evidence of the necessity (a).

The propriety of an alienation with the consent of the next reversioner may come in question, not only with reference to the conduct of the widow, whether or not she was justified by necessity, but also with reference to the conduct of the next reversioner, whether or not his conduct was honest. If, in the absence of legal necessity, he engineered the transaction to suit his own ends and for his own immediate gain, his consent would lose all its virtue. The transaction would stand no higher than a partial alienation in his favour and would have to be judged from that standpoint. Nevertheless, whatever might be said of the conduct of

Hindu Law—(Continued).**—26.—Widow—(Continued).**

the widow or the next reversioner, the transferee, if he made due enquiry and acted bona fide, would still be entitled to the benefit of the equitable rule laid down by the Privy Council in 6 M.I.A. 393, and now enacted in S. 38 of the Transfer of Property Act. Nor would the antecedent mismanagement of the estate affect him, unless he was in some way a contributory party thereto.

If two widows, or, two daughters, taking jointly the estate of their deceased husband or father, make an arrangement for separate possession and enjoyment, the arrangement will not ordinarily deprive the survivor of the right to the whole estate, or enable the ladies to confer a title on a third party, which will not terminate, at the latest, with the life of that survivor.

The propriety of an alienation by one of several limited owners of a portion of the property in her separate possession should be determined with reference to the estate as a whole and not with reference to the separated portion in her possession. *Shyamadas Roy Chowdhury v. Radhika Prosad Chatteraj*, 22 C.W.N. 846=29 C.L.J. 24=47 Ind. Cas. 853.

RICHARDSON and WALMSLEY, JJ.

References:—24 I.A. 183=25 C. 189; 8 C.W.N. 658; 34 A. 189; 10 C. 1102; 6 W.R. 51; 13 M.I.A. 209; 41 C. 793; 19 C. 236; 6 M.I.A. 393, R.; 40 C. 721; 17 C.W.N. 1062, F.; 22 C. 354; 35 C. 939, Not F.; 42 C. 875, Expt.

(9) *Ijara* granted by a Hindu widow to her manager 40 years before suit—Value of recitals of legal necessity in the deed—Alienation if may bind reversioner apart from legal necessity—Acquisition by widow out of income, if part of the corpus of the estate.

The recitals of legal necessity in an alienation by a Hindu widow, made more than 40 years before suit, could not be given the weight attached to similar recitals in 43 I.A. 249, inasmuch as, in this case, evidence was available as to the pecuniary condition of the estate at the time of the alienation, and it was made to a person, who, in fact, managed the estate for the widow.

Held, on the evidence, that the alienation in this case, a permanent *ijara*, was not made for legal necessity, nor was it binding on the reversioners apart from legal necessity as being for the "benefit of the estate" (a).

Held, also, that the reversioners did not, by getting themselves substituted as the legal representatives of the widow in a suit for arrears of *ijara* rent which had fallen due in her lifetime, ratify the *ijara*.

Property acquired by the widow out of the income of the estate became part of the corpus of the estate, where it appeared that her intention was to treat the purchased property

Hindu Law—(Continued).**—26.—Widow—(Continued).**

as part of the original estate (b). **Upendra Kishore Mandal v. Nqbo Kishore Mandal**, 23 C.W.N. 64

N. R. CHATTERJEE and SMITHER, JJ.

References:—(a) 43 I.A. 249=14 C. 186=21 C.W.N. 225; 44 I.A. 98=40 M. 402=21 C.W.N. 761; 33 C. 842: 41 C. 798; 18 B. 534; 20 C.W.N. 200; 25 C. 8, Dist.; 40 M. 709=44 I.A. 147, R. (b) 10 C. 324; 14 C. 387, R.

(10) *Widow, mortgage by, and the then reversionary—Decree, effect of—Execution sale—Auction purchaser, title—Fraud in securing decree.* **Ganga Narayan Datta v. Indra Narayan Saha**, 35 Ind. Cas. 49=25 C.L.J. 391=24 C.W.N. 350. See Final Part, 1916, Col. 825 and Final Part, 1917, Col. 493.

(11) *Surrender by, in favour of reversioners, Validity of, Requisites for.*

A surrender by a Hindu widow in favour of her husband's reversioners made, otherwise than for consideration to meet legal necessities must, in order to be valid, be of the whole of her interest in the estate. **Mohananda Dutta Chowdhury v. Balkanthanatha Dutta**, 45 Ind. Cas. 872.

FLETCHER and SHAMSUL HUDA, JJ.

(11-a) *Permanent lease, grant of, by—Usufructuary mortgage executed by husband, Payment of—Legal necessity.*

Payment of a usufructuary mortgage executed by the husband is a legal necessity and a permanent lease granted by the widow for a premium and an annual rent for such a purpose is binding upon the reversioners. **Balkuntha Nath Sarkar v. Satish Chandra Bushan**, 46 Ind. Cas. 876.

FLETCHER and SHAMSUL HUDA, JJ.

(11-b) *Adoption—Agreement reserving life-estate to widow with natural parents—Minor if bound by—Test fair and reasonable and for minor's benefit.*

A minor can only act through a guardian and contracts entered into by a guardian are binding on the minor, provided they have been properly entered into and are for his benefit.

An agreement entered into by a Hindu widow adopting a minor son to her deceased husband with the natural parents of the boy reserving to herself a life interest in the estate of her husband is binding on the minor, provided that at the time it was entered into it was a fair and reasonable agreement which, to any reasonable man, would have appeared for the benefit of the minor. **Keshobati Kumari v. Satya Narayan Sinha**, 47 Ind. Cas. 55.

ROE and COUTTS, JJ.

(11-c) *Debt for legal necessity—Lender, Duty of—High rate of interest, Stipulation for—Reasonable rate.*

In the case of a loan to a Hindu widow for legal necessity, where the necessity for the loan is apparent, the lender is not bound to ascertain

Hindu Law—(Continued).**—26.—Widow—(Continued).**

how the necessity for loan was brought about to make any enquiries about it. Unless it is shown that he acted *mala fide*, he cannot be affected by any mismanagement on the part of the widow. Interest at a high rate cannot be allowed to a creditor advancing money to a Hindu widow for legal necessity, unless the high rate is explained. The creditor will, in such cases be entitled to only a reasonable rate of interest. **Dwaraka Prasad v. Prithpal Singh**, 47 Ind. Cas. 106.

LINDSAY, J.C.

(11-d) *Release of part of estate—Compromise of bona fide claim—Validity of—Reversioners, if bound by—Collusion, Allegation as to, Burden of proof in case of.*

A Hindu widow is entitled to release a part of the estate by compromise of a *bona fide* claim, provided that the compromise is not shown to be unfair or made solely for her own benefit to the prejudices of the interests of the reversioners.

It is the reversioners who seek to set aside such a compromise, that should prove that the compromise entered into by the widow was entered into collusively for the purpose of conferring upon herself a benefit at the expense of the estate. **Ram Sumran Prasad v. Shyam Kumari**, 47 Ind. Cas. 697.

ROE and JWALA PRASAD, JJ.

(12) *Surrender—Validity—"Whole estate", meaning of—Registered deed, if necessary—Transfer of Property Act (IV of 1882), Ss. 6 (a), 43, 54 and 142—Registration Act (III of 1877), S. 17, cl. 1.* **Munugarra Satyalakshmi Narayana v. Munugarra Jagannatham**, 6 L. W. 765=24 M.L.T. 498=(1917) M.W.N. 854=34 M.L.J. 249. See Final Part, 1917, Col. 493.

(13) *Widow's power to divide husband's property between daughters and their sons—Reversioners if bound by such gift.* **Senakkayala Virasami Naidu v. Bommadevara Pichayya Naidu**, 33 M.L.J. 536=6 L.W. 758=43 Ind. Cas. 167. See Final Part, 1917, Col. 492.

(14) *Conversion to Mahomedanism—Subsequent marriage with a Muhammadan—Rights in first husband's estate—Caste Disabilities Removal Act (XXI of 1950), S. 1—Hindu Widows' Re-Marriage Act (XV of 1856), S. 2.*

Held by the Full Bench (Seshagiri Aiyar, J. dissenting):—A Hindu widow, who becomes a Muhammadan and marries a Muhammadan forfeits by her re-marriage her interest in her first husband's estate (a).

Per Chief Justice (Phillips, J., concurring):—The above conclusion may be supported on two grounds, first, according to Hindu Law and independently of S. 2 of Act XV of 1856, the widow of a Hindu forfeits her husband's estate on re-marriage; second, on a proper construction of S. 2 of Act XV of 1856 widows of a Hindu who remarry after conversion forfeit their estate by virtue of that section.

Hindu Law—(Continued).**—28.—Widow—(Continued).**

Per Oldfield, J. (Krishnan, J., concurring):—The above conclusion may be based only on the first ground. On a proper construction of S. 2 of Act XV of 1856 the section does not apply to widows of a Hindu who re-marry after conversion to another religion.

Per Seshagiri Aiyar, J.—A Hindu widow inherits her estate on the death of her husband. On conversion to another religion her estate is preserved to her by Act XXI of 1850. The Hindu Law is no longer applicable to her and there is nothing in any statute which divests such a person of her estate because she then marries according to her new religion. On a proper construction of S. 2 of Act XV of 1856, the section applies only to widows of a Hindu who re-marry while they are Hindus. *Tayar-amma v. Sivya*, 35 M.L.J. 317=24 M.L.T. 183=8 L.W. 480=(1918) M.W.N. 625=41 M. 1078 (F.B.).

WALLIS, C.J., OLDFIELD and SESHAGIRI
AIYAR JJ.

References:—1 M. 926, *Affr.* 22 B. 321. F. 23 M.L.T. 81. *overruled.*

(15) *Surrender to second reversioner—Im mediate female reversioner consenting—Surrender is valid—Provision for maintenance of the two reversioners—If vitiate surrender—Doctrine of civil death of widow after surrender.*

It is competent to a Hindu widow to surrender her interest in the husband's estate to a second reversioner with the consent of the next reversioner even though the next reversioner is a female.

A widow in possession of her husband's estate and her daughter who was the next reversioner jointly surrendered the estate to the infant son of the daughter represented by his father as guardian. The deed of surrender provided that the widow and daughter were to be maintained by the guardian and afterwards by the infant son when he attained majority. The infant died two years later. The widow and the daughter having also died, the actual reversioners sued to recover the properties alleging that the surrender was invalid.

Held that the surrender was valid and vested the properties in the infant son as full owner.

Held further that the stipulation for the maintenance of the widow and the daughter did not vitiate the surrender.

A widow who surrenders her limited interest in her husband's estate is not civilly dead for any purpose other than that of bringing the next reversioner on or on her to the husband's estate. *Chinnaswami Pillai v. Appasami Pillai*, 35 M.L.J. 512=8 L.W. 512=(1918) M.W.N. 756=24 M.L.T. 403.

SADASIVA AIYAR and NAPIER, JJ.

References:—31 M.L.J. 406; 31 M. 446; 30 M. 145; 34 M.L.J. 229, R.

(16) *Widow's right of gift.* See C.P. ACT XI OF 1898 (TENANCY), No. 10, 44 Ind. Cas. 1901.

Hindu Law—(Continued).**—28.—Widow—(Continued).**

(16-a) *Adoption by—Divesting of estate—Widow's power to adopt, Limitations to—Adoption to last made holder, Rule re, if applies to Impartible Raj.* See HINDU LAW (ADOPTION), No. 2, 16 A.L.J. 725.

(16-b) *Adoption by, Consent of husband, Necessity of—Agreement conferring benefit on, at the expense of minor adopted son, Validity of.* See HINDU LAW (ADOPTION), No. 8, 46 Ind. Cas. 850.

(16-c) *Power of, to adopt—Limit of time to exercise of.* See HINDU LAW (ADOPTION), No. 10, 47 Ind. Cas. 41.

(17) *Will by Hindu widow in favour of person whose adoption invalid—Validity of will—Right of collaterals of widow's husband to question disposition by widow of property inherited from her father.* See HINDU LAW (ADOPTION), No. 21, 6 P.R. 1918.

(18) *Alienation by Hindu widow—Consent of next reversioner—Effect on actual reversioner—Presumption of legal necessity.* See HINDU LAW (ALIENATION), No. 5, 44 Ind. Cas. 611.

(19) *Alienation by—Maintenance, for purposes of—Of portion of estate, validity of.* See HINDU LAW (ALIENATION), No. 6, 46 Ind. Cas. 269.

(20) *Alienation by—Legal necessity—Strict proof of, after long lapse of time—Legal necessity, Recital of, in document.* See HINDU LAW (ALIENATION), No. 7, 46 Ind. Cas. 344.

(21) *Life interest held by Hindu widow as mother of deceased son surviving her husband—Re-marriage of such widow if forfeits such interest.* See HINDU LAW (RE-MARRIAGE), No. 1, 3 Pat. L.J. 639.

(22) *Hindu Law—Alienation by widow—Next reversioner failure to sue by—After-born reversioner, effect on, Suit by—Limitation Act, Art. 125.* See HINDU LAW (REVERSIONERS), No. 2, 35 M.L.J. 57.

(22-a) *Decree for maintenance passed in favour of daughter against her father's widow—Alienation by widow in pursuance of such decree if binds reversioners.* See HINDU LAW (REVERSIONERS), No. 6-a, 3 Pat. L.J. 426.

(23) *Compromise petition restraining powers of alienation of Hindu widow, Construction of.* See JUDICIAL PROCEEDINGS, 47 Ind. Cas. 710.

(24) *Sale by, without necessity or consent of reversioners—Validity of.* See LAND ACQUISITION ACT, No. 8, 40 Ind. Cas. 355.

(25) *Alienation by Hindu widow—Suit by heir of reversioner.* See LIMITATION ACT (1908), No. 185, 20 Bom. L.R. 762.

(26) *Suit to set aside alienation by widow—Plaintiff to prove doing by widow of act necessarily resulting in transfer—Defence of mortgage suit abandoned by widow after slight contest—Execution sale by Court if amounts to*

Hindu Law—(Continued).**—26.—Widow—(Concluded).**

private alienation—Auction or Court-sale when may be considered as private sale. See LIMITATION ACT (1908), No. 167, 35 M.L.J. 364.

(27) Widow, Surrender by, of possession of land in lieu of maintenance—Reversioner, Surrender in favour of—Right of redemption of. See MORTGAGE (REDEMPTION), No. 23, 178 P.W.R. 1918.

(28) Estate similar to that which Hindu widow inherits in cases of intestacy, if can be created by will. See WILL, No. 15, 3 Pat. L. J. 199.

—27.—Will.

(1) *Construction of will—Testator vesting life-estate on daughter-in-law with reversion to her male issue—Her son not entitled to dispose of property during her lifetime.*

The single rule of construction in a Hindu as in an English will is to try to find out the meaning of the testator taking the whole of the document together, and to give effect to the meaning.

Where a testator intended that his estate should vest in his daughter-in-law for life and after her death the property shall devolve upon the male issue of herself and her husband (testator's son), there is no manner of doubt that, during the lifetime of the daughter-in-law, her son has no right whatsoever in the estate and is not consequently entitled to dispose of it either temporarily or permanently. *Mt. Jasodhan v. Bhehan Singh*, 44 Ind. Cas. 209.

SHADI LAL and SCOTT-SMITH, JJ

(2) *Request—Performance of thaligais in temples—No allocation of income—Bequest if void for vagueness or uncertainty—Vars, Meaning of—Religious instruction, Imparting of, application of balance of income towards, Validity of—Cy pres, Doctrine of, how far in harmony with Hindu sastras—Application of, to gifts by Hindus—Trust, Private or public—Statements by testator before Sub-Registrar and in judicial proceedings, Evidentiary value of—Evidence Act (1872), Ss 6, 32 (3), (7)—Civ. Pro. Code (1909), S. 92, Power under, of Indian Courts to frame scheme on Cy pres application—Suit under, compromise of, Validity of—Interrogatories, Answers to, if can be regarded in India as a codicil or will.*

A Will by a Hindu appointed his divided brother's son as his *vars* to conduct with the help of his properties, charities at three places mentioned by him. Giving of *thaligais* in the temples on the *Tirunakshayram* day was the mode specified for conducting the charity. There was no special allotment made for the purpose. Two statements were put in to prove that the testator had a clear testamentary intention in favour of charity. One was his statement before the Sub-Registrar at the time

Hindu Law—(Continued).**—27.—Will—(Continued):**

of the registration of the Will, when he declared that he intended by the Will to bequeath properties to charities and the second was his written statement in a suit against him for a declaration that part of the properties in dispute and some other properties did not belong to him solely, in which he had stated that he acquired the properties for charity and intended to make a testamentary disposition in that behalf. A suit having been instituted under S. 92, Civ. Pro. Code, for removal of the *vars* aforesaid, from trusteeship and for a scheme for the management of the trust:

Held, (1) that there was no vagueness or want of definiteness in the dedication and it was not therefore void (a);

(2) that the term "*vars*" was not used in its technical sense and the mention of it did not make the 1st defendant the heir to the whole property subject to the performance of certain charities, but gave him only rights of managing the property as trustee (b);

(3) that the mention of the word "*thaligai*" in the direction to carry into effect the charitable intention was meant to be only illustrative and not exhaustive and that it was competent to the Court, to frame a scheme by which the balance of the income, after allotting a particular amount for the *thaligai*, might be applied towards imparting religious instruction;

(4) that statement made by the testator before the Sub-Registrar at the time of registration of the Will was receivable in evidence under S. 32, cl. (7) of the Evidence Act and also under S. 6 as forming part of *res gestae*. The written statement filed by the testator in a suit against him relating to the properties comprised in the bequest was admissible under S. 32 (3) of the Evidence Act, as a statement opposed to the pecuniary interest of the person making it;

(5) that the trust was not a private trust, as one of the objects was to feed the devotees and it was therefore a public trust (c).

A compromise of a suit under S. 92, Civ. Pro. Code, cannot be accepted by a Court, where the compromise aims at giving a portion of the trust properties to any of the parties to the suit.

Per Abdur Rahim, J.—The rule as to *cy pres* is quite in harmony with the teachings of Hindu Sastras and has been applied in many cases relating to charitable gifts by Hindus.

Per Seshagiri Aiyar, J.—The principal consideration where object mentioned does not exhaust the corpus of the fund is to find out whether there was a general testamentary intention or purpose. Even though the object may be specified and the bequest otherwise definite, if the law will not allow the application of the fund for the purpose, it may be that the Courts are not at liberty to infer a general testamentary intention in favour of charity in general and to direct the application of the property to other purpose of a charitable kind.

Hindu Law—(Continued).**—27.—Will—(Continued).**

The primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that a testator had a particular object in view and that he intended the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed by the testator do not misappropriate the funds?

If the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income will not be any reason for holding that the bequest failed either wholly or in part. If it appears that the donor intended that, in any event, the fund should be devoted to charity and that a particular institution was named merely as the channel by which that intention was to be effected, the whole fund will be regarded as having been dedicated to charity and the Court will proceed to carry out the intention of the testator on the principle of *cy pres*.

The rule of English Law cited from Jarman on Wills that even answers to interrogatories may be regarded either as a codicil or Will may not apply to testamentary dispositions in India. Under the Hindu Wills Act and the Indian Succession Act it is doubtful whether such informal declarations could be regarded as testamentary.

There is nothing in the religion of the Hindus, in their traditions, and in the consciousness of the people, which will compel Courts to respect prejudices which sap at the root of religion and which pervert and not advance its precepts. Therefore whenever grants made to religious institutions are not ear-marked or, if ear-marked, are not intended to exhaust the recurring income, and whenever they are made as a general thank-offering, it is proper and legitimate to direct their application to the promotion of knowledge.

Indian Courts have ample powers to give directions towards the application of the trust income, even though the trustee may not himself be competent similarly to apply it. The doctrine of *cy pres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and his failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated.

S. 92, Civ. Pro. Code, gives Indian Court ample powers to sanction a scheme on a *cy pres* application of a charitable trust. *Muthukrishna Nalcken v. Ramachandra Nalcken*, 47 Ind. Cas. 611.

ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

Hindu Law—(Continued).**—27.—Will—(Continued).**

References:—(a) 29 B. 725=1 Bom. L.R. 607=3 C.W.N. 621=26 I.A. 71=7 Sar. P.O.J. 543=12 Ind. Dec. (N.S.) 485 (P.C.) and 30 M. 340=2 M.L.T. 198=17 M.L.J. 379, *Dist.* (b) 24 B. 420=2 Bom. L.R. 46=12 Ind. Dec. (N.S.) 812 and 30 A. 84=5 A.L.J. 67=12 C.W.N. 231=18 M.L.J. 7=10 Bom. L.R. 59=7 C.L.J. 131=3 M.L.T. 144=35 I.A. 17 (P.C.), *Dist.*; 23 Ind. Cas. 166=37 M. 199=18 C.W.N. 554=15 M.L.T. 285=(1914) M.W.N. 299=26 M.L.J. 411=19 C.L.J. 369=12 A.L.J. 315=16 Bom. L.R. 328=41 I.A. 51 (P.C.), *F.* (c) 14 M. 1=5 Ind. Dec. (N.S.) 1 and 30 B. 495=10 Ind. Dec. (N.S.) 894 and 30 Ind. Cas. 74=18 M.L.T. 124=(1915) M.W.N. 531=2 L.W. 632, *Dist.*

(3) Self-acquired property devised to son and daughter's son in equal shares—Restraint on their powers of alienation also imposed—Rights of devisees.

The will of a Khatri, after bequeathing his self-acquired property to his son and daughter's son in equal halves, went on to say that the devisees shall not be competent to transfer by mortgage, sale, etc., their respective shares of property until 40 years after my death. If any one alienates his property, then the other, who does not transfer his own, can get the alienation cancelled by bringing a suit. Moreover the above mentioned persons are not at liberty to pay off their respective debts from my property: *Held*—In a suit brought by the son's son questioning a mortgage made by his father, *held* that what passed under the will was an absolute estate, that subsequent provisions of the will so far as they constituted a restraint on alienation were a mere nullity and that under the will the devisees became full owners of the properties devised to them respectively. *Held*, also, that the property devised was self-acquired property in the hands of the devisees. *Held*, further, that the plaintiff, who was not in existence at the time of the mortgage had no *locus standi* to challenge it. *Held*, also, that, as the property, at the time of a compromise, was not joint Hindu family property, the plaintiff had no *locus standi* to challenge the compromise (a): *Amar Nath v. Guran Ditta Mal*, 14 P.R. 1918=16 P.W.R. 1918=43 Ind. Cas. 117.

SHADI LAL and LE-ROSSIGNOL, JJ.

References:—(a) 4 B.L.R. 265; 4 M.H.C. 345; 1 C. 304; 24 C. 406; 18 M. 252; 26 B. 319; 5 C. 438, R; 18 Ind. Cas. 625, *Not F.*

(4) Ancestral property—Manager of joint family cannot distribute ancestral property by will.

Held, that a Hindu proprietor or the manager of a joint Hindu family cannot make by Will any equal or unequal distribution of his ancestral property. *Nand Lal v. Dewan Chand*, 76 P.L.R. 1918=78 P.W.R. 1918=86 P.R. 1918=45 Ind. Cas. 162.

LE-ROSSIGNOL and WILBERFORCE, JJ.

Reference:—2 M. 317=5 Ind. Jur. 352=1 Ind. Dec. (N.S.) 491, *Dist.*

Hindu Law—(Concluded).**—27.—Will—(Concluded).**

(5) Whether a Hindu can leave testamentary direction for disposal of his tenant right by his widow after his death. See C.P. ACT XI OF 1898 (TENANCY), No. 10, 44 Ind. Cas. 1001.

(6) Will by Hindu widow in favour of person whose adoption invalid—Validity of will—Right of collaterals of widow's husband to question disposition by widow of property inherited from her father. See HINDU LAW (ADOPTION), No. 21, 6 P.R. 1918.

(7) Rules for construing Hindu wills. See WILL, No. 15, 3 Pat. L.J. 199.

Hindus.

Whether Mahomedan Law of pre-emption applies to Hindus. See PRE-EMPTION, No. 14, 45 Ind. Cas. 255.

Hindu Widow's Remarriage Act.

See ACT XV OF 1856.

Hire-purchase.

Sale—Failure of hirer to pay rent according to terms of agreement—Owner, right of, to recover full amount from hirer as well as guarantor—Vendee from hirer, whether acquires good title—Contract Act (IX of 1872), S. 108, Excep. 1, Applicability of.

Plaintiff sued to recover certain sums from the defendants on the basis of contracts entered into by the latter, some as principal debtors and some as guarantors respectively. The operative portions of the contracts were as follows: (i) the plaintiff company agreed to let to the hirer a sewing machine with accessories for which the hirer, having paid Rs. 20 as the first month's rent, in advance, agreed to pay the owner Rs. 5 regularly every month in advance; (ii) on failure of the hirer to perform the agreement the owner could retake the possession of the machine; (iii) the hirer could at any time during the hire become the purchaser of the machine by payment in cash of the price endorsed on the agreement; (iv) the "guarantor" agreed to guarantee the due payment of any sum of money which might become payable to the owner under the agreement. It appeared that the hirer sold the machine to one P. who sold it to F, from whom the plaintiff also sought to recover its possession:

Held, (1) that the contracts were contracts of hiring and letting and did not amount to sales, and plaintiffs were entitled to recover from the hirer and guarantor jointly and severally the full amount which the hirer had agreed to pay for the monthly hire of the machine;

(2) that the defendant F acquired no good title to the machine which he obtained at a time when his alienor was still merely a hirer of it, and had not exercised the option of purchasing it from the plaintiff company (a).

Held, also, that S. 108, Exemption I, Contract Act, does not apply where there is only a qualified possession such as a hirer of goods has (b).

Hire-purchase—(Concluded).

The Slinger Manufacturing Company of Lahore v. Niaz Ali, 144 P.W.R. 1918=46 Ind. Cas. 888.

RATTIGAN, O.J.

References:—(a) Heloy v. Mathews, (1895) A.C. 471 (475)=64 L.J.Q.B. 465=11 R.R. 332=72 I.T. 841=48 W.R. 561=60 J.P. 20; 6 Bom.L.R. 871, F. (b) 12 B.L.R. 42=30 W.R. 467, F.

Holding.

Meaning of—House in regard to which no contract for payment of rent—Whether part of holding. See LANDLORD AND TENANT, No. 26, 43 Ind. Cas. 377.

Homestead.

(1) *Raiyat, Of a—Bengal Tenancy Act (VIII B.C. of 1885), S. 182, Applicability of, whether or not part of agricultural holding*, The Bengal Tenancy Act applies to the homestead of a *raiya*, by virtue either of the general provisions of the Act or by virtue of the special provision to be found in S. 182, whether or not the homestead is part of an agricultural holding. **Rai Charan Karmakar v. Sib Ram Parai**, 46 Ind. Cas. 489.

TEINON and RICHARDSON, JJ.

(2) *Lease of, Transferability of—Transfer of Property Act (1882), S. 108 (g)*. See LEASE, No. 11 b, 46 Ind. Cas. 636.

Homicide.

Per Chief Justice—At common law suicide is a form of homicide and S. 299 of the Indian Penal Code is wide enough to cover the case of suicide. **Chikkam Ammiraju v. Chikkam Seshamma**, 31 M.L.J. 494=5 L.W. 735= (1917) M.W.N. 423=41 M. 31 See Final Part. 1917, Col. 495.

Horoscope.

Admissibility of, in evidence—Nature of horoscope. See HINDU LAW (MARRIAGE), 21 O.C. 298.

House Rent.

And ground rent—Distinction between See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), No. 1 a, 44 Ind. Cas. 887.

Hundi.

(1) *Negotiable Instruments Act (XXVI of 1881), Ss. 64, 76—Non presentment by holder—Liability of drawer—Onus of proof*.

N, who had sold potatoes to H, drew a hundi payable at sight on the latter which was in favour of M. M sold it to plaintiffs who sent it in an unregistered letter to their agent at Oxnepore. The letter miscarried, and the loss, owing to the carelessness of the plaintiffs, was not discovered till after fourteen months of the loss. The plaintiffs did not present the bill to N, but brought a suit on foot of the hundi.

Hundi—(Concluded).

against N and H. The suit was dismissed against H, but decreed against N:—*Held* that N was not liable under the hundi, inasmuch as the plaintiffs had not shown that N could not suffer loss by reason of non-presentment for payment. *Nanray Mal v. Chait Ram*, 16 A.L.J. 899.

RICHARDS, O.J. and TUDBALL, J.

- (2) *Payable at sight—Negotiable Instruments Act (XXVI of 1881), S. 83, Applicability of, to holders of, for valuable consideration, when entitled to return of money.*

S. 83 of the Negotiable Instruments Act provides a rule relating to the presentation of bills of exchange for the purpose of acceptance and as hundis which are payable at sight, are presented not for acceptance but for payment, the section does not apply.

When the hundis turn out to be worthless and when no payment can be obtained upon them, holders for valuable consideration are in every way entitled to the return of their money. *Ram Dayal v. Lalta Prasad*, 47 Ind. Cas. 683.

LINDSAY, J.C.

- (3) *Insufficiently stamped hundi executed in lieu of a mortgage-deed thereby cancelled—Stamp Act, 1899.*

Held, that a suit is neither maintainable on an insufficiently stamped hundi, executed in lieu of the balance of a mortgage-deed, partly paid in cash, which was cancelled by an endorsement thereon to the effect that whole of the mortgage-money had been received in full, nor the amount due can be recovered on the strength of that mortgage-deed.

The principle of law is that, when the creditor entirely discharges the debtor from his liability on the old transaction and enters into a new contract which by reason of some defect is not enforceable, the creditor must lose his money and cannot take advantage of his former position. *The Firm Bhagat Ram Ganpat Rai v. Chajju Ram*, 15 P.W.R. 1918=44 Ind. Cas. 886.

SHADI LAR, J.

References:—7 C. 266, R.; 4 A. 135, D.

Husband and Wife.

- (1) *Husband, Liability of, to provide residence for wife—Restitution of conjugal rights, Claim for.*

A husband is bound to provide a suitable residence for his wife if he wants restitution of conjugal rights. *Ahmad Ali v. Jinnatunnessa*, 46 Ind. Cas. 491.

FLETCHER and SHAMSUL HUDA, JJ.

- (2) *Relationship of, Existence of—Marriage, Presumption in favour of—Marriage, Facts necessary to establish—Not merely long cohabitation—Birth of child—Acknowledgment of marriage and legitimacy of child.*

Provided the conduct of the parties be shown to be compatible with the existence of the relationship of husband and wife, every

Husband and Wife—(Concluded).

presumption ought to be made in favour of marriage where there has been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult, if not impossible, to obtain a trustworthy account of what really occurred.

Not cohabitation simply and birth of a child, but cohabitation and birth with treatment tantamount to acknowledgment of the fact of the marriage and the legitimacy of the child, suffice to establish the marriage of the parents. *Mohammad Ali Khan v. Shujat Ali Khan*, 46 Ind. Cas. 913.

DRAKE-BROCKMAN, J.C.

- (3) *Restitution of conjugal rights, suit for—Disagreement between families of husband and wife, whether ground for refusing relief—Discretion of Court.*

Held, that a mere disagreement between the families of the husband and the wife is not by itself a sufficient cause for refusing relief to the husband in a suit for restitution of conjugal rights.

In a suit for restitution of conjugal rights it was found that the marriage had not been consummated, that there was bad feeling between the families of the husband and of the wife and that the wife refused to go to her husband at the dictation of her parents:

Held, that under these circumstances relief could not be refused to the plaintiff. *Bajid v. Satto*, 182 P.W.R. 1918.

WILBERFORCE, J.

References:—187 P.W.R. 1912=17 Ind. Cas. 254; 82 P.R. 1908=147 P.W.R. 1908; 46 P.R. 1916=134 P.W.R. 1916=34 Ind. Cas. 538, Dist.

- (4) *Purchase of property by husband in name of wife—Advancement, presumption as to—English Law, Applicability of, to India. See ADVANCEMENT*, 47 Ind. Cas. 376.

- (5) *Husband's petition for dissolution of marriage—No co-respondent mentioned—Leave to proceed without co-respondent to be obtained before hearing of petition. See DIVORCE ACT (IV OF 1869), No. 2, 45 C. 595.*

- (6) *Long cohabitation by man and woman and treatment as—Presumption arises from. See EVIDENCE*, No. 4-b, 146 P.L.R. 1917.

Hyderabad Assigned Districts Courts Law (1889).

Jurisdiction of Assistant Commissioner to try suits of Rs. 5,000 in value, if deprived by his appointment to place where suit for more than Rs. 1,000 is not triable. See RES JUDICATA, No. 14, 42 Ind. Cas. 657.

Hypothecation.

- (1) *Validity of hypothecation of moveable property—Hypothecated moveables left in*

Hypothecation—(Concluded).

possession of mortgagor—Bona fide purchaser for value without notice, rights of—*Contract Act*, S. 108.

A bona fide purchaser of hypothecated goods without notice of the encumbrance takes the goods free of it. *Sriram Narasiah v. Bommi-reddi Venkataramiah*, 35 M.L.J. 450=8 L.W. 517=24 M.L.T. 454=(1918) M.W.N. 718=47 Ind. Cas. 976.

PHILLIPS and KUMARASWAMI SASTRI, JJ.

(2) Hypothecation of goods to another as security—Validity. See MORTGAGE (EQUITABLE MORTGAGE), No. 1, 22 C.W.N. 758.

Hypothecation Bond.

Provision for payment by instalments—Further provision for payment of whole amount on default—Enhanced interest if claimable without previous demand. See LIMITATION ACT (1908), No. 137, (1918) M.W.N. 586.

Illegal Contract.

Agreement to bring about marriage between plaintiff and defendant's relative—Agreement if legal consideration—Suit for recovery of price of mare—Such agreement if may be pleaded in avoidance of claim for money. See CONTRACT ACT (1872), No. 13, U.B.R. (1918), 4th Qr., 119.

Illegitimacy.

Hindu Law—Illegitimate issue—Assimilation into caste—Legality of marriage. See HINDU LAW (MARRIAGE), No. 1, 21 O.C. 298.

Immoveable Property.

(1) Limitation Act (IX of 1908), Art. 144—*Parjot*—*Charai*—*Charsai*—Immoveable property, interest in.

Held, that the right to parjot, charai and charsai dues should, for the purposes of limitation, be deemed to be an interest in immoveable property. *Sheoraj Singh v. Debi Bakhsh Singh*, 21 O.C. 119=46 Ind. Cas. 439.

LINDSAY, J.C.

(2) Proceeds of, if immoveable property—If "or any interest therein" under Limitation Act, Art. 144—If "benefits to arise out of land" under S. 3, cl. (25) of the General Clauses Act (X of 1897)—Land Acquisition Act (I of 1894), Acquisition of land under—Sale proceeds of, Suit for, Limitation for—Limitation Act (1908), Arts. 120, 132, 141 and 144.

A claim for the proceeds of what was once immoveable property but has been substituted by moveable property cannot be regarded as a claim for immoveable property or any interest therein or any benefit arising out of land. In a claim of this sort, where the property has lost the impress of its original nature and been converted into money, a suit has to be instituted within 6 years of the time when the cause of action accrued.

Immoveable Property—(Concluded).

Therefore a suit against the vendor for the value of the property compulsorily acquired under the Land Acquisition Act, 1894, is governed by Art. 120 of the Limitation Act, and the period of limitation is 6 and not 12 years. *Raj Radha Kishen Rai v. Nauratan Lal*, 3 Pat. L.J. 522=46 Ind. Cas. 627.

MILLER, C.J. and IMAM, J.

References:—33 C. 92, Dist.; 10 Bom. L.R. 210, R.

(3) Pugmill attached to earth—Whether immoveable property. See GENERAL CLAUSES ACT (X OF 1897), No. 1, 43 Ind. Cas. 625.

(4) Joshipan income, Suit for—Suit of the nature of suit for—Villages situate outside British India, Suit in respect of, Jurisdiction. See JURISDICTION (OF CIVIL COURTS), No. 16, 46 Ind. Cas. 782.

(5) Turn of worship, if interest in. See LIMITATION ACT (1908), No. 5, 22 C.W.N. 994.

(6) Simple mortgage-debt if immoveable property for purposes of execution under O. XXI, r. 54, Civ. Pro. Code (=S. 274, Civ. Pro. Code). See MORTGAGE (GENERAL), No. 15-a, 21 O.C. 400.

(7) Decrees relating to immoveable property not immoveable property within the meaning of chapter relating to execution in Civ. Pro. Code. See SMALL CAUSE COURT, No. 4, 44 Ind. Cas. 352.

Impartible Estates.

Right to maintenance out of estate of son of adopted son of late zamindar claimed as against sole devise of estate—Right to maintenance in impartible estate if based on custom or Hindu Law. See HINDU LAW (MAINTENANCE), No. 4, 35 M.L.J. 392.

Impartible Property.

Impartible estate, Transfer of—Right of younger member of transferor to recover portion of property transferred for maintenance.

Where there has already been a grant made for maintenance from impartible property, the transfer of the impartible property may not transfer the grant made, but where it is alleged that the transfer of such impartible property is subject to the right of maintenance that is in the younger members of the family, that suggestion must be supported by proof of a custom existent in the family. *Thakur Debendra Nath Sah Deo v. Deo Nandan Singh*, 3 Pat. L.J. 648.

ROE and COUTTS, JJ.

Reference:—36 C. 943, R.

Improvements.

(1) Right of Mulgeni tenant to, if can be attached and sold in Court auction. See ATTACHMENT, No. 3, (1918) M.W.N. 887.

Improvements—(Concluded).

(2) Encroachment in good faith by defendant upon lands of plaintiff believing them to be his own—Improvements made in good faith by defendant—Liability of owner to pay value of improvements—Defendant if entitled to charge on land for value of such improvements. See CONTRACT ACT, No. 47, 40 Ind. Cas. 464.

(3) By mortgages in possession—Mortgages if can recover costs of improvements from mortgagor. See MORTGAGE (REDEMPTION), No. 4, 20 Bom. L.R. 895.

Inam.

(1) See DEVADAYA UNENFRANCHISED INAM.

(2) *Inam grant—Presumption—Grant of King's share—If only melvaram right.*

In the absence of the actual terms of an inam grant, there is no presumption that the grant was of the royal share of the revenue only. A grant of a village, by or on behalf of the Crown under British rule, is, in law, to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant might have had. The fact that rulers in India generally collected their land revenues by taking a share of the produce of the land is not by itself evidence that the soil of lands in India was not owned by them and could not be granted by them. Indeed that fact would support the contrary assumption that the soil was vested in the rulers, who drew their land revenues for their soil generally in the shape of a share in the produce of the soil, which was not fixed as an invariable share, but depended on the will of the rulers. *Adusumilli Suryanarayana v. Achutha Pothanna*, (1918) M.W.N. 859=40 M. 1012=25 M.L.T. 30=23 C.W.N. 273=9 L.W. 126 (P.C.).

LORD ATKINSON, SIR JOHN EDGE and SIR WALTER PHILLIMORE, BART.

(3) Of service inam—Inam lands, if vest in joint family only or also in divided branches of original grantees. See SERVICE INAM, No. 1, (1918) M.W.N. 849.

Income Tax Act (1886).

(1) S. 31 (3)—*Income Tax Amendment Act (V of 1916), S. 4—Composition of Income-tax, Agreement for—Determination of composition.*

The effect of sub-S. 3 of S. 31 of the Income Tax Act of 1886 (added by Act V of 1916) is to put an end to all agreements of composition of Income-tax subsisting on 1st April 1916 and all future agreements whenever a further change of the rate of the tax is made. The operation of the section is, however, limited to "any tax not already due" under the agreement so that the agreement still subsists as to sums which have become payable but have not been already paid at the date of the change of rate. *Abdul Sukur Sahab v. The Secretary of State for India*, 23 M.L.T. 159=7 L.W. 326=34 M.L.J. 210=46 Ind. Cas. 285.

BAKEWELL, J.

Income Tax Act (1886)—(Concluded).

(2) S. 31—*Agreement made under section—Suit to enforce agreement if lies on original side of High Court.* See HIGH COURT, JURISDICTION OF, No. 2, 35 M.L.J. 23.

Incorporeal Hereditament.

Possessory rights in incorporeal hereditaments—Right to easement not fully prescribed for—Remedy against persons interfering with such user. See DECLARATORY SUIT, No. 5, 34 M.L.J. 426.

Incumbrance.

Purchase by landlord at sale in execution of rent decree—Landlord if should annul interest of purchaser of portion of tenancy. See LANDLORD AND TENANT, No. 6, 28 C.L.J. 266.

Indemnity.

(1) *Limitation Act (IX of 1908), Art. 116—Sale of property—Covenant to make good loss in case of vendee being compelled to pay off money in excess of sale consideration—Breach of covenant—Covenant of title—Limitation.*

A sale deed was executed in favour of the plaintiffs on July 4th, 1901, purporting to convey the property free from encumbrances and containing the covenant that, should any excess sum be charged against them, the other properties of the vendor would be liable for the same together with damages and costs. At the date of the sale, there was a prior simple mortgage existing on the property. That mortgagee brought a suit for sale on August 1st, 1902, and it was decreed. May 20th, 1915, was fixed for sale of the property and on May 19th, 1915, the plaintiffs paid off the decree. On July 10th, 1915, the plaintiffs brought the present suit for recovery of the amount, which they paid on account of the prior mortgage, together with interest, from the estate of the vendor. Held that the suit was not barred by limitation, inasmuch as the plaintiffs were not suing upon a mere covenant of title, but upon a covenant of indemnity as set forth in the sale-deed, and the cause of action arose on the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. *Ram Dulari v. Hardwar Lal*, 16 A.L.J. 706=40 A. 605.

PIGGOTT and WALSH, JJ.

Reference:—11-A 27 (F.B.), Dist.

(2) *Honestly taking steps to enforce original claim—Which of two innocent parties should suffer.* *Ramaawami Sastri v. Kall Ragava Iyengar*, (1917) M.W.N. 668=43 Ind. Cas. 124. See Final Part, 1917, Col. 500.

(3) Suretyship and indemnity, difference between—Sale of *Zurpeshgi* interest in land leased to another at certain rate of rent—Representation to vendee that higher rate of rent due from lessee under record of Revenue authorities—Undertaking given to vendee by

Indemnity—(Concluded).

vendor to indemnify vendee against loss, if any, arising from the non-realisation from lessee of higher rate of rent—Contract whether one of suretyship or indemnity. See **HINDU LAW (DEBTS)**, No. 12, 3 Pat. L.J. 392.

(4) Provision in sale-deed containing agreement by vendor to establish title should it be assailed—Provision is indemnity clause—Continuing covenant—Right of vendee conducting unsuccessful legal proceedings to damages against vendor—Points to be proved by vendee. See **LIMITATION ACT (1908)**, No. 92, 35 M.L.J. 124.

(5) Vendee agreeing to pay vendor's creditors out of money left in hands of vendee—Covenant to compensate vendor on non-payment—Contract of agency, not indemnity, constituted. See **VENDOR AND PURCHASER**, No. 8, 24 M.L.T. 260.

Indian Councils Acts, 1861 (24 & 25 Vict., c. 67).

S. 104—Power of Governor-General in Council to create new Courts of Justice if included in his power to make laws and regulations. See **DEFENCE OF INDIA ACT**, 3 Pat. L.J. 537 (F.B.).

Indian Soldiers Litigation Act.

See **ACT XII OF 1915**.

Inherent Power.

(1) Of Court to investigate question of fraud alleged to have taken place long ago, Conditions for exercise of. See **LIS PENDENS**, No. 1, 20 Bom. L.R. 929.

(2) See **CIV. PRO. CODE (1908)**, S. 151.

(3) High Court—Civ. Pro. Code (1908), S. 151, Under, to interfere when its decree is being wrongly executed. See **HIGH COURT, POWERS OF**, No. 2, 3 Pat. L.J. 435.

Inherent Powers of Court.

(1) Money paid over under illegal order must be returned to Court. **Surrendra Nath Goswami v. Bangelbadan Goswami**, 24 C.L.J. 533—36 Ind. Cas. 457—22 C.W.N. 160. See **Final Part**, 1916, Col. 844.

(2) Pre-emption suit. Dismissal of, on loss of title to property qualify for pre-emption—Getting back title—Revival of suit—Inherent power of Court to revive—Civ. Pro. Code (1908), S. 151. See **PRE EMPTION**, No. 14-a, 47 Ind. Cas. 137.

(3) To remand independently of provisions of Civ. Pro. Code—Caution in exercise. See **REMAND**, No. 4, 3 Pat. L.J. 253.

Injunction.

(1) Civ. Pro. Code (Act V of 1908), O. XXI, r. 32, cls. (1) and (5), S. 47—Breach of prohibitory injunction—Remedy if by suit or application in execution.

Injunction—(Continued).

The remedy for a breach of a permanent injunction is by application for execution and not by suit.

Per **Richardson**, *J.* (**Beachcroft, J.**, not expressing any opinion):—O. XXI, r. (5) of the Civ. Pro. Code, applies to injunctions both mandatory and prohibitory. **Sachl Prosad Mukerjee v. Amar Nath Roy Chaudhury**, 22 C.W.N. 851—27 C.L.J. 506—46 C. 103—46 Ind. Cas. 864.

RICHARDSON and BEACHCROFT, JJ.

References:—29 M. 314; 26 B. 283; 33 C. 306; 32 B. 181, R.; 16 B. 338; 21 M. 36, *Dist.*

(2) *Permanent injunction, suit for—Temporary injunction, if can be denied.*

In a suit for a permanent injunction, temporary injunction should not be denied where it will have the effect of denial of justice. **Gunabala Chowdhurani v. Hem Nallal Chowdhurani**, 43 Ind. Cas. 24.

WOODROFFE and SHAMSUL HUDA, JJ.

(3) *Suit to remove karnavan from his office—Injunction restraining him from contracting loans—Raising of money for necessary purpose in spite of order—Tarwad if bound by such loan.*

In a suit by the members of a Malabar tarwad against a karnavan, for removing him from his office, an injunction was obtained restraining him from contracting loans. *Held* that, notwithstanding such injunction a loan raised by the karnavan for necessary purposes of the family and utilised for such purposes was binding on the tarwad. **Puzhakkal Edom v. Mahadeva Fattar**, 35 M.L.J. 96—47 Ind. Cas. 778.

ABDUR RAHIM and OLDFIELD, JJ.

References:—9 A. 487; 25 A. 431, R.; (1915) A.C. 750, *Dist.*

(4) Court cannot issue injunction against person not a party to the suit. See **CIV. PRO. CODE (1908)**, No. 476, 44 Ind. Cas. 496.

(5) Suit to recover ryotwari lands from lessees—Right to water from Government channel—Declaration and injunction if could be granted in absence of Government to whom channel belonged. See **DECLARATORY SUIT**, No. 5, 34 M.L.J. 425.

(6) When proper remedy. See **EASEMENTS ACT** No. 2, 7 L.W. 332.

(7) Against easements, how granted. See **EASEMENTS ACT**, No. 14, (1918) M.W.N. 167.

(8) Reconstruction of house involving change in situation of roshandans if implies fresh easement—Fresh period of twenty years if necessary—Injunction to demolish obstruction to roshandans. See **EASEMENTS ACT**, No. 18, 98 P.W.R. 1918.

(9) Decree for—Disobedience and obstruction—Enforcement through police. See **HEREDITARY OFFICE**, No. 1, 16 A.L.J. 700.

Injunctions—(Concluded).

(10) Conditions necessary for issue of—Civ. Pro. Code (1908), O. XXXIX, r. 1—Money attached before judgment and ordered after decree to be paid to decree-holder, Injunction to stop payment of, Validity of—Provincial Insolvency Act (III of 1907), Ss. 34, 35 and 47. See **PROVINCIAL INSOLVENCY ACT (III OF 1907)**, No. 26-a, 3 Pat. L.J. 456.

(11) Suit for, restraining defendants from cutting timber and undergrowth from jungle, Valuation of—Court Fees Act (1870), S. 7 (IV) (d). See **VALUATION OF SUIT**, No. 3, 46 Ind. Cas. 884.

Ink.

Difference of ink—Whether amounts to material alteration. See **DOCUMENT**, No. 1, 49 Ind. Cas. 488.

Insolvency.

(1) *Presidency Towns Insolvency Act (III of 1909)*, Ss. 53 (1), 108, 109—*Rights of attaching creditor—Subsequent adjudication—Right to sale-proceeds—Attachment does not prevail against Official Assignee. In re Prem Lal Dhar*, 44 C. 1016=43 Ind. Cas. 348. See **Final Part**, 1917, Col. 502.

(2) *Annulment of insolvency—Suit by Receivers commenced before annulment—Suit maintainable after annulment.*

One G. R. started a firm in which he associated his two brothers and his father as partners without contribution of capital. Subsequently a brother of G. R. sued him for partition. Instead of fighting that suit G. R. made an application to be adjudged an insolvent and a composition was accepted by the creditors. Thereupon the insolvency was annulled. Before this, however, the Receivers had commenced a suit against the brothers of G. R. in respect of their liability to G. R. in certain other concerns in which the brothers of G. R. had no interest. The suit was decreed and upon appeal to the High Court it was objected that the suit by the Receivers after annulment of the insolvency was not maintainable:—*Held* that the suit was maintainable. **Munnu Lal v. Nalin Kumar Mukerji**, 16 A.L.J. 938.

RICHARDS O.J. and BANERJI, J.

(3) *Third parties dealing with insolvent in good faith and for value—Official Assignee not intervening—Dealings, if binding on the Assignee—After acquired property of insolvent, if for the benefit of Assignee—Possession of undischarged insolvent, if adverse to Official Assignee—Member of joint Hindu family becoming insolvent—Subsequent joint acquisition of the family including the insolvent—Official Assignee entitled only to insolvent's share. Murari Dass Brjharatna Dass v. The Official Assignee of Madras*, 6 L.W. 663=49 Ind. Cas. 532. See **Final Part**, 1917, Col. 502.

(4) *Joint Hindu trading family—How far minor members partners—Minor member rendering assistance in the trade if can be*

Insolvency—(Continued).

adjudicated insolvent for debts incurred during minority—Contract Act, S. 248.

A father and son constituted a Nattukottai Chetti trading family. During the minority of his son the father started a business intending it to be a joint family business of himself and his minor son. The son helped the father in the business both when he was a minor and after he attained his majority. It was sought to adjudicate the son an insolvent in respect of debts incurred for the business. It was found that all the debts in respect of which he was sought to be made liable were incurred during his minority.

Per Chief Justice and Spencer, J. (Sadasiva Aiyar, J., dissenting):—Held the son is not personally liable, for debts contracted during his minority and is not liable to be adjudicated an insolvent in respect thereof.

Per Chief Justice.—The interest of a minor in a joint Hindu family business whether existing at the date of his birth or founded during his minority is acquired by virtue of his belonging to the family and does not depend on any agreement on his part or on his admission by the other members of the family to the benefits of the partnership. Such minors are not governed by Ss. 247 and 248 of the Contract Act.

The fact of a minor helping in the family business does not constitute admission to the benefit of the partnership within the meaning of S. 247 of the Indian Contract Act, but may be referred to his position as a minor member of the family.

Per Sadasiva Aiyar, J.—S. 248 of the Contract Act applies and the son is liable equally with his father for the debts contracted from the beginning of the business and is liable to be adjudicated in respect thereof.

The adult junior members of a joint Hindu family and the minor members after they attain majority are personally liable and to the extent of their separate properties also (that is, not merely to the extent of their interests in joint family properties) for debts incurred for family necessities by the managing member who is the agent of the family entitled to pledge the credit of all the family for debts incurred for family necessity.

A Hindu father belonging to a trading community has a right to begin lawful and ordinary trade business as a joint family business in which himself and his minor sons were to be partners. *Official Assignee of Madras v. Palaniappa Chetty*, 24 M.L.T. 216=38 M.L.J. 473=4 L.W. 530=41 M. 824=(1918) M.W. N. 721 (F.B.).

WALLIS, O.J., SADASIVA AIYAR and SPENCER, JJ.

(5) *Maintainability of suit against insolvent—Leave of Court, necessity of. Muhammad Yakub v. Bijal Lal*, 20 O.C. 304=43 Ind. Cas. 262. See **Final Part**, 1917, Col. 502.

(6) *Transfer to wife in good faith two years prior to insolvency if valid against Official Receiver. See FRAUDULENT TRANSFER*, No. 1, 28 C.L.J. 536.

Insolvency—(Concluded).

(7) Petition to be declared insolvent—Petition when to be granted. See **PROVINCIAL INSOLVENCY ACT (III OF 1907)**, No. 2, 52 P.R. 1918.

(8) Permission to sue *in forma pauperis*—Subsequent insolvency of plaintiff—Receiver in insolvency if can continue suit under said permission. See **RECEIVER**, No. 1, 16 A.L.J. 440.

Insolvency Proceedings.

Claim to goods seized by Official Assignee after adjudication dismissed on merits—Suit for same relief, maintainability of—Presidency Towns Insolvency Act, S. 7. Hajee Abdul Latheef Sahib v The Official Assignee of Madras, 40 M. 1173=44 Ind. Cas. 847. See Final Part, 1917, Col. 503.

Insolvent.

- (1) Applicant's debts being less than Rs. 500—No application for execution pending at the date of filing of petition to be declared insolvent.

S was declared an insolvent on his own petition. It appeared that his debts were less than Rs. 500, and no application for execution of any decree was pending against him. On the appeal of one of the creditors the order of adjudication was set aside as illegal. *Mola v. Shah Baz*, 93 P.L.R. 1918.

WILBERFORCE, J.

(2) Sale of property by—Enquiry into fraudulent nature or otherwise of—Right of suit by aggrieved party. See **PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909)**, No. 7, 22 C. W.N. 335.

(3) Suit by undischarged insolvent—Security for costs if can be demanded of him. See **SECURITY FOR COSTS**, No. 1, 24 C. W.N. 1018.

Instalment.

Mortgage bond made up of principal and prospective interest—Stipulation to pay by instalments—Default in payment of instalments. See **MORTGAGE (GENERAL)**, No. 8, 45 Ind. Cas. 724.

Instalment Bond.

Limitation Act (IX of 1908), Sch. I, Art. 75—Bond—Payable by instalments—Power to sue for whole amount on default of payment.

An instalment bond executed on February 23rd, 1909, was payable in five annual instalments. There was a provision that, in default of payment of any instalment, the creditor would have the power to sue for the entire amount in a lump sum. Nothing having been paid on account of the first two instalments, the creditor brought a suit for the recovery of the subsequent instalments. The Small Cause Court held that the suit was barred: *Held in*

Instalment Bond—(Concluded).

revision, that the suit was within time. *Mohan Lal v. Tika Ram*, 16 A.L.J. 929=47 Ind. Cas. 926.

RAOOF, J.

References:—30 A. 123, F.; 35 A. 455 and 15 Ind. Cas. 856, Dist.

Instalment Decree.

- (1) *Whole decree becoming payable on failure to pay two instalments—Failure to pay—Acceptance after due date.*

An instalment decree fixed the dates on which the several instalments were to be paid: and it provided that on failure to pay any two instalments on the fixed dates, the whole of the decree became payable at once. The first instalment was not paid on the due date but was paid off before the second instalment fell due. There was a further default in paying the amount of the second instalment on the due date. The decree-holder thereupon applied to recover the whole amount of his debt remaining unpaid:

Held, rejecting the application, that the real intention of the parties was that before the penalty could be enforced two instalments must be in arrears together, whereas in the present case, only one instalment was in arrears. *Subraya Venkappa. Hegde v. Sumbaya Hegde*, 20 Bom. L.R. 335=42 B. 304=45 Ind. Cas. 561.

BEAMAN and HEATON, JJ.

Reference:—27 B. 1, R.

(2) Whole amount becoming due on failure to pay one instalment when second became due—Limitation. See **EXECUTION OF DECREE**, No. 7, 20 Bom. L.R. 773.

(3) Default and subsequent payment—Whether acceptance means waiver of default provision. See **EXECUTION OF DECREE**, No. 20, 45 Ind. Cas. 324.

Intention.

Question of fact—Examination of intention—Specific Relief Act, S. 42—Declaratory suit by trespasser, not maintainable.

The question with what intention a person did a certain act can hardly be said to be anything but a question of fact. The question of intention must be examined with reference to subsequent acts of the person alleged to have that intention.

The Specific Relief Act does not contemplate an action by a person not having a title. A trespasser cannot sue for a declaration that he is a trespasser. *Raghobir Prasad v. Murl Kahar*, 45 Ind. Cas. 303.

ROE and IMAM, JJ.

Interest.

- (1) *Decretal amount paid in part—Judgment-debtor alleging it to be whole—Whether liability to pay interest on whole—Application of Civ. Pro. Code (Act V of 1908), O. XXIV, rr. 1, 2, 8.*

Interest—(Continued).

A decree for dower for Rs. 5,000 with interest and costs was passed in favour of the widow of a deceased Muhammadan realisable from his estate in the hands of his heirs. The judgment-debtors in execution proceedings objected that the widow could get the decree executed for three-fourths of the amount only, the decree-holder being entitled to one-fourth of the estate as heir. The judgment-debtors deposited three-fourths of the amount with interests and costs while taking the objection. The objection was overruled up to the High Court. Upon the decree-holder claiming interest on the full amount until three months after the decision of the High Court, *held* that the amount deposited in Court might have been immediately on deposit paid out to the decree-holder in part discharge of her claim and the judgment-debtors were relieved from paying interest on that amount. **Amtul Habib v. Muhammad Yusuf**, 16 A.L.J. 15=40 A. 125=43 Ind. Cas. 520.

RICHARDS, C.J. and BANERJI, J.

- (2) *Mortgage decree—Mortgage executed by widow and next reversioner—Decree against both—Execution, application for, against both—Objection as to interest after period of grace by widow—Widow, Death of, pending execution—Next reversioner, if can raise same objection subsequently—Decree absolute—Further interest.*

A Hindu widow, in possession of her husband's estate, and B, the next reversioner, jointly executed a mortgage bond on which the creditor obtained a decree against both and executed the same against both, claiming interest at the bond rate until actual payment. A alone made an objection as regards interest subsequent to the period of grace, but her objection was disallowed. Pending execution, A died and B was substituted in her place. B then filed a fresh objection on the ground that the decree-holder was not entitled to interest after the period of grace under the terms of the decree. About the same time, he filed an application for the amendment of the decree on the ground that it was not in accordance with the judgment. *Held*, that B was entitled to defend his newly acquired title by all means accessible to his new character.

The proper period for allowing further interest after the period of grace, would be when the decree absolute is made. If the decree absolute does not contain any mention of interest, it should be considered as disallowed. **Udit Narayan v. Jasoda Sahun**, 27 C.L.J. 576=46 Ind. Cas. 469.

CHATTERJEE and WALMSLEY, JJ.

Reference:—34 C. 150=5 C.L.J. 106, R.

- (3) *Compound interest—Court's power to give relief when money-lender not shown to have taken undue advantage of his position.*

It is difficult for a Court of Justice to give relief on grounds of simple hardship, in the absence of any evidence to show that the money-lender had unduly taken advantage of

Interest—(Continued).

his position even when the transaction appeared to be undoubtedly improvident.

The opinion of the Chief Court affirming that of the Divisional Judge that the plaintiff in a redemption suit was bound by the mortgagor's contract to pay compound interest at 25 per cent. per annum was upheld. **Aziz Khan v. Duni Chand**, 23 C.W.N. 180=165 P.W.R. 1918=101 P.R. 1918 (P.C.).

VISCOUNT HALDANE, LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE and MR. AMEER ALL.

- (4) *Payable in paddy—Mortgage—Charge on immoveable property—Penal rate of—Enforceability of—Contract Act (1872), S. 74.*

A suit on a mortgage the interest on which is payable in paddy is clearly a suit to enforce a charge of money on immoveable property.

A Court may reduce a penal rate of interest on a mortgage bond but it cannot exclude it altogether. **Halshikesh Singh v. Lakh Narain Singh**, 46 Ind. Cas. 884.

FLETCHER and SMITHER, JJ.

- (5) *Interest, reasonable rate of—Security, how far affects question Channu Lal v. Musammatt Raj Kuar*, 20 O.C. 318=43 Ind. Cas. 295. See Final Part, 1917, Col. 505.

- (6) *When enhanced rate on default not penal—Respondent's right to support the decree under appeal without filing cross objections, etc.*

Held, that an enhanced rate of interest in case of default in payment either of principal or interest on due date is not penal if it is reasonable and normal one, though it is good deal higher than the original rate.

So where a bond debt payable by two instalments on which interest was charged in advance at the rate of about two per cent. per annum and it was chargeable at the rate of twelve per cent. per annum in addition to *chilkana* at one anna per rupee, the enhanced rate was not considered unreasonable (a).

Chilkana at one anna per rupee is charged in the Multan District, but it is not usual to charge it in such cases like the present one.

Held, also, that a party, who is content to accept the lower Court's decision, can without filing a cross-appeal or cross-objections resist an appeal from that decision on the ground that the decree errs in favour of the appellant and should therefore be not disturbed.

On the above principle the Chief Court refused to reduce the amount of interest allowed by the lower appellate Court at the rate of six per cent. per annum from the date of the bond as it was far less than the amount which could legally be decreed against the defendant by calculating the interest at the rate of twelve per cent. per annum from the date of the default. **Muhammad Ali v. Farma Nand**, 48 P.W.R. 1918=125 P.L.R. 1918=45 Ind. Cas. 232.

CHEVIS and LESLIE-JONES, JJ.

References:—(a) 36 B 164; 36 M. 343, R.

Interest—(Continued).

(6-a) On arrears of rent, from what date to be calculated. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 34-a, 45 Ind. Cas. 592.

(7) **Agra Tenancy Act**—Suit by co-owner for share of profits—Whether *Lambardar* liable to pay interest. See **U. P. Act II OF 1901 (AGRA TENANCY)**, No. 19, 44 Ind. Cas. 415.

(8) Rule as to award of. See **APPEAL (GENERAL)**, No. 27, 35 M.L.J. 169.

(9) Loan of money at high rate of interest for agreement to labour without pay for two years—Provision for repayment of principal with enhanced interest in case of default to work on any day—Provision as to interest if separable from other portions of contract. See **CONTRACT ACT**, No. 17-a, 3 Pat. L.J. 412.

(10) Decree in mortgage suits, Appeal or cross-objection—Court-fee, Calculation of—Amount on date of decree to be basis—Future interest not to be taken into account. See **COURT FEES**, No. 2, 3 Pat. L.J. 443.

(11) Mortgage bond taken in satisfaction of decree—Suit under mortgage for accounts—Interest awarded by Court on principal amount of original decree—Claim for interest on amount of consolidated amount of bond given in satisfaction of decree. See **DEKKHAN AGRICULTURISTS' RELIEF ACT**, No. 1, 20 Bom. L.R. 469.

(12) Mortgage by father for necessity—Stipulation for high rate of interest—Sons if bound to pay such high rate. See **HINDU LAW (ALIENATION)**, No. 3, 40 Ind. Cas. 369.

(13) Debt contracted by Hindu father on credit of family property—Discretion of Court, Reasonable exercise of—Appellate Court, Interference by. See **HINDU LAW (DEBTS)**, No. 11, 21 O.C. 265.

(14) Plea of stipulation being in part a penalty—Plea one of fact—Plea not to be raised for first time in appeal. See **HINDU LAW (DEBTS)**, No. 8, 14 N.L.R. 41.

(15) Penalty—Compound interest at enhanced rate, how to be relieved against. See **HINDU LAW (IMPARTIBLE ESTATES)**, 7 L.W. 36.

(15-a) Loan to widow for legal necessity—High rate, Recovery of—Reasonable rate. See **HINDU LAW (WIDOW)**, No. 11-c, 47 Ind. Cas. 106.

(16) Arrears of rent—Interest at 6½ per cent per mensem on arrears, Stipulation as to—Stipulation if penalty. See **LANDLORD AND TENANT**, No. 24, 12 Ind. Cas. 614.

(17) Surrender by occupancy tenant to landlord for consideration—Hair of tenant put in possession by Revenue Officer—Landlord's right to recover purchase money with interest—Suit for refund if lies in Civil Court. See **LANDLORD AND TENANT**, No. 66, 14 N.L.R. 126.

(18) Hypothecation bond—Provision for payment by instalments—Further provision for

Interest—(Concluded).

payment of whole amount on default—Enhanced interest if claimable without previous demand. See **LIMITATION ACT (1908)**, No. 137, (1918) M.W.N. 586.

(18-a) Annuity under terms of a *Waqf*, On, Award of. See **MAHOMEDAN LAW (WAQF)**, No. 6, 37 Ind. Cas. 904.

(19) Ancestral trade carried on for minor's benefit—No personal liability for debts—Interest though not stipulated for yet recoverable as damages. See **MINOR**, No. 2, 22 C.W.N. 489.

(20) Provision in mortgage-deed for part-payment of mortgage money—Tender made after demand by mortgagee, Validity of—Rebate of interest. See **MORTGAGE (GENERAL)**, No. 19, 83 P.W.R. 1918.

(20-a) Rate of, in a mortgage decree from date fixed for payment to date of realisation—Discretion of Court to allow—Contractual rate when can be allowed. See **MORTGAGE (INTEREST)**, 47 Ind. Cas. 701.

(21) Mortgage, covenant in, to pay compound interest with six monthly rests if amount not paid within a year, if penal—Interest, High rate of, if hard and unconscionable. See **MORTGAGE SUIT**, No. 2, 47 Ind. Cas. 649.

(22) Pre-emption suit—Joinder of claims—Interest to which pre-emptor is entitled—Money left with vendee out of sale price—Vendee's failure to discharge encumbrance—Right to set-off. See **PRE-EMPTION**, No. 19, 21 O.C. 269.

(23) Deposit in Court by mortgagor of more amount than that due—Deposit if a valid tender—Mortgagor's right to interest on amount so deposited. See **TRANSFER OF PROPERTY ACT**, No. 64, 34 M.L.J. 439.

(24) Offer by mortgagor to repay debt—Assertion by mortgagee of absolute right to property—Tender if dispensed with—Amount not paid by mortgagor—Exoneration of mortgagor from payment of interest. See **TRANSFER OF PROPERTY ACT**, No. 67, 34 M.L.J. 488.

(25) Deposit of mortgage-money before notice but after institution of suit—Deposit if effectual to prevent interest from running. See **TRANSFER OF PROPERTY ACT**, No. 63, 35 M.L.J. 605.

(26) Liability of trustee of public trust to pay compound. See **TRUSTS ACT**, No. 2, (1918) M.W.N. 555.

(27) Executor not paying arrears of income—Delay in rendering account—Liability of executor to pay interest on arrears. See **WILL**, No. 9, 7 L.W. 513.

Interlocutory Order.

(1) Order accepting security tendered by decree-holder and delivering possession to him not an—Appeal lies against order. See **APPEAL (GENERAL)**, No. 14, 22 C.W.N. 657.

Interlocutory Order—(Concluded).

(2) When can be interfered with in revision. See CIV. PRO. CODE (1908), No. 162, 48 Ind. Cas. 684.

(3) Interference with, in revision—Civ. Pro. Code (1908), S. 115. See REVISION, No. 16 a, 47 Ind. Cas. 676.

(4) Appeal from final decree competent—Other remedies open—No interference by High Court with interlocutory orders in suit. See REVISION, No. 29, 120 P.W.R. 1918.

(5) Interference with, by Chief Court. See REVISION, No. 25, 58 P.L.R. 1918.

Interpretation of Statutes

Headings of chapters—Description of sections in the margin.

Held that reliance cannot be placed upon the "headings" of chapters or descriptions given of sections in the margin of the same. *Ajnas Kuar v. Payag Singh*, 46 Ind. Cas. 534.

KNOX, J.

Interrogatories.

(1) *Code of Civil Procedure (Act V of 1908), O. XI, rr. 6, 7, 21—Practice—Interrogatories—Suit for breach of contract—Irrelevant interrogatory*

A suit was brought to recover damages for breach of contract. The defendant put in a list of ten interrogatories for the plaintiff to answer. The interrogatories being served on the plaintiff, the plaintiff appeared in Court, answered three and objected to the rest as being irrelevant. Later on the defendant put in an application in which it was prayed that the plaintiff be ordered to answer the remaining interrogatories and the Court thereupon passed an *ex parte* order to this effect. "The plaintiff be asked to answer the interrogatories. If he fails to comply, he will do so at his own risk." The plaintiff subsequently presented another application in which the Court was asked to reconsider the *ex parte* order and in which the former objection was reiterated. The Court refused to reconsider the *ex parte* order and said that the order was not "prejudicial to the plaintiff." The defendant then put in an application asking the Court to dismiss the suit, which was then set down for hearing on a subsequent date. On that date, the Court held that the interrogatories were not irrelevant, and without giving the plaintiff a further opportunity of answering them, it proceeded to dismiss the suit. *Held* that the order of the Court was wrong inasmuch as it was not justified by anything in O. XI of the Code of Civil Procedure in postponing its adjudication on the question whether the interrogatories were relevant or not to the date of hearing and then refusing the plaintiff the option of complying, or refusing to comply with a clear and specific order directing him to answer such interrogatories as might be held to be relevant.

Held, also, that an objection under r. 6 of O. XI required adjudication by the Court, that

Interrogatories—(Concluded).

the rule gave the plaintiff an alternative remedy and not that he was to ask the interrogatories to which he objected to be struck out. *Bhagwan Das Gondka v. Ram Kumar Rameshwar Das*, 16 A.L.J. 762—46 Ind. Cas. 660.

BANERJI and PIGGOTT, JJ.

(2) Answers to, if regarded in India as a codicil or will—Value of such answers in India. See HINDU LAW (WILL), No. 2, 47 Ind. Cas. 611.

Intestacy.

Partial intestacy, Effect of. See WILL, No. 14, 21 O.C. 374.

Irrigation.

Interference with right of—Continuing wrong. See REMAND, No. 5, 177 P.W.R. 1918.

Irrigation Cess.

See MAD. ACT VII OF 1863.

Irrigation Right.

Private water course from state canal, From—Dispute to—Government if a necessary party—Canal department, if can confer permanent rights without proceeding under S. 20 or S. 23 of Canal Act (1890)—Interference with, a continuing wrong within the meaning of S. 23, Limitation Act (1908). See REMAND, No. 5, 177 P.W.R. 1918.

Issues.

Agreement of parties as to the issue on which the Court to decide the case—Finding of the Court on that issue—Whether parties can raise new issues in second appeal.

Where parties settled the point on which the Court must decide a case, and the Court decided the case on the agreed issue, it is open for parties, in second appeal to press the case on new issues. *Halodhar Malo v. Kali Posonno Basu Roy*, 43 Ind. Cas. 18.

FLETCHER and NEWBOULD, JJ.

Reference :—14 W.R. 268, R.

Jaghir.

(1) Certificate holder of Jagir—Whether liable to co-sharers. See CONTRACT ACT, No. 86, 43 Ind. Cas. 923.

(2) Portions of, Transfer of, if sale or grant of tenure—Resumability, Burden of proof as to, on whom lies. See RESUMPTION, No. 2, 45 Ind. Cas. 888.

Jalkar.

See FISHERY.

Joint Decree.

Co-reversioners impleaded as defendants in suit against alienee of Hindu widow—No disclaimer by co-reversioners of position of

Joint Decree—(Concluded).

defendants and no endeavour to be made plaintiffs—Right of such reversioners to benefit of relief given to plaintiff on paying proper Court-fee. See **HINDU LAW (REVERSIONERS)**, No. 3, 35 M.L.J. 153.

Joint Owners.

See **CO-SHARERS**.

Joint Possession.

Suit for—Co-sharer, Erection of shed by, on portion of joint property—Joint possession, Suit by other co-sharers. Maintainability of. See **CO-SHARERS**, No. 5, 46 Ind. Cas. 496.

Joutak Ratan Britti.

Gift to Ratis of family by Raja of joutak ranian britti reciting similar previous grants—Condition restraining alienation by future Ratis and enjoyment of profits only given—Rule of succession to britti prescribed—Essentials and validity of usage creating family custom of succession. See **GRANT**, No. 1, 45 O. 835.

Judge.

(1) *Agreement of parties as to the issue on which the Court to decide the case—Whether Court bound to go outside the settled issue.*

Where parties settle the point on which the case to be decided, the Judge is not bound to go outside the points pressed before him. **Halodhar Malo v. Kali Prasanno Basu Roy**, 43 Ind. Cas. 18.

FLETCHER and NEWBOLD, JJ.

(2) *Appointment of, as additional Judges, Validity of.* See **GOVERNMENT OF INDIA ACT (1915)**, 33 M.L.J. 787.

(3) *His knowledge of character of parties, if could be relied upon in deciding case.* See **PRACTICE AND PROCEDURE**, No. 1, 45 Ind. Cas. 734.

(4) *Issues, Finding as to, by a predecessor—Successor if bound to accept.* See **PRACTICE AND PROCEDURE**, No. 2, 47 Ind. Cas. 555.

Judgment.

(1) *Civ. Pro. Code (Act V of 1908), O. XLI, r. 31—Judgment in appeal—Appellate Court—Contents of judgment.*

O. XLI, r. 31 of the Civ. Pro. Code, intends and requires that there should be some statement, however brief, by the appellate Judge to show that he has exercised his own mind independently on the question involved in the appeal. A litigant is entitled as of right to a first appeal; and that involves that he is entitled to know, however briefly, the reasons which have moved the appellate Judge to his conclusion. **Ganpati Rana Kojapure v. Sevakram Manukhram**, 20 Bom. L.R. 461 = 47 Ind. Cas. 161.

BATCHELOR, A.C.J. and KEMP, J.

References:—22 M. 12; 1 Bom. L.R. 490, F.

Judgment—(Continued).

(2) *Written and signed by Judge who heard case—Pronouncement of, by his colleague—Validity of—Civ. Pro. Code (1908), S. 99, O. XX, r. 2.*

Where a Judge who heard the case having written and signed his judgment found it inconvenient to himself, having regard to other public duties he had to discharge, to be present in the Court-house for the purpose of pronouncing the judgment to written and signed by him and invited his colleague a Judge presiding in another Court to read in open Court the judgment that he had written and signed.

Held, that the judgment did not become invalid merely on that ground and that even if this procedure was unauthorised by the terms of the Civ. Pro. Code, S. 99 clearly covered the case, as it was a mere irregularity not affecting the merits. **All Bux v. Khidir Ahmad**, 46 Ind. Cas. 618.

FLETCHER and SHAMSUL HUDA, JJ.

(3) *Obtained by false evidence and suppression of it—Suit to set aside such judgment, if lies.*

No suit will lie to set aside a judgment on the ground that it had been obtained by perjured evidence tendered at the trial and by the suppression of evidence. **Kadrivelu Nalnar v. Kuppaswami Nalcker**, 34 M.L.J. 590 = 23 M.L.T. 372 = 8 L.W. 103 = 41 M. 743 = (1918) M.W.N. 514 = 45 Ind. Cas. 774 (F.B.).

WALLIS, C.J., SADASIVA AIYAR and SPENCER, JJ.

References:—29 M. 179, overruled; 38 M. 203; 16 C.W.N. 1002; 37 A. 535, F.

(4) *Judgment without points for determination and decision thereon, legality of.*

Where a judgment of a Court of first appeal did not contain the points for determination nor its decision thereon but consisted only of a general statement by the Judge that he had carefully considered the record and found no reason to interfere with the conclusions arrived at by the trial Court, *held*, that the judgment was not in accordance with law. **Baij Nath v. Kayastha Patshala**, 21 O.O. 309.

KANHAIYA LAL, A.J.C.

References:—8 O.C. 290; 9 O.C. 32, R.

(5) *Order refusing leave to defendant to file written statement, if judgment within cl. 15 of Letters Patent* See **APPEAL (GENERAL)**, No. 2, 45 O. 818

(6) *Appellate Court, Of—Suit for confirmation of possession and declaration of title—Possession and title, Question of, not gone into by appellate Court—Judgment, Validity of.* See **APPEAL (GENERAL)**, No. 21, 46 Ind. Cas. 328.

(7) *Statement in, concerning not raised but left open, inadvisability of making.* See **CIV. PRO. CODE (1908)**, No. 389, 45 Ind. Cas. 913.

(8) *Suit to register will—Judgment based on statements made before registering officer—No further evidence taken by Court—Judgment invalid.* See **EVIDENCE ACT**, No. 68, 34 M.L.J. 526.

Judgment—(Concluded).

(9) Of subordinate Court—Irrelevant matter in it—High Court, if can order such matter to be expunged. See HIGH COURT (POWERS OF), No. 1, 35 M.L.J. 368.

(10) Dismissal of appeal without investigation of merits. See LETTERS PATENT (CALCUTTA), No. 1, 28 O.L.J. 205.

(11) Order of single Judge of High Court staying criminal trial—Order not final adjudication of rights of parties—Order not a judgment under cl. 10 of Patna Letters Patent. See LETTERS PATENT (PATNA), 3 Pat. L.J. 509.

(12) Judgments in criminal trials, evidentiary value of. See PRINCIPAL AND AGENT, No. 2, 40 Ind. Cas. 452.

Judgment-debtor.

Non-transferable occupancy holding, Purchaser of, if a representative of, under S. 47, Civ. Pro. Code (1909)—Execution sale, if can object to—O XXI, r. 100, Proceedings under, if entitled to maintain. See EXECUTION SALE, No. 4-a, 3 Pat. L.J. 579.

Judicial Act.

See ADMINISTRATIVE ORDER.

Judicial Precedents.

High Court, Decisions—Subordinate Courts in Central Provinces not bound by, but by the decision of the Judicial Commissioner's Court. See CASE-LAW, 46 Ind. Cas. 902.

Judicial Proceeding.

Enquiry under Bengal Land Registration Act (VII of 1876), if judicial proceeding—Evidence Act (I of 1872), S. 3—Compromise restraining powers of transfer of widow, Interpretation of.

An enquiry under the Bengal Land Registration Act for the purpose of registration of rival claimants is a judicial proceeding regard being had to the definition of the term Court within the meaning of S. 3, Evidence Act.

A compromise petition filed in a land registration dispute between a Hindu widow and her husband's reversioners to the effect that any transfer made by the widow would be null and void and would not in any way prejudice the right of the reversioners and their heirs and representatives must be construed to give the widow a life-estate with such powers and limitations as are vested in a Hindu widow and not as disabling her from dealing with the property as a Hindu widow under the Hindu Law. *Rama Singh v. Harakhdhari Singh*, 47 Ind. Cas. 710.

JWALA PRASAD and COURTS, JJ.

Reference :—8 C. 224, R.

Judicial Separation.

Burmese Buddhist Law. No judicial separation in—Crim. Pro. Code (1898), S. 438, Order under, same effect as order for. See CRIM. PRO. CODE (1898), No. 12, 46 Ind. Cas. 620.

Jurisdiction.

- 1.—GENERAL.
- 2.—OF CIVIL COURTS.
- 3.—OF CIVIL AND REVENUE COURTS.
- 4.—OF CIVIL OR REVENUE COURTS.
- 5.—OF CRIMINAL COURTS.
- 6.—OF REVENUE COURTS.

—1.—General.

(1) *Application for commutation of rent made to Sub Divisional Officer under S. 40, Bengal Tenancy Act—Jurisdiction of such officer to transfer it to Settlement Officer—Decision by Assistant Settlement Officer if legal—Bengal Tenancy Act, S. 40—Jurisdiction of Civil Court—Jurisdiction of Revenue Court—Validity of order made without jurisdiction.*

A Sub Divisional Officer to whom a tenant applies for commutation of his rent under S. 40, Bengal Tenancy Act, is not competent to transfer the application to the Settlement Officer, as the "officer" mentioned in sub-S. 3 of S. 40 is the officer who received the application from the applicant.

Though a Civil Court is not competent to examine the propriety of an order of commutation made with jurisdiction under S. 40, Bengal Tenancy Act (a), yet if a question of jurisdiction arises, it is incumbent upon the Civil Court to satisfy itself that the order is made with jurisdiction, for an order made without jurisdiction is a nullity and does not affect the rights and obligations of the parties (b).

So where an application was made to a Sub-Divisional Officer under S. 40 of the Act, but he transferred it to the Settlement Officer, who again transferred it to the Assistant Settlement Officer and the Assistant Settlement Officer heard it on the merits and made an order of commutation, held that the order of the Assistant Settlement Officer was made without jurisdiction. *Jadu Nath Manu v. Pran Krishna Das*, 45 C. 769=27 O.L.J. 569=46 Ind. Cas. 455.

MOOKERJEE and WALMSLEY, JJ.

References :—(a) 3 C.W.N. 311, R. (b) 21 C.L.J. 487, R.

(2) *Money paid out of Court under illegal order made without jurisdiction—Must be brought back into Court. Surenthra Nath Goswami v. Bankelchadan Goswami*, 24 O.L.J. 533=36 Ind. Cas. 457=24 C.W.N. 160. See Final Para, 1916, Col. 863.

(3) *Nizam's Stamp Law—Promissory note executed in the Nizam's Dominions but stamped only with a British Stamp—Suit lies in British Court on the promissory note—Stamp Act (II of 1895), S. 35.*

The defendant executed, in the Nizam's Dominions, a promissory note in favour of the plaintiff. It was stamped with a British Stamp and not with a Hyderabad Stamp which was required by the law of the Hyderabad State. The plaintiff having sued to recover on the promissory note in a Court of British India :

Jurisdiction—(Continued).**—1.—General—(Continued).**

Held, that the British Court was competent to adjudicate upon the claim, inasmuch as the Hyderabad law did not render such a promissory note void.

If the law of the foreign country in which the document was executed provides no more than that the agreement shall not be received in evidence, because it is not stamped, then the agreement may be sued upon and enforced in a Court in British India, but if the law of the foreign country provides that, by reason of the want of stamp, the agreement itself which is contained in the unstamped document shall be void, then the plaintiff cannot succeed in a Court of British India: English cases reviewed. **Dhondiram Chattrabhu Marwadi v. Sadasuk Savatram Marwadi**, 20 Bom. L.R. 464 = 42 B. 522 = 46 Ind. Cas. 174.

BATCHELOR, A.C.J. and SHAH, J.

(4) *Civ. Pro. Code (Act V of 1908)*, Ss. 20, cl. (c), 21—*Cause of action*.

The opposite party sued the petitioner company in the Court at Feni upon two policies of life insurance issued by them to his deceased father. The assured sent proposal forms for the policies from some place in the Chittagong District to the Head Office of the Company at Calcutta, where the policies were made out and despatched to the assured, who subsequently died within the local limits of the Court of Feni in the District of Noakhali. The trial Court and on appeal the District Judge held that the death of the assured being a part of the plaintiff's cause of action and it having taken place within its local limits, the Court at Feni had jurisdiction.

Held—That in the absence of anything to show that there had been a failure of justice, the trial cannot, in view of S. 21 of the *Civ. Pro. Code*, be set aside as without jurisdiction.

Per Richardson, J.—(Sembler)—The Court at Feni had jurisdiction under S. 20, cl. (c) of the *Code*. **The Bengal Provident and Insurance Co., Ltd. v. Kamal Kumar Choudhury**, 22 C.W.N. 517 = 44 Ind. Cas. 694.

RICHARDSON and BEACHCROFT, JJ.

References:—34 A. 49; *Bank of England v. Vaghans*, (1891) A.C. 107; 23 C. 564; 14 C. 256; 41 B. 426; 27 M. 191; *Oakland v. Champion*, 7 T.R. 205; 1 C.W.N. 136; 24 C. 661; 31 C. 314, R.

(5) *Contract—Sale and purchase of cotton and grain—Pukka arhat system—Jurisdiction—Place of rendition of accounts*

Plaintiffs, residents of Bareilly, sued in the Bareilly Court defendants, commission agents at Bombay, on an alleged contract with the plaintiffs on the pukka arhat system, whereby they stated that the defendants agreed to render accounts at Bareilly and that according to the custom of the trade under the pukka arhat system, the Bareilly Court had jurisdiction to try the suit. Defendants pleaded that the contract was made at Bombay, the account was to be rendered at Bombay and the amount

Jurisdiction—(Continued).**—General—(Continued).**

was payable at Bombay. The plaintiff, however, gave no evidence of the contract.

Held that, under the circumstances, the Bombay Courts had jurisdiction and the plaintiff's suit was rightly dismissed. **Lalta Prasad v. Ram Sarup**, 40 Ind. Cas. 505.

TUDBALL and RAFIQUE, JJ.

(6) *Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887)*, S. 21 (a)—*Suit, Valuation of, at more than Rs. 5,000—Appeal against, to District Judge—Consent of parties, if can confer jurisdiction—Objection to jurisdiction when to be taken*.

A Subordinate Judge decreed *ex parte* a suit for recovery of money on the basis of a mortgage valued at more than Rs. 5,000 and also dismissed an application by the defendant for re-hearing under O. IX, r. 13, *Civ. Pro. Code*.

Against the order dismissing his application under O. IX, r. 3, the defendant preferred an appeal to the District Judge, and no objection was raised by the parties as to the jurisdiction of the District Judge who decreed the appeal.

Held, (1) that, the District Judge had no jurisdiction to entertain the appeal by virtue of the provisions of S. 21, cl. (a) of the *Bengal, N.W.P. and Assam Civil Courts Act*, and his order was a nullity and void;

(2) that the fact of the plaintiff not having raised any objection in the appeal did not estop him from raising it before the High Court inasmuch as the consent of parties cannot confer jurisdiction where there is an inherent want of jurisdiction, and the objection can be taken at any time.

Where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree and if it does pronounce a decree that decree is null and void. On the other hand if a Court has jurisdiction and the law requires some preliminary conditions to be observed ancillary to such jurisdiction being exercised the parties may waive these conditions and in that event the jurisdiction cannot be impeached on the ground of irregularity in the exercise of the Court's jurisdiction. **Raghu Singh v. Unuf Ali**, 45 Ind. Cas. 920 = 4 Pat. L.W. 445.

CHAPMAN and ATKINSON, JJ.

(7) *Decree—Suit to set aside—Jurisdiction—Inferior Court, if competent to try—Form of decree in such suit*. **Arunachalam Chetty v. Sabapathy Chetty**, 6 L.W. 368 = 41 Ind. Cas. 937 = 33 M.L.J. 469 = 41 M. 213. See Final Part, 1917, Col. 512.

(8) *Suit for return of excess freight collected and for price of good short delivered and alternatively for money due on general average account—Court having jurisdiction over suit—Jurisdiction of British Court over non-resident foreigner—Civ. Pro. Code, S. 20 (c)—Cause of action*.

The plaintiff and the defendant a ship-owner residing at Cutch of which State the

Jurisdiction—(Continued).**—1.—General—(Continued).**

latter was a subject, entered into a Charter party whereby the defendants' ship was to sail from Ootch to Basrah and bring from there to Calicut a fixed quantity of goods. Owing to rough weather on the return voyage to Calicut from Basrah, a portion of such goods had to be jettisoned. On arrival at Calicut, the master of the ship refused delivery of any of the plaintiff's goods till the freight for the whole consignment was paid which the plaintiff paid under protest and took delivery of the remaining bundles and sued in the Calicut Court for the return of the excess freight collected and for price of the bundles short delivered or in the alternative, for what is due to him on a general average account.

Held that the cause of action for the refund of freight arose wholly in Calicut where it was collected, that the cause of action for short delivery of goods arose in part at Calicut as it was the place of performance that the fact that the voyage safely came to an end being part of the plaintiff's cause of action for the general average it arose in Calicut where the voyage ended and that therefore the Calicut Court had jurisdiction under S. 20, Civ. Pro. Code, to try the suit in its entirety. The term cause of action in S. 20, Civ. Pro. Code, means the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to entitle him to succeed (a).

A Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction but the question whether its decree could be enforced against him in the foreign State is a question for disposal for the Courts of that state. *Malistry Rajabhai Narai v. Haji Karim Mamood*, 35 M.L.J. 189-24 M.L.T. 209 = (1918) M.W.N. 521 = 47 Ind. Cas. 708.

PHILLIPS and KRISHNAN, JJ.

References:—(a) (1919) L.R. 3 C.P. 375 (382); (1982) 2 Q.B.D. 653; 17 C. 362 (P.C.), R.

(9) *Civ. Pro. Code, S. 21—Objection to jurisdiction before appellate Court—Appellate Court deciding the appeal on the merits as well as recording a finding of want of jurisdiction—Decision on the merits if could be upheld.*

No appellate Court shall allow objection to the place of suing to be taken, unless it was taken before the settlement of issues and unless there has been a consequent failure of justice.

Where these conditions were not present, the appellate Court should not have allowed the objection to be taken.

Where, however, the objection was allowed, but at the same time a decision on the merits was also given by the appellate Court.

Held, that, though the finding as to jurisdiction must be set aside, the decision on the merits could be sustained. *Chokkalingam Chettiar v. Kuranthappan Chettiar*, (1918) M.W.N. 661 = 47 Ind. Cas. 764.

• PHILLIPS and KRISHNAN, JJ.

Jurisdiction—(Continued).**—1.—General—(Continued).**

(10) *Civ. Pro. Code, 1908, S. 20 (b)—Place where contract made not within jurisdiction of Court in which suit brought—Jurisdiction exists if place of performance or place of payment of money under contract is within jurisdiction of Court.* *Maghraj Ramniranjandas v. Thakurdas*, U.B.R. (1917), 4th Qr., p. 38 = 44 Ind. Cas. 609. See Final Part. 1917, Col. 513.

(10-a) Jurisdiction or ordinary Courts, when taken away—Strict construction. See O.P. ACT XI OF 1898 (TENANCY), No. 20, 45 Ind. Cas. 654.

(11) Central Provinces Courts Act—Jurisdiction in the matter of appeal. See O. P. ACT II OF 1904 (COURTS), No. 1, 44 Ind. Cas. 287.

(12) Inherent absence of jurisdiction—Whether conduct of parties vitiates proceedings. See BEN. ACT VI OF 1908 (CHOTA NAGPUR TENANCY), No. 1-a, 45 Ind. Cas. 72.

(13) Failure of Revenue Officer to exercise jurisdiction vested under S. 40, Madras Estates Land Act—Competency of Revenue Appellate authority under S. 205 to remand the case to original Court for proper determination of money rent. See MAD. ACT I OF 1908 (ESTATES LAND), No. 13, 40 Ind. Cas. 63.

(13-a) Appeal. Entertaining of, by Court without jurisdiction to hear—Appellate decree passed without jurisdiction, Appealability of—Civ. Pro. Code (1908), S. 100 (1). See APPEAL (GENERAL), No. 7, 27 C. L. J. 115.

(13-b) Consent of parties—Failure to take objection if can confer, when not conferred by law. See APPEAL (LETTERS PATENT), 44 Ind. Cas. 999.

(14) Whether Court has jurisdiction to grant conditional orders on claim petition. See CIV. PRO. CODE (1908), No. 376, 44 Ind. Cas. 1007.

(15) Goods sent in excess returned—Loss of goods returned—Damages—Place of suit. See CIV. PRO. CODE (1908), No. 47, (1918) M. W. N. 379.

(16) Contract made within district Ambala—Performance to be outside Ambala district—Breach also outside Ambala—Jurisdiction of Ambala Court. See CIV. PRO. CODE (1908), No. 46, 26 P. R. 1918.

(17) Objection as to jurisdiction of Court passing decree if can be considered by executing Court. Objection as to decree being contrary to S. 10, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 10, 42 P. L. R. 1918.

(18) Decree embodying a compromise which goes beyond the property in dispute—Whether successor Munsif has jurisdiction to set aside the decree. See COMPROMISE, No. 2, 43 Ind. Cas. 772.

(19) Jurisdiction of High Court on its original side to try suit relating to income-tax against Collector of Madras. See HIGH COURT, JURISDICTION OF, No. 2, 35 M.L.J. 23.

Jurisdiction—(Continued).**—1.—General—(Concluded).**

(20) Dispute as to possession of immoveable property—Withdrawal from magisterial proceedings by one party promising resort to Civil Court—Suit brought late supported on plea of want of jurisdiction of Magistrate—Jurisdiction, meaning of. See LIMITATION, ACT (1908), No. 124, 22 C.W.N. 342.

(20-a) Minor, Decree against a, Validity, when not properly represented in suit—Court, Jurisdiction of, to sell property of minor in execution—Minor, Recovery of property by—Suit for, after attaining majority—Limitation—Limitation Act (1908), Arts. 12 and 144. See MINOR, No. 5-b, 113 P.R. 1918.

(20-b) Limitation, question of, a question of. See MORTGAGE (SALE), No. 8-a, 3 Pat. L.J. 947.

(21) Judge sitting on Original Side of High Court, it has jurisdiction to modify minutes of order before formal order drawn up. See PRACTICE AND PROCEDURE, No. 3, 24 M.L.T. 500.

(22) Whether want of objection of consent of parties confers jurisdiction, where law does not confer it. See APPEAL (LETTERS PATENT), No. 1, 44 Ind. Cas. 999.

(23) Finding of law or fact based on question of jurisdiction—Power of High Court to go into such findings or question. See REVISION, No. 6, 16 A.L.J. 717.

(24) Wrong decision that petition for restoration was barred by limitation—Such decision if error in exercise of jurisdiction. See REVISION, No. 20, 3 Pat. L.J. 376.

(25) Puling Chief or Prince, Suit against, without consent of Government of India under S. 86, Civ. Pro. Code (1908), Submission to jurisdiction without objection raised—Jurisdiction, Objection to, if can be taken in appeal. See RULING CHIEF OR PRINCE, 46 Ind. Cas. 558.

(26) Objection to pecuniary—Valuation of suits, based on High Court, if can be raised for the first time in. See VALUATION OF SUIT, No. 4, 46 Ind. Cas. 892.

(27) Gross under-valuation of one item in suit—Permission to withdraw claim if can be given—Grant of permission if proper exercise of jurisdiction—Duty of Court. See WITHDRAWAL OF SUIT, No. 3, 35 M.L.J. 27.

—2.—Of Civil Courts.

(1) Revenue Jurisdiction Act (X of 1876), S. 4 (a)—Bombay Hereditary Offices Act (Bom. Act III of 1874), S. 18—Mahar Vatan—Suit by villagers to restrain Mahars from taking away skins from their dead animals—Mahars claiming the right as Vatan—Jurisdiction—Civil Court—Cognisance of the suit.

The plaintiffs, who were residing in a village, sought for an injunction to prevent the skins

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).**

of their dead animals being taken away by defendants, who were village Mahars and claimed the right of taking away the skins as Vatan. The lower Courts held that the suit was barred by S. 18 of the Hereditary Offices Act, 1874, and S. 4 (a) of the Revenue Jurisdiction Act, 1876. The plaintiffs having appealed:

Held, (1) that the question, whether there was or was not a Mahar Vatan as contended for, was within the jurisdiction of the Civil Courts; and (2) that the plaintiffs would be entitled to injunction, unless the Mahars should succeed in showing that there was an hereditary office as alleged by them. *Savta Tukaram Mali v. Santya Parsha Mahar*, 20 Bom. L.R. 993.

HEATON and HAYWARD, JJ.

References—18 Bom. L.R. 779; 8 B.H.C. (A.C.) 27, R.

(2) Registration by false recitals.

If the recitals in a deed of gift, which induced the Sub-Registrar to register it, are false, the jurisdiction of the Civil Courts is not barred. *Khadak Singh v. Deepchand*, 43 Ind. Cas. 16.

BATTEN, A.J.C.

(3) *Bengal, N.W.P. and Assam Civil Court's Act* (XII of 1887), S. 21, cl. 4—Notification under—Appeals. Subordinate Judges empowered to hear, from Munsif—Revenue appeals, such notification if confers jurisdiction to hear also—Agra Tenancy Act (II of 1901), S. 197.

In a notification issued with the previous sanction of the Local Government, the High Court directed that all appeals from the decrees or orders of a Munsif shall be preferred to the Court of the Subordinate Judge, the latter Court was thereby empowered to dispose of appeals preferred to it quite as fully and effectively as if it had been the Court of the District Judge.

In virtue of this notification, a Subordinate Judge so empowered became the appellate Court from the Court of the Munsif and therefore had power to take action under S. 197 of the Agra Tenancy Act. *Pirhl Singh v. Lal Singh*, 46 Ind. Cas. 736.

KNOX, J.

(4) Tax, Notification of—Berar Municipal Law of 1886, Ss. 42, 44—Civil Court, if can question illegality of tax duly notified—Scavenging purposes, Taxation for.

A Civil Court is debarred under S. 44 (9) of the Berar Municipal Law from considering the illegality of a tax duly notified. A defect in the constitution and meeting of the Committees imposing the tax being a mere informality is protected by sub S. (9).

S. 42 of the Berar Municipal Law shows that the condition of taxation of a building or shop for scavenging purposes is a provision by the Committee for scavenging service, and not the actual rendering of it in respect of a latrine

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).**

existing in the building or shop. *Taher Ali v. Municipal Committee, Khamgaon*, 46 Ind. Cas. 682.

KOTWAL, OFFG. A.J.C.

- (5) *District Judge, Power of, under S. 98, Bengal Tenancy Act (VIII B.C. of 1885)—Remuneration of common manager re—Limitation, Question of, if arises in suit for arrears of pay on basis of such order.*

The District Judge has, under the terms of S. 98 of the Bengal Tenancy Act, ample power to pass orders with respect to the remuneration of the common manager. No question of limitation arises in case of a suit brought by a retired common manager to recover arrears of his pay on the basis of such an order of the District Judge. *Trailokya Nath Roy v. Durga Nath*, 46 Ind. Cas. 686.

FLETCHER and SMITHER, JJ.

- (6) *Joshipan income, suit for, a suit relating to immovable property—Villages situate outside British India, suit in respect of, jurisdiction of Courts re—Civ. Pro. Code (1908), Ss. 16, 20.*

A suit for Joshipan income is clearly a suit relating to immovable property within the meaning of S. 16, Civ. Pro. Code (1908).

In a suit for the recovery of Joshipan income in respect of village partly situated in British India and partly situated outside, it was held that the plaintiff could only get a decree in respect of the income from the villages situated within British India. *Balwant v. Tulshilal* 46 Ind. Cas. 782.

FINDLAY, OFFG. A.J.C.

- (7) *Decree sent to Collector for execution—Execution proceedings, Order of Collector in—Civil Courts, Jurisdiction of, to interfere with such order—Specific Relief Act (I of 1877), S. 9, Possessory suit under—Mesne profits, Subsequent suit for, Maintainability of—Possessory suit and suit for mesne profits, cause of action for, different.*

A Civil Court is precluded from interfering in matters declared to be in the Collector's jurisdiction regarding the execution of a decree sent to him, but it is not divested of its ordinary jurisdiction in regard to other matters merely because the decree has gone to the Collector, and a Civil suit will lie with respect to an order of the Collector upon which, if it had been made by the Court acting within its jurisdiction, an action could have been maintained.

The right to possess immovable property and the right to enjoy the profits of property, are distinct causes of action. A person dispossessed of immovable property is therefore entitled to sue for possession of land under S. 9 of the Specific Relief Act and leave the question of mesne profits for another suit. That would depend on title, a matter not gone into in a suit under the Specific Relief Act. *Janardhan Ganesh v. Ramchandra*, 46 Ind. Cas. 885.

PRIDEAUX, A.J.C.

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).**

- (8) *Bengal, United Provinces and Assam Civil Courts Act (1887), Courts established under—Santal Parganas, Land in, or interest in, or arising out of, Suit re, maintainability of, in—Santal Parganas Regulation of 1872, S. 5, Under.*

Under S. 5 of the Santal Parganas Regulation of 1872 as it stood in 1907, no suit would lie in any Court established under the Bengal, United Provinces and Assam Civil Courts Act (1887) in regard to any land or any interest in or arising out of any land in the Santal Parganas, so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette to have been completed and concluded. *Sahdeo Narain Deo v. Kusum Kumari*, 46 Ind. Cas. 929.

CHAPMAN and ATKINSON, JJ.

- (9) *Declaration by Revenue Court that a person is a tenant under S. 107-G of Oudh Rent Act (XXII of 1886)—Suit by such person for declaration that he is under-proprietor, not a tenant, Maintainability of in Civil Court—"Transferred," meaning of, in S. 25, Oudh Laws Act (XVIII of 1876).*

A person declared by the Revenue Court to be a tenant under S. 107-G of the Oudh Rent Act, having filed a suit for a declaration that he is an under-proprietor and not a tenant, it was held that the Civil Court had jurisdiction to entertain the suit.

The word "Transferred" as used in S. 25 of the Oudh Laws Act, is of general import and its meaning cannot be restricted to cases in which the transfer has been made under orders of the Court. *Nadir Singh v. Indar Sen Singh*, 47 Ind. Cas. 662.

LINDSAY, J.C.

Reference:—Selected Decision No. 7 of 1908, Dissented from.

- (10) *Hereditary Village Offices Act (Mad. Act III of 1895), Ss. 13, 31—Proprietary Estates' Village Services Act (Mad. Act II of 1894), S. 15—Jurisdiction—Revenue Officers, Appeal from—Hereditary office, Creation of.*

The prohibition contained in S. 21 of the Hereditary Village Offices Act (III of 1895), against Civil Courts considering or deciding any claim to succeed to hereditary village offices, does not apply to a claim to be appointed to any of those offices on its creation, as, for instance, when new offices are created in pursuance of S. 15 of the Proprietary Estates Village Service Act (II of 1894) on the re-grouping or amalgamation of proprietary villages. The Courts have jurisdiction to try such claims.

The office of Headman (Nattamangar), though formerly held by one man, has been in several cases in recent times held by two persons, of whom one exercises the Police and Magisterial functions and the other the Revenue functions. In such a case, both officials can be called headmen, and, when a person has to be selected

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).**

for a new office created under S. 15 of Act II of 1894 for the families of the last holders of the abolished offices, the selection may be made from the family of the old Revenue officer or from that of the Police and Magisterial officer.

If a proprietor fails to make an appointment as required by S. 15 (1) of Act II of 1894, the power of appointment vests by S. 15 (3) on the Revenue officer in charge of the division. The District Collector and Board of Revenue have no power to hear appeals from the action taken by the Revenue officer or to set it aside.

Per *Napier, J.*—It is not open to a man, on the ground of his being eligible for the office, to ask for a declaration that the person appointed is not a person qualified to hold the office. *Krishnaswami Naidu v. Akkalammal*, 24 M.L.T. 489.

SADASIVA AIYAR and NAPIER, JJ.

Reference :—33 M. 208, Comm.

- (11) *Jurisdiction of Rent and Civil Courts—Proprietary title, question of—Rent Court deciding upon a mere assumption without evidence, final character of such decision—Power of Civil Court to go into the question of proprietary title.*

Where a Rent Court has found upon evidence that the relationship of landlord and tenant exists between two persons that decision would often be final. But where the Rent Courts arrived at a decision without any evidence at all and upon a mere assumption, and, a question of proprietary title being involved and a tenancy not having been established, it is open to the Civil Court to arrive at a finding on the question of proprietary title. *Jalpa Din v. Kalka Baksh Singh*, 21 O.C. 323.

STUART, J.C.

- (12) *Jurisdiction of Civil or Revenue Court—Partition, suit for declaration of right to—Jurisdiction of Civil Courts—Question for determination by Revenue Court—Punjab Land Revenue Act (XVII of 1887), S. 158 (2) (xvii).*

Held, that a Civil Court has jurisdiction to entertain and decide a suit for a declaration that the plaintiff is entitled to have certain land partitioned.

Where, therefore, plaintiff sued for a declaration that she was entitled as the widow of A to have the land jointly held by her and defendants partitioned: *Held*, that her suit was maintainable in a Civil Court, which would merely decide whether or not the plaintiff had a legal right to claim partition, and it would be a question solely for the Revenue authorities to decide whether partition should or should not be allowed. *Muhammad Dhall v. Kala Singh*, 123 P.W.R. 1918=46 Ind. Cas. 11.

RATTIGAN, C.J.

- (13) *Punjab Municipal Act (III of 1911), S. 121, Order under—Courts, whether can interfere with such orders.*

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).**

Held, that a Civil Court has no jurisdiction to interfere with a Municipal Committee's order under S. 121 of the Punjab Municipal Act, in the absence of a finding that the action of the Committee is wanton or without any justification or is tainted by *mala fides*. *Municipal Committee, Rohtak v. Haji Karim-ud-din*, 135 P.W.R. 1918=46 Ind. Cas. 571.

LE-ROSSIGNOL, J.

- (14) *Jurisdiction of Civil or Revenue Court—Suit by landlord against the reversioners of a deceased occupancy tenant to recover his holding alleged to have wrongly been possessed by them—S. 77 (3) (d) of Act XVI of 1887.*

Held, that, a suit brought by a landlord against the reversioners of a deceased occupancy tenant for ejecting them from the holding of the deceased, of which they have taken possession after the death of his widow, on the ground that the holding had been acquired only by the father of the tenant and not by their common ancestor, does not fall within the purview of S. 77 (3) (d) of the Punjab Tenancy Act XVI of 1887 and is therefore cognizable by a Civil and not a Revenue Court. *Ghulam v. Jowala Singh*, 179 P.W.R. 1918=130 P.L.R. 1918=103 P.R. 1918.

SHAH DIN, J.

References :—111 P.R. 1910=234 P.W.R. 1910, Dist.; 22 P.R. 1894, R.

- (15) *Kachin Hill Tribes Regulation (I of 1895), Ss. 1 (3), 3 (1)—Applicability of Regulation to Kachin in hill tracts—Jurisdiction of ordinary Civil Courts to try suit triable outside hill tract.* *Pauksal How and Co. v. Sinwa Naung*, U.D.R. (19-7), 4th Qr., p. 49=44 Ind. Cas. 659. See Final Part, 1917, Col. 514.

- (16 & 17) *Co-operative Societies Act—Liquidator.* See ACT II OF 1912 (CO-OPERATIVE SOCIETIES), No. 2, 44 Ind. Cas. 363.

- (18) *Legality of imposition of tax by statutory body, if triable by Civil Courts.* See PUN. ACT III OF 1911 (MUNICIPAL), No. 2, 74 P.L.R. 1918.

- (19) *Declaration, Suit for, by Jagirdar—Revenue, Right to receive, in kind—Civil Courts, Jurisdiction of to entertain—Punjab Land Revenue Act (1887), Ss. 15, 48 and 158 (4).* See DECLARATORY SUIT, No. 6-a, 110 P.R. 1918.

- (20) *Certificated guardian, Sale by, of minor's property with sanction of District Judge—District Judge, if competent to order re-sale after sale executed and registered—Minor, Interest of, District Judge's duty to look after.* See GUARDIAN AND WARD, No. 2, 46 Ind. Cas. 542.

- (21) *Propriety of order for commutation of rent not questionable by Civil Court—Duty of Civil Court to satisfy itself that order made under S. 40, Bengal Tenancy Act, was made with jurisdiction.* See JURISDICTION (GENERAL), No. 1, 45 C. 769.

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Concluded).**

(22) Ejectment suit in Revenue Court—Defendant ejected as sub-tenant—Suit in Civil Court by defendant for declaration of title as co-tenant if maintainable. See JURISDICTION (OF REVENUE COURTS), No. 2, 16 A.L.J. 933.

(23) Validity of documents of title—Jurisdiction of Revenue Courts to finally determine such validity—Jurisdiction of Civil Courts to decide matter exclusively reserved to Revenue Court. See JURISDICTION (OF REVENUE COURTS), No. 6, 31 O.C. 210.

(24) Application to serve ejectment notice on tenant—Suit by tenant claiming occupancy tenure contesting in Revenue Court his liability to ejectment. Dismissal of—Subsequent suit in Civil Court for possession of land as occupancy tenant—Duty of Civil Court to return plaint for presentation to Revenue Court. See JURISDICTION (OF REVENUE COURTS), No. 11, 147 P.W.R. 1918.

(25) Trees within holding out down by occupancy tenants—Suit for damages by Small Causes Court, if entertainable. See LANDLORD AND TENANT, No. 2, 16 A.L.J. 621.

(26) Surrender by occupancy tenant to landlord for consideration—Heir of tenant put in possession by Revenue Officer—Landlord's right to recover purchase-money with interest—Suit for refund if lies in Civil Court. See LANDLORD AND TENANT, No. 66, 14 N.L.R. 125.

(27) Application for partition by one recorded co-sharer—Denial of applicant's title by other recorded co-sharers—Question of title, Determination of, to be made by Civil or Revenue Court. See PARTITION, No. 5, 6 P.R. 1918 (Rev.).

—3.—Of Civil and Revenue Courts.

(1) *Agra Tenancy Act*, Ss 95, 177 (f)—*Party to Revenue suit—Jurisdiction, Plea as to, if can be raised to oust jurisdiction of Revenue Court.*

Held, that a defendant in a Revenue suit (e.g.) one under S. 95, *Agra Tenancy Act*, could not by formally raising an absolutely untenable plea of jurisdiction take every case from the Revenue Court to the Civil Court. *Deo Narain Singh v. Sitla Baksh Singh*, 40 A. 177.

(2) *Suit, maintainability of—Tenant, status of—Settlement Officer—Settlement of rents—Bengal Tenancy Act* (VIII of 1885), Ss. 105-A, 109.

A Settlement Officer, when hearing an application for settlement of rent, has jurisdiction to enquire as to whether a tenant belongs to the class to which he was shown in the record of rights. It is not competent to a Civil Court under S. 109 of the *Bengal Tenancy Act* to enquire into the status of a tenant, which was the subject of enquiry before a Settlement Officer. *Bepin Krishna Kumar v. Hari Das Ghose*, 27 C.L.J. 210—44 Ind. Cas. 562.

FLETCHER and TEUNON, JJ.

• *Reference* :—19 C.W.N. 636, R.

Jurisdiction—(Continued).**—3.—Of Civil and Revenue Courts—(Contd.).**

(3) *U.P. Land Revenue Act* (III of 1901), S. 111—*Partition, Application for, before Revenue Court—Title, Question of, raised in—Application for postponement pending decision of Civil Court—Civil Court, Suit as proper extent of share, Maintainability of.*

Where the applicants in a partition case filed in a Revenue Court, themselves requested the Court before the issue of notices to the recorded co-sharers or at any rate before the filing of objection by the recorded co-sharers, to postpone the case until the question of their title was cleared up in a Civil Court and the Revenue Court granted the postponement and the applicants then instituted the proposed suit in the Civil Court.

Held, that the Civil Court had jurisdiction to entertain the suit. *Deoki Nandan v. Kall Shankar*, 45 Ind. Cas. 873—5 O.L.J. 116.

LINDSAY, J.C.

References :—25 Ind. Cas. 316; 17 O.C. 224—1 O.L.J. 335, *Dist.*

(4) *Jurisdiction once vested, if ousted by subsequent admission of fact—Under-proprietary plots, Suit for possession of—Succession, Right of, in dispute—Landlord and tenant, Denial of right of—Revenue Court, if entertainable in.*

A subsequent admission of a fact cannot take away a jurisdiction if it was once vested.

A suit for possession of certain under-proprietary plots was filed by the plaintiff on the ground of his being the heir of the deceased under-proprietor and his dispossession from those plots by the defendant-landlord. The defendant, while denying the allegation, admitted in the Court of first instance at the time of argument the heirship of the plaintiff to the deceased under-proprietor.

Held that as the relationship of landlord and tenant was denied in the pleadings and the plaintiff's right of succession was in dispute, the suit was rightly filed in the Civil Court. *Mahadeo Gir v. Bhagwant Singh*, 46 Ind. Cas. 8—5 O.L.J. 143.

KANHAIYA LAL, A.J.C.

Reference :—18 Ind. Cas. 294—46 O.C. 105, *Dist.*

(5) *Oudh Rent Act* (XXII of 1886), S. 127—*Ejectment by notice—Usufructuary mortgage—Mortgagor, Possession of mortgaged land by, as lessee and holding over, Position of.*

A usufructuary mortgagee in possession gave a lease of the mortgaged property to the mortgagor for three years on certain conditions. After the expiry of the term of lease the mortgagor-lessee continued to be in possession and the mortgagee sought to eject him through the Rent Court by notice under S. 127 of the *Oudh Rent Act*.

Held, that, where there is a doubt whether the mortgagor was in possession of the land as

Jurisdiction—(Continued).**—3.—Of Civil and Revenue Courts—(Old.).**

holding over after the lease or as proprietor who had usufructually mortgaged his holding and had taken or retained possession of the land which, if the mortgage was a valid one, would have been in the usufructuary possession of the mortgagee, the mortgagor could not be ejected through the Rent Court by notice under S. 127 of the Oudh Rent Act. **Mohammad Naim v. Murlidhar**, 46 Ind. Cas. 75=5 O.L.J. 163.

HOLMS, S.M. and FERARD, J.M.

(6) *Under-proprietary right—Declaration of, by Revenue Court only—Oudh Rent Act, S. 107-H.*

A Civil Court has no jurisdiction to declare under the terms of S. 107-H of the Oudh Rent Act that any person has acquired an under-proprietary right in the land and this right can only be declared by a Revenue Court. **Raghubar v. Suraj Bahad**, 46 Ind. Cas. 357.

LINDSAY, J.C.

(7) *Madras Estates Land Act, S. 77—Plaint allegations bringing case under S. 77—Suit to be filed in Revenue Court—Jurisdiction will not depend on defendant's pleas—Questions to be decided being complicated will not affect jurisdiction.*

When the allegations in the plaint bring a case within S. 77 of the Madras Estates Land Act, the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend upon any pleas the defendant might raise. The fact that the Court may have to go into complicated questions as the right of redemption by the landlord or the continuance of the service on which lands were granted on favourable tenure will not affect the jurisdiction of the Revenue Court (a). **Yenkata Ramaya v. Chakali**, 34 M.L.J. 309=23 M.L.T. 361=41 M. 554=7 L.W. 508=(1918) M.W.N. 327=46 Ind. Cas. 471.

SPENCER and KUMARASWAMI RASTRI, JJ.

Reference:—(a) (1910) M.W.N. 431, R.

(8) Acquisition by fractional inamdars of entire kudivaram interest—Lease of portion of acquired lands—Suits for rent—Suit to be filed in Revenue Courts. See MAD. ACT I OF 1908 (ESTATES LAND), No. 2, 34 M.L.J. 419.

(9) No dispute as to rate of rent—Jurisdiction of Collector to confer occupancy rights on non-occupancy ryot—Jurisdiction of Civil Courts. See MAD. ACT I OF 1908 (ESTATES LAND), No. 16, 23 M.L.T. 352.

(10) Order staying or refusing to stay suit pending in Revenue Court—Whether appeal lies to Civil Court from such order. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 22, 16 A.L.J. 231.

(11) Ejectment suit in Revenue Court—Denial by defendant of tenancy from plaintiff—Allegation of lease from other persons—Proprietary title in issue in first Court—

Jurisdiction—(Continued).**—3.—Of Civil and Revenue Courts—(Old.).**

Appeal if lies to Civil Court. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 23, 16 A.L.J. 239.

(12) Plaintiff in suit for profits not recorded as co-sharer—Suit not barred—Procedure—Question as to title—Jurisdiction of Revenue and Civil Courts. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 29, 16 A.L.J. 504.

(13) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 11, 43 Ind. Cas. 652.

(14) Oudh Rent Act, S. 108—Jurisdiction of Revenue Courts and Civil Courts—Under-proprietary title and possession. See OUDH ACT XXII OF 1886 (RENT), No. 7, 44 Ind. Cas. 357.

(15) Collector effecting partition under Civ. Pro. Code in execution of decrees—Jurisdiction of Civil Court to her application for re-opening partition. See CIV. PRO. CODE (1908), No. 96, 20 Bom. L.R. 411.

(16) Suit for recovery of goantiaship, if lies in Civil Court. See GAONTIA TENURE, 3 Pat. L.J. 229.

(17) Mortgagee alleging injury to his interest by alleging collusion in partition proceedings—Remedy lies by suit in Civil Court. See PARTITION, No. 4, 2 P.R. 1918 (Rev.).

(18) Decision of Revenue Court that defendant and plaintiff were landlord and tenant—Subsequent suit by plaintiff in Civil Court for declaration of proprietary title in him—Subsequent suit if *res judicata*—Jurisdiction of Civil Court to entertain such suit. See RES JUDICATA, No. 36, 45 P.R. 1918.

—4.—Of Civil or Revenue Courts.

Madras Estates Land Act (I of 1908), Ss. 9, 153, 163—Non-occupancy tenant of old waste, suit against, for ejectment—Lease entered before Act, Expiry of, after Act—Jurisdiction of Court, Civil or Revenue—Tenant, if a trespasser under S. 163. See MAD. ACT I OF 1908 (ESTATES LAND), No. 8-a, 33 M.L.J. 757.

—5.—Of Criminal Courts.

Jurisdiction of—Execution of document. Enquiry into fact of, Result of enquiry—Consideration of, in the Registrar's Court in an enquiry under S. 74 of the Registration Act (1908). See REGISTRATION, No. 2, 46 Ind. Cas. 878.

—6.—Of Revenue Courts.

(1) *Agra Tenancy Act (II of 1901), Ss. 158, 167—Resumption of rent-free grant—Jurisdiction of Civil and Revenue Court—Revision to High Court.*

An application was made to the Revenue Court for partition. Certain persons objected that they had become proprietors of a certain share by reason of their having held it as a rent-free grant for more than fifty years and for two generations. The Revenue Court held that—

Jurisdiction—(Continued).**i.—Of Revenue Courts—(Continued).**

this was a question of proprietary title and referred the parties to the Civil Court. The latter thereupon brought a suit in the Civil Court for the declaration contended for by them. The Court of first instance held that it was not a question of proprietary title and that the suit was cognizable by the Revenue Court. The plaint was accordingly returned for presentation to the proper Court. The decision of the first Court was affirmed by the District Judge in appeal:—*Held*, in revision, that having regard to S. 167 of the Tenancy Act and to the fact that cases under S. 158 of that Act are mentioned in the fourth schedule to it at cases cognizable by the Revenue Court, a suit for a declaration that *muafi* rights had ripened into proprietary rights could only be brought in the Revenue Court and not in the Civil Court. *Nannhu v. Sri Thakurji Maharaj*, 16 A.L.J. 881=46 Ind. Cas. 764.

BANERJI and PIGOTT, JJ.

Reference:—7 A.L.J.*818, F.

- (2) *Agra Tenancy Act (II of 1901, Local)*, S. 167—*Ejectment suit in the Revenue Court—Defendant ejected as sub-tenant—Suit in the Civil Court by defendant for declaration of title as co-tenant—Suit not maintainable.*

Where a Revenue Court, in a suit for ejectment, decided that B was A's sub-tenant, and, accordingly, decreed B's ejectment, *held* that a subsequent suit in the Civil Court by B for a declaration that he was a co-tenant of A was not maintainable having regard to S. 167 of the Agra Tenancy Act. *Kishore Singh v. Bahadur Singh*, 16 A.L.J. 933.

TUDBALL and ABDUL RAOOF, JJ.

References:—7 A.L.J. 555; 8 A.L.J. 940; 11 A.L.J. 671; 12 A.L.J. 1352, R.; 10 A.L.J. 408; 13 A.L.J. 278, Dist.

- (3) *Madras Estates Land Act (I of 1908)*, S. 3 (2) (b)—*Village not an estate as defined in the Act—Sub-Collector's order in regard to crops of village, whether legal—Jurisdiction.*

Order of a Sub-Collector directing the retention of crops of a village not falling within the definition of estate, *ab initio* void. The Sub-Collector was devoid of jurisdiction in the matter. *Krishnaswami Nayadu v. Sriramu Nayadu*, 43 Ind. Cas. 30.

AZIZ-UD-DIN, B.M.

- (4) *Restitution, Power of, of Revenue Courts Civ. Pro. Code (Act V of 1908)*, S. 144—*Upper Burma Land and Revenue Regulation (III of 1889)*, S. 12 (1)—*Rules 5, 10, framed under S. 12—Revenue Court's order relating to moveable property, mode of enforcement of.*

Every Revenue Court or revenue officer exercising powers of a judicial nature has the power, so far as may be, to restore a party to the position which he would have occupied but for a decree or order which has been reversed in appeal

Jurisdiction—(Continued).**—5.—Of Revenue Courts—(Continued).**

or revision. This power is definitely expressed in S. 144 of the Code of Civil Procedure and is an inherent power with all Courts.

By rule 5 framed under S. 12 of the Upper Burma Land and Revenue Regulation, Revenue officers in dealing with all cases of a judicial nature have been given the powers conferred upon Civil Courts with reference to the institution and trial of suits.

The words "any power exercised by the Civil Court in the trial of suits," as used in S. 12 (1) of the Upper Burma Land and Revenue Regulation and as conferred upon revenue officers by rule 5, are intended to include the power to execute a decree or order in regard to moveable property. Cl. (2) of S. 12 of the Regulation and rule 10 thereunder, which contains special provision for the enforcement of orders relating to immoveable property, are not intended to restrict the more general power contained in cl. (1) of S. 12 and in rule 5.

For the resumption of deeds of grant of the well-sites, a Revenue Court should take action in conformity with the provisions of the Code of Civil Procedure for execution of a decree relating to moveable property.

Where deeds have been filed as exhibits in another Court, that Court should be given notice that the deeds in question are to be held at the disposal of the party in whose favour the order of resumption has been made, and not at the disposal of the party by whom the deeds were produced before the Court. *The Burma Oil Company, Ltd. v. Balj Nath Singh*, 46 Ind. Cas. 475.

THOMPSON, F.C.

- (4-a) *Trespasser, Ejectment of—Revenue Court, Powers of.*

A Revenue Court is competent to eject a trespasser. *Ram Lal v. Abdul Hasan Khan*, 46 Ind. Cas. 543.

- (5) *Madras Estates Land Act (I of 1908)*, Ss 26, 112—*Suit by tenant contesting landlord's right of sale under S. 112—Objections to validity of contract not specified in S. 26—Competency of Revenue Court to decide objections.* *Sethurama Aiyangar v. Subbiah Pillai*, 33 M.L.J. 599=41 M. 121. See Final Part, 1917, Col. 521.

- (6) *Jurisdiction of Revenue Courts to decide finally on validity of documents.*

The proposition that the Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of documents of title, though correct as a general statement of the law, is subject to the obvious qualification that the Civil Courts cannot decide any matter in which jurisdiction has been exclusively reserved to Revenue Courts. *Jagannath Singh v. Drigbhai Singh*, 21 O.C. 210.

LINDSAY, J.O.

Reference:—19 O.C. 58, Expl.

- (7) *Suit for mesne profits accruing due during period when person entitled thereto was not*

Jurisdiction—(Continued).**—8.—Of Revenue Courts—(Continued).**

in possession—Punjab Tenancy Act, Ss. 14, 77 (3) (n)—Revenue Court: if can try such suit.

Case where it was held that a Revenue Court had jurisdiction, under S. 77 (3) (n) of the Punjab Tenancy Act to try a suit for mesne profits of land of which the plaintiff was landlord under S. 14 of the Act during the period for which he claimed mesne profits but of which he had not obtained possession at the time of the institution of the suit. **Mahant Ratan Das v. Battan Singh**, 58 P.R. 1918 = 46 Ind. Cas. 437.

SHAH DIN and SCOTT-SMITH, JJ.

*References:—*82 P.R. 1894 and 1 P.R. 1893 (Rev.). *F*; 145 P.R. 1893, *R*.

- (8) *Dispossession of tenant by landlord—Possession decreed to tenant in suit for possession—Suit by tenant after more than one year of dispossession for compensation—Suit cognisable by Revenue Court—Punjab Tenancy Act, Ss. 4, 14, 50, 51, 77 (3) (j)—Specific Relief Act, S. 9.*

A tenant dispossessed by his landlord in May or June, 1915, obtained against him a decree for possession on the 8th May 1916, and, more than a year after his dispossession, instituted in the Civil Court a suit for compensation. *Held* that the suit, whether brought within or after the year of limitation laid down in S. 50 of the Punjab Tenancy Act falls under S. 77 (3) (j) of the Act and is cognisable only by a Revenue Court. **Akhbar Hussain v. Karm Dad**, 90 P.R. 1918 (*F B.*).

SHAH DIN, CHEVIS and LE-ROSSIGNOL, JJ.

*References:—*45 P.R. 1891 (*F B.*); 64 P.R. 1898 (*F B.*), *Comm. upon and Not F.*; 82 P.R. 1894; 63 P.R. 1904; 17 C. 926; 21 A. 204, *R*.

- (9) *Punjab Tenancy Act (XVI of 1887), S. 77—Proviso added by Act III of 1912—Jurisdiction of Civil and Revenue Courts—Suit for possession—Allegation in plaint and written statement—Examination of parties by Court—Plea of defendant determines question of jurisdiction.*

The plaintiffs in their plaint asserted that the defendants were mere trespassers, and the defendants in their written statements contended that the plaintiffs had no rights whatsoever in the land, but, on examination by Court, the plaintiffs urged that the defendants were their tenants-at-will and the defendants pleaded that they were occupancy tenants of certain persons. The plaint was returned for presentation to the Revenue Court.

Held, that the order was right, for it is impossible in a case of this kind for the Civil Court to ignore the plea put forward by the defendants, having regard to Act III of 1912. **Ata Ullah Khan v. Umar Din**, 63 P.L.R. 1918 = 171 P.W.R. 1918 = 47 Ind. Cas. 594.

BATTIGAN, J.

Jurisdiction—(Continued).**—8.—Of Revenue Courts—(Continued).**

- (10) *Suit for possession of land held by deceased occupancy tenant—Defendant claiming to be in possession by virtue of gift from last occupancy tenant—Punjab Tenancy Act (XVI of 1887), S. 77 (3) (a)—Suit cognisable by Revenue Court.*

Plaintiff sued for possession of certain land, which had been held by one S, a deceased occupancy tenant. Defendant alleged that the land was gifted to him by S, during his lifetime. The plaint stated that the defendant claimed to be in possession by virtue of a gift, but that S, had no power to make a gift: *Held*, that, under the circumstances, the suit was cognisable by a Revenue Court under S. 77 (3) (a) of the Punjab Tenancy Act. **Ahmed Din v. Kishore Chand**, 141 P.W.R. 1918 = 46 Ind. Cas. 882.

BROADWAY, J.

- (11) *Punjab Tenancy Act (XVI of 1887), Ss. 77 (3) (d), Proviso (1), 100 (3)—Jurisdiction of Civil or Revenue Court—Suit for possession by occupancy tenant—Occupancy rights, proof of—Court, duty of.*

Plaintiff sued for possession of certain land on the allegation that he was an occupancy tenant thereof under S. 8 of the Tenancy Act and had been illegally dispossessed by the landlord-defendant. It appeared that the defendant had applied for a notice of ejectment to be served upon the plaintiff, who was a tenant under him, and that, upon this, the plaintiff had filed a suit in the Revenue Court contesting his liability to ejectment on the ground that he was an occupancy tenant. This suit was dismissed on the ground that the plaintiff had failed to establish occupancy rights. Thereupon, he filed the present suit in a Civil Court:

Held, (1) that although the suit was one for possession of a land comprised in the tenancy, yet, in order to succeed therein, the plaintiff had to establish a claim to a right of occupancy and, as that was a matter, which could be determined only by a Revenue Court under S. 77 (3) (d) of the Punjab Tenancy Act, it was the duty of the Civil Court in which the suit was instituted to act in accordance with the instructions contained in the proviso to S. 77 of the Tenancy Act and return the plaint for presentation to the Collector; and

(2) that, as the plaintiff had been prejudiced by the mistake as to jurisdiction, the Chief Court would not pass an order under S. 100 (3) of the Tenancy Act. **Farman v. Ghanthu**, 147 P.W.R. 1918 = 46 Ind. Cas. 811.

SCOTT-SMITH, J.

*Reference:—*70 P.R. 1893, *Dist.*

- (12) *Suit in Civil Court for ejectment—Plea of tenancy—Suit referred to and decided by Revenue Court—Appeal to District Judge on ground of jurisdiction—Competency of appeal. See U.P. Act II of 1901 (AGRA TENANCY), No. 80, 16 A.L.J. 590.*

Jurisdiction—(Concluded).**—6.—Of Revenue Courts—(Concluded).**

(13) Order with jurisdiction of Revenue Court for commutation of rent — Propriety of such order if within competency of Civil Court to question. See JURISDICTION (GENERAL), No. 1, 45 C. 769.

(14) Landlord and tenant—Proprietary title, question of, decided in Revenue Court without evidence—Civil Court's jurisdiction to try such question. See JURISDICTION (OF CIVIL COURTS), No. 11, 21 O.O. 324.

(15) Suit for declaration of plaintiff's right to have certain land partitioned—Civil Court has jurisdiction in suit — Question whether partition should be allowed within jurisdiction of Revenue Courts. See JURISDICTION (OF CIVIL COURTS), No. 12, 123 P.W.R. 1918.

(16) Suit by landlord against reversioners of deceased occupancy tenant to recover his holding alleged to have been wrongly taken possession of by them — No jurisdiction in Revenue Court to try suit. See JURISDICTION (OF CIVIL COURTS), No. 14, 179 P.W.R. 1918.

(17) Claim for rent against occupiers of ryoti land lies in Revenue Court. See LANDLORD AND TENANT, No. 54, 35 M.L.J. 11.

Kabincamali.

Failure by husband to comply with terms of —Right of wife to dower. See MAHOMEDAN LAW (DOWER), No. 1, 43 Ind. Cas. 17.

Kachchi Adat.

Custom of the trade—Bombay silver market—Principle of kachcha adatia can sue to recover damages for breach of contract from the selling party direct, without intervention of the kachcha adatia—Kachcha adatia distinguished from pakka adatia. Abraham v. Sarupchand, 19 Bom. L.R. 609=41 Ind. Cas. 256=42 B. 224. See Final Part, 1917, Col. 528.

Kamin.

Possession of house as Kamin in *ahadi*—Succession—Village custom. See ABADI, No. 3, 116 P.R. 1918.

Kanam.

Anubhavam, meaning of. See MALABAR LAW, No. 1, 43 Ind. Cas. 379.

Karnavan.

Meloharath granted by Karnavan before expiry of prior lease, if void *ab initio*—Delegation by Karnavan of management to another—Right to resume management so delegated. See MALABAR LAW, No. 7, 35 M.L.J. 405.

Kasi.

(1) Office of, not hereditary—Grant to, construction of — Presumption — Grant not heritable and divisible. See MAHOMEDAN LAW (GENERAL), 46 Ind. Cas. 853.

Kasi—(Concluded).

(2) Application to be appointed mutwalli rejected by District Judge—District Judge if has powers of Kasi. See MAHOMEDAN LAW (WAKF), No. 5, 38 C.W.N. 138.

Koti Tenure.

(1) *Khoti Village—Dunlop's Proclamation—Introduction of survey settlement in the village—Tenants of Khot registered as Khatedars—Fixity in the amount of rent payable—Kabulayats passed by Khots to Government—Bombay Survey and Settlement Act (Bom. Act I of 1865), Sec. 37, 38—Teak trees on Varkas lands—Sale by Government to the Khatedars—Khot's right to the sale-proceeds.*

In certain Khoti villages, within the area to which the Dunlop's Proclamation applied, Survey Settlement was introduced in 1865-66; and a revised settlement was made in 1902. The Khots thereupon passed annual Kabulayats to Government, one of the clauses of which gave to the Khots right to one-third of the sale-proceeds of teak trees in the villages standing on lands not belonging to the Dharekarries.

On Varkas lands in those villages the Khots used to pay a certain fixed amount to Government every year and recover the customary dues from those who were in occupation of the lands prior to the settlement of 1865-66. After the settlement, they recovered from the occupants the fixed assessment and the *sayda*. Later on, Government sold teak trees which grew on certain lands in those villages to the registered Khatedars, who cut and removed the same. The Khots claiming that they were governed by the Dunlop's Proclamation sued Government to recover the sale-proceeds on the ground that they were the owners of the trees; and relying on the strength of the clause in the Kabulayat, claimed in the alternative one-third of the sale-proceeds:

Held, by *Heaton J.*, that, as between the Khots and the Government, the matter in dispute was concluded by the Kabulayat and the Khot could not obtain more than one-third of the proceeds of the sale of the trees:

Held, by *Shah, J.*, (1) that the Dunlop's Proclamation could apply to Varkas lands in a Khoti village; but if any person claimed the benefit of the Proclamation, he should prove that the land on which the trees stood, was his in a popular sense, i.e., it was sufficiently marked out as being in his permanent occupation in his own right so as to make it properly describable as his land;

(2) that assuming that the Khot had a right to the trees on Varkas lands under the Proclamation, that right was unaffected by the Kabulayats which regulated only those rights which a Khot enjoyed only as a Khot and which would come to an end if he ceased to be the Khot;

(3) that it was quite impossible, on evidence, to hold that the Khots were in permanent occupation of the lands in question or that they had such interest in the lands as would enable

Khoti Tenure—(Concluded).

them to obtain the benefit of the Dunlop's Proclamation ;

(4) that the Khot had no claim to the teak trees under S. 40 of the Land Revenue Code and they had failed to prove that they were entitled to the benefit of Dunlop's Proclamation in respect of the Varkas lands in question (a). *Sadaashv Parsharam Riebud v. The Secretary of State for India*, 20 Bom. L.R. 141=44 Ind. Cas. 872.

HEATON and SHAH, JJ.

References :—(a) 14 Bom. L.R. 77 ; 3 B.H. O.R. A.C.J. 132 ; 12 B. 534 ; 4 B. 264 ; Bom. P.J. (1879) 274 ; 18 B. 670 ; 23 B. 518, R.

(2) Transfer of occupancy holding in khoti village without leave of khot—Khot's right to re-enter. See OCCUPANCY TENURE, No. 1, 20 Bom. L.R. 681.

Kotwall Jalgir.

Occupancy right if can be acquired in. See OCCUPANCY TENURE, No. 7, 23 C.W.N. 136.

Kudlwaram.

Grant of inam—Presumption that Melwaram alone granted if proper. See INAM, No. 1, (1918) M.W.N. 859 (F.G.).

Laches.

(1) Acquiescence and laches, Difference between. See LIMITATION ACT (1908), No. 186, 41 Ind. Cas. 726.

(2) Delay in instituting suit for specific performance of contract—Whether it amounts to. See SPECIFIC PERFORMANCE, No. 3, 44 Ind. Cas. 244.

Lambarder.

(1) *Partition proceedings, Institution of, if prevents lease by—Such proceedings when become contentious—C.P. Land Revenue Act (1881), S. 136 (g)—Transfer of Property Act, S. 52.*

The mere institution of a partition proceedings under the C.P. Land Revenue Act, 1881, would not in itself put an end to the authority of the lambarder to give a lease (a).

Such a proceeding is not necessarily in its origin and nature a contentious proceeding. It becomes contentious within the meaning of S. 52, "Transfer of Property Act, only when a question of title within the meaning of S. 136 (g) of the C.P. Land Revenue Act being raised, the Deputy Commissioner elects under that section to exercise his powers as a Civil Court (b). *Fakirgir v. Mulchand*, 14 N.L.R. 18=43 Ind. Cas. 934.

MITRA, A.J.C.

References :—(a) 10 N.L.R. 89, R. (b) 23 A. 399 (P.C.).

(2) *Appointment of successor to office of—Points to be considered by officer appointing one of several rival candidates—Discretion*

Lambarder—(Concluded).

of officer making appointment, Interference with, Principles governing.

Where the rule framed for appointing a successor to office of lambarder specified four matters for consideration, held that they were not the only matters to be taken into account ; they should be considered among other matters. An officer making an appointment is at liberty to consider all matters which may reasonably be regarded as relevant to the suitability of an appointment, and he is expected to decide between rival candidates according to the general balance of their respective claims and of the administrative advantages, or disadvantages, of appointing each respectively. If he exercises his discretion in a reasonable manner neither ignoring any portion of those matters which he ought to consider, nor perversely running counter to the general sense of the rule, his decision ought to be allowed to stand ; and the mere fact that an appellate or revising officer takes a different view of personal claims is not a good reason for upsetting or modifying that decision. *Chaudhri Masbir Ali v. Malik Cairagh Khan*, 1 P.R. 1918 (Rev.)=2 P.W.R. 1918 (Rev.)=131 P.L.R. 1918=45 Ind. Cas. 87.

MAYNARD, F.C.

(3) *Lambarder and Mukaddam—Mukaddam Gomastha—Whose agent he is—Whether co-sharers liable to contribute towards remuneration of Mukaddam Gomastha. See C.P. ACT XVIII of 1881 (LAND REVENUE), No. 6, 43 Ind. Cas. 967.*

(4) *Lambarder, taking possession as mortgages—Adverse possession to other co-sharers—Limitation. See C.P. ACT XI OF 1892 (TENANCY), No. 18, 45 Ind. Cas. 184.*

Land Acquisition.

Partition of holding within Calcutta Municipality—Separate assessment of divided holdings refused by Municipality—Acquisition by Municipality of divided plots in two proceedings—Legality of such separate acquisition. See BEN. ACT III of 1899 (CALCUTTA MUNICIPAL), No. 9, 22 C.W.N. 538.

Land Acquisition Act (1894).

(1) *Ownership of land in proprietor—Tenant, only a licensee to occupy abadi land—Compensation, apportionment of—Wajib-ul-arz.*

Where the wajib-ul-arz declared that the ownership in abadi land remained in the proprietor and the tenant had only a license to occupy it without any right to dispose of it in any way, held that the proprietor is entitled to the whole of the compensation awarded for the site under the Land Acquisition Act. *Shankar Govind v. Kisan*, 45 Ind. Cas. 554.

DRAKE BROOKMAN, J.C.

References :—4 N.L.R. 149 ; 4 N.L.R. 155 ; *Frank Wair & Co. v. London County Council*, (1904) 1 K.B. 713, Appr.

Land Acquisition Act (1894)—(Continued).

(1-a) Compensation for land acquired for purposes of making street if claimable under Act. See BOM. ACT III of 1888 (CITY OF BOMBAY MUNICIPALITY), No. 3, 24 M.L.T. 297 (P.C.).

(1-b) Acquisition of land under, Sale-proceeds of, if immovable property or any interest therein or benefit to arise out of land—General Clauses Act (1897), S. 3, cl. (25)—Suit for, Limitation for—Limitation Act (1908), Arts. 120, 132, 141 and 144. See IMMOVABLE PROPERTY, No. 2, 3 Pat. L.J. 522.

(2) S. 9—*Claim for damages, whether entertained—Market value at date of acquisition.*

Held, that in a suit for enhancement of compensation awarded by the Collector for land acquired by a public body for a public purpose, a claim for damages for severance cannot be entertained by the Civil Court, unless it was originally made before the Collector.

The question of the market value of land at the date of the acquisition does not depend on the result of the acquisition. *Umar Bakhsh v. The Secretary of State*, 145 P.W.R. 1918—46 Ind. Cas. 906.

OHEVIS, J.

(3) Ss. 9, 18—*Notice—Effect of non-issue of notice—Validity of proceedings.*

The plaintiff purchased certain plots of land from Imdad Husain and Altaf Husain. He did not apply for mutation of names and the result was that Imdad Husain sold his share to his wife Ahmadi Begam, who applied for mutation of names. After this, the plaintiff applied for mutation of names, but the Revenue Court for certain reasons allowed his name to be recorded in respect of a half share only. The result was that there were two *Khata*s in the public records, viz., No. 22 in the name of Ahmadi Begam and No. 23 in that of the plaintiff. The plaintiff, however, seems to have remained in possession and to have planted some trees, the boundary marks also between the plots were obliterated. With the object of acquiring some land for public purposes the Local Government issued a notification in which these lands were also included. In regard to *Khata* No. 22, no notice was issued to the plaintiff and no public notice was issued as required by S. 9 (1) of the Land Acquisition Act. An award was made in respect of *Khata* No. 22, the persons who were recorded therein not objecting on the date fixed in the special notices. The plaintiff, however, did appear and made an objection to the special officer and laid claim to the compensation on the ground that he was the owner. He took no steps under S. 18 of the Act for a reference to the Court. The compensation was placed to his credit in the Treasury. In regard to *Khata* No. 23, public notice and special notice were issued, but the full period of 15 days was not allowed. The plaintiff objected and applied for a reference under S. 18 in respect of it. Award was made in respect to *Khata* No. 23. At the

Land Acquisition Act (1894)—(Continued).

date of the suit the reference was pending before the District Judge. Formal possession on behalf of Government was taken of both the *Khata*s. The present suit was filed for a declaration that all the proceedings were null and void, because of the irregularities of procedure. There was, however, nothing fraudulent or corrupt in the proceedings, and it was also found that the plaintiff had knowledge of the proceedings resulting in the award:—*Held* that the land acquisition proceedings were not vitiated by the mere fact that no special notice had been issued to the plaintiff in regard to *Khata* No. 22, inasmuch as he had actual knowledge of all the proceedings. In regard to *Khata* No. 23, the plaintiff had less right to complain, for notice was issued to him, though only ten days before the date fixed, and he would be able to get full compensation for it, when the reference which was pending before the District Judge would be disposed of after his objections had been heard.

Held, also, that the proceedings would not be invalidated by reason of the fact that the two *Khata*s were treated separately, though there were no division marks upon the land itself. *Secretary of State v. Qamar Ali*, 16 A.L.J. 669.

TUDBALL and ABDUL RAOF, JJ.

References:—32 C. 605; 30 C. 576 and First Appeal No. 7 of 1915 (of Allahabad H.C., decided on 10-5-1916), R.

(4) Ss. 9, 25 (2)—*Collector if empowered to deal with claim preferred to him not on date fixed in notice but at later date—Original cost of construction of building if may be enquired into in assessing market value thereof.*

A person cannot be deemed to have under S. 25 (2) of the Land Acquisition Act omitted to make a claim pursuant to the notice given under S. 9 of the Act, merely because he did not make it by the date originally fixed in the notice but did so at a later date. At any time before giving his award the Collector has jurisdiction to deal with any claim made to him under S. 9 (2) of the Act (a).

There is no authority for the proposition that the original cost of construction of a building can in no case be taken into consideration in assessing the market value thereof. This is the best method of ascertaining the market value where there have been no sales in the neighbourhood and where the house under acquisition has never been rented (b). *Secretary of State v. Bohan Lal*, 60 P.R. 1918—76 P.W.R. 1918—44 Ind. Cas. 883.

SCOTT SMITH and SHADI LAL, JJ.

References:—(a) 12 C.W.N. 263; 33 A. 376, Dist. (b) 9 Bom. L.R. 1232; 23 B. 325; 22 W. R. 234; 9 C.W.N. 655, Dist.; 9 Bom. L.R. 99; 34 B. 486, R.

(5) Ss. 12, 18—*Single notice and single objection—Awards may be treated as one—One consolidated appeal from awards. See CONSOLIDATION (OF APPEALS), 34 M.L.J. 279.*

Land Acquisition Act (1893)—(Continued).

(6) Ss. 12 (2), 45 (2), (3), 53—*Notice of award under S. 12 (2) whether property served on manager of estate—Civ. Pro. Code (1908), O. III, r. 6 (1) and (2), O. V, r. 12, if applicable to such notice. Rajah Papamma Rao Garu v. Revenue Divisional Officer, Guntur, 93 M. L. J. 472 = (1917) M.W.N. 878 = 24 M.L.T. 471 = 8 L.W. 499. See Final Part, 1917, Col. 21.*

(7) S. 18—*Reference to Court for valuation—Duty of Court to see whether the evidence displaces Collector's award—Effect when evidence exaggerated and reckless.*

Compensation payable for land acquired by Government cannot be ascertained with mathematical accuracy and the Court has to see whether the evidence adduced displaces the amount awarded by the Collector.

The valuation of the Collector is not displaced by evidence of value given by the claimant which is so exaggerated and reckless that no reliance can be placed thereon. *F. W. Higgins v. Secretary of State, 22 C.W.N. 669 = 46 Ind. Cas. 221.*

FLETCHER and SHAMSUL HUDA, JJ.

(8) S. 19, sub-S. 2, cl. (b)—*Reference by Collector—Limitation—Sale by Hindu widow of property inherited from husband, without necessity or consent of reversioners, Validity of—Position of purchaser.*

Where some time before the date of the award, the Collector made an order that the appellant should go to the Civil Court, and where afterwards it appeared that the Mukhtear who was acting for the appellant did not take part in the proceedings before the Collector: *Held* that the appellant was not represented before the Collector at the time of the award and a reference made within six months of the award was not barred by limitation.

The sale by a Hindu widow without legal necessity and consent of reversioners is not void, but only voidable at the instance of the reversioners or persons claiming under them. *Mahendra Chandra Datta v. Abhoy Charan Sarma, 40 Ind. Cas. 355.*

CHATTERJEE and NEWBOULD, JJ.

*References:—*34 C. 329, *F.*; 14 C.W.N. 106, *R.*

(9) Ss. 18, 31 (2)—*Compulsory acquisition—Compensation—Special Collector—Apportionment—Payment to some claimants—Reference by Collector at the instance of other claimants—Tribunal of Appeal, jurisdiction of, to hear reference—Award of additional amount to claimant—Refund by the claimants who are paid off, cannot be ordered by Tribunal—Suit for refund—City of Bombay Improvement Trust Act (Bom. Act IV of 1898), S. 48 (11), Gangadas v. Haji Ali Mahomed, 18 Bom. L. R. 896 = 36 Ind. Cas. 433 = 42 B. 54. See Final Part, 1916, Col. 889.*

(10) S. 18. See Nos. 3 and b, *supra*.

Land Acquisition Act (1893)—(Continued).

(11) S. 23—*Compensation to be paid for acquiring stone quarry—Mode of calculation.*

Per Fletcher and Greaves, JJ.—The proper basis of the compensation to be paid for acquiring a stone quarry is the amount of workable stone as estimated by a competent witness in the case.

Per Hudus, J. (dissenting).—In cases of this kind, it is generally necessary to take two or all the methods of valuation available, in order to arrive at a fairly correct valuation. Exact valuation is practically impossible and approximate market value is all that can be aimed at. *Mazaffar Ali Khan v. The Secretary of State for India in Council, 44 Ind. Cas. 1 (F.B.).*

FLETCHER, GREAVES and SHAMSUL HUDA, JJ.

*Reference:—*11 C.W.N. 875, *Appr.*

(12) S. 23—*Acquisition of orchard land—Compensation payable to owner—Principles of valuation. Elias M. Cohen v. Secretary of State, 2 Pat. L.J. 615 = 43 Ind. Cas. 17. See Final Part, 1917, Col. 22.*

(13) Ss. 23, 49—*"Market value of land"—Compensation awarded on the basis of rent income—Compound appurtenant to house but in cultivatory possession of tenant with rights of occupancy—Mode of assessment.*

In a case of compulsory acquisition of land, a plot of land appurtenant to a house as compound was acquired. The land in question was let to agricultural tenants who had acquired occupancy rights. The sum awarded to the appellant for compensation was calculated at 16 years' purchase on the rent income of the plot plus a sum of money paid as compensation to the tenants. The owner objected that compensation should have been given to him according to the market value of the land considered as a building site. *Held* that the principle adopted for awarding compensation was correct inasmuch as that the land was not at the disposal of the owner for sale as a building site its value as such being diminished by the existence of occupancy rights (a). *L. W. Orde v. Secretary of State, 16 A.L.J. 301 = 40 A. 367 = 44 Ind. Cas. 923.*

PIGGOTT and WALSH, JJ.

Reference:—(a) 33 B. 483, *R.*

(14) S. 25 (2). See No. 3, *supra*.

(15) S. 31 (2). See No. 9, *supra*.

(16) S. 45 (2) (3). See No. 6, *supra*.

(17) S. 49. See No. 13, *supra*.

(18) S. 53. See No. 6, *supra*.

(19) S. 54—*Appeal against valuation of some of the plots acquired—Memorandum of objections in respect of plots not covered by appeal—Right to file such memorandum—Civ. Pro. Code, 1909, O. XLI, rr. 22 and 23.*

Where in a land acquisition appeal by the Government objection was taken to the valuation of the District Judge in respect of some

Land Acquisition Act (1894)—(Concluded).

only of the several plots acquired, *held*, that the respondent was entitled to file a memorandum of objections relating not merely to the plots covered by the appeals, but also to other plots, all being the subject-matter of the same petition.

Under the Civ. Pro. Code O. XLI. r. 22, a memorandum of objections may be filed against the decrees as a whole or against a part of it which may not be the subject-matter of the appeal. S. 54, Land Acquisition Act, makes no departure from this rule. *The Deputy Collector, Madura Division v. Muthirula Mudali*, 35 M.L.J. 83=8 L.W. 271=24 M.L.T. 88=(1918) M.W.N. 468.

ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

References:—8 B. 368; 34 M. 705; 49 B. 514, *Rel. on*; (1900) 2 Ch. D. 280, *Dist.*

(20) S. 54—Award—Appeal—Difference between Judges—*Letters Patent*, Ss. 15, 36.

Where an appeal under S. 54 of the Land Acquisition Act against an award of the District Judge was heard by a Division Bench of the High Court and the learned Judges who heard the appeal differed from the Land Acquisition Judge and among themselves as to the amount of the award proceeding on different principles of calculation and finally agreed to award the smaller of the two sums respectively arrived at by them.

Held: No further appeal lies under cl. 15 or 36 of the Letters Patent (a).

Held, also, that S. 98 of the Civ. Pro. Code applies to appeals in Land Acquisition cases; that the Judges who heard the appeal having differed on the principles of valuation as well as the amount awardable there was no majority which concurred in varying or reversing the award of the District Judge and the Division Bench should have dismissed the appeal (b). *Manavikraman Tirumalpad v. The Collector of Nigiris*, 35 M.L.J. 110=(1918) M.W.N. 540=24 M.L.T. 155=8 L.W. 261=41 M. 943 (F.B.).

ABDUR RAHIM, OLDFIELD and SESHAGIRI AIYAR, JJ.

References:—(a) 40 C. 21; 17 C.W.N. 421, *F.* (b) 22 C.L.J. 525, *doubted*.

Land Alienation (Punjab).

See PUN. ACT XIII OF 1900.

Land Encroachment.

See MAD. ACT III OF 1905.

Land Estates (Madras).

See MAD. ACT I OF 1908.

Land Improvements Loans.

See MAD. ACT XIX OF 1883.

Landlord and Tenant.

(1) *Denial by tenant of landlord's title, when works forfeiture—Relief against forfeiture—Principles governing tenant for specific term—Position of.*

A tenant was sought to be ejected on the ground that he disclaimed his landlord's title

Landlord and Tenant—(Continued).

and asserted his own by an incidental and casual statement made by him in a document executed by him to a third party purporting to convey some property other than that to which the assertion related. The assertion was not addressed to the landlord nor was it followed up by transferring the particular property to a third party. *Held* that such a collateral reference as the one contained in the said document was not enough to constitute a disclaimer of the landlord's title justifying the forfeiture of the tenancy. The principle being well settled that a tenant cannot acquire title by prescription against his landlord so long as he does not to the knowledge of the landlord repudiate the tenancy under which he holds possession: the denial must be unequivocal and some act tending to the giving up of the relationship of tenant must have been committed. Principles governing doctrine of forfeiture by denial discussed.

Per Seshagiri Aiyar, J.—Obiter dictum. A tenant holding a lease for his life becomes liable to forfeiture of his tenancy by denial of the landlord's title during the period. Where there has been a denial of title, the tenant to obtain relief against forfeiture, must prove that the denial was occasioned by the fraud, mistake or accident of the landlord and that he himself was neither careless nor negligent. *Kemalcooti v. Muhammad*, 41 M. 629.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(1914) M.W.N. 915; (1891) 1 Q. B. 417; (1889) 10 A.D. and E. 427; (1836) 1 M. and W. 695; (1881) 16 Ch. D. 730; 2 Coup. 622; 35 A. 145, *R.*

(2) *Cutting down by tenant of trees on agricultural land—Suit for damages—Civil Court—Jurisdiction—Agra Tenancy Act (II of 1901)*,—Ss. 57, 65, 167.

The plaintiff was the landlord and the defendants were occupancy tenants of a certain agricultural holding. The latter cut down two trees within the boundaries of that holding, and a Munsif, exercising the powers of a Small Cause Court Judge, granted the plaintiff a decree for damages in a suit brought for that purpose:—*Held* that the suit was cognizable by a Civil Court.

The cutting down of trees does not raise a presumption that the act is detrimental to the land within S. 57 of the Tenancy Act. *Manukh Ram v. Bhijraj Saran Singh*, 15 A.L.J. 621=40 A. 646=46 Ind. Cas. 971.

FIGGOTT, J.

Reference:—9 A.L.J. 672, *R.*

(3) *Tenant liable for the damage caused to the neighbouring godown by the falling of the premises let—Transfer of Property Act (IV of 1882), S. 108, cls. (n) and (o).* *Bai Monghial v. Doongersey Lakmidas*, 19 B.M. L.R. 887=43 Ind. Cas. 272. See Final Part, 1917, Col. 543.

(4) *Kadim Inamdar—Alienation of rights in the soil—Enhancement of rent—Miradars—*

Landlord and Tenant—(Continued).

Land Revenue Code (Bom. Act V of 1879).
S. 217.

The inamdar, to whom Government has granted all its rights in the soil in a village where a survey settlement has been introduced, is entitled to raise the rents of permanent tenants even when such permanent tenancies commenced before the alienation (*a*). **Fandu Bala Jagtap v. Ramchandra Ganesh Deshpande**, 20 Bom. L.R. 16=42 B. 112=43 Ind. Cas. 738.

BEAMAN, J.

References:—(*a*) 3 B. 141; 17 B. 475; 29 B. 415; 12 Bom. L.R. 707, R.

(5) *Suit, maintainability of—Bengal Tenancy Act (VIII of 1865), S. 105, suit under—Suit, withdrawal of, effect of—Rent, non-payment of—Limitation Act (IX of 1908), Sch. I, Art. 130.*

An application made under S. 105 of the Bengal Tenancy Act but withdrawn is to be treated as one never made.

Hence, although an application under S. 105 was previously withdrawn, without liberty to make a fresh application, a subsequent suit under the same section is maintainable (*a*).

The mere non-payment of rent for a certain period does not bar a landlord's right to have the rent assessed and to recover rent from his tenant. Art. 130, Sch. I of the Limitation Act applies after the tenure is found to be rent-free. **Srimati Kamini Sundari Chowdharani v. Abdul Habin Moulvi**, 28 C.L.J. 254=47 Ind. Cas. 420.

TEUNON and RICHARDSON, JJ.

Reference:—(*a*) 40 C. 423, F.

(6) *Incumbrance—Bengal Tenancy Act (VIII of 1865), S. 161 (a)—Interest of purchaser of a portion of non-transferable holding.*

An incumbrance implies a limitation of the rights of a tenant and not a total extinction of them. A landlord purchaser at a sale in execution of his rent decree is not required to annul the interest of a purchaser of a portion of a non-transferable occupancy holding (*a*). **Fazarali Mahaldar v. Poroo Mian**, 28 C.L.J. 266.

CHITTY and WALMSLEY, JJ.

Reference:—(*a*) 11 C.L.J. 16, F.

(7) *Lease, construction of—Permanent and heritable tenure—Transferable by custom—Re-entry, right of.*

When a landlord grants a permanent and heritable tenure in land, he has no estate left in him, unless he reserves to himself a right of re-entry or reversion (*a*).

A lease dated the 19th March, 1877, creating a permanent and heritable tenure, contained the following clause: "God forbid, if the said land and *bari* be not used for dwelling purposes the right under the pattah shall be void".

Held, (i) that the clause did not contain any reservation of the right of re-entry by the landlord; and

Landlord and Tenant—(Continued).

(ii) that such tenure was transferable by custom. **Mohammad Reajuddin Ahmed v. Basude Sundarl Dasl**, 28 C.L.J. 278.

SANDERSON, G.J. and MOOKERJEE, J.

Reference:—(*a*) 17 C. 826 (828), R.

(8) *"Taluka" patta, if imports permanency—Covenant by tenant to relinquish land on grantor personally requiring it, if runs with the land—Grant to be construed against grantor—Rule explained—Land encroached upon by tenant and treated by landlord as part of permanent tenancy—Tenant if may be ejected therefrom. Sarada Kripa Laha v. Akhli Bandu Biswas*, 21 C.W.N. 903=41 Ind. Cas. 530=28 C.L.J. 18. See Final Part, 1917, Col. 539.

(9) *Under-raiyati holding—Transferability—Purchase by landlord in execution of a money decree without objection by tenant—Title and possession. Raja Pramatha Bhusan Deb Roy Bahadur v. Ram Charan Mondal*, 22 C.W.N. 124. See Final Part, 1917, Col. 542.

(10) *Bengal Tenancy Act (VIII of 1865), sale of non-transferable holding in execution of decree for rent, if permissible under, in Sylhet District—Bengal Act VIII of 1869, Ss. 59, 64 and 65, whether govern such cases.*

The respondents, who are 8 annas co-sharer landlords of jote in the District of Sylhet, obtained a decree for rent in a suit in which the other co-sharer landlords were parties, and applied for execution of the decree by sale of non-transferable jote of the judgment debtors. The lower Courts treated the case as one falling under the provisions of the Bengal Tenancy Act:

Held—That the case is governed by the provisions of Bengal Act VIII of 1869 and not the Bengal Tenancy Act. As the holding is not transferable, the decree-holder cannot obtain satisfaction of his decree by the attachment and sale of the non-transferable holding of the judgment-debtors under the provisions of S. 59, or S. 64 or S. 65 of the Bengal Act VIII of 1869. **Alok Chandra Pal v. Jaluram Namsut**, 22 C.W.N. 563=45 Ind. Cas. 763.

TEUNON and NEWBOULD, JJ.

(11) *Non-occupancy raiyati holding, sale of, in execution of money-decree—Raiyat's right to raise question of non-transferability.*

A non-occupancy raiyati holding was sold in execution of a money-decree, whereupon the judgment-debtors objected on the ground of non-transferability. The pattah of the land prohibited any kind of transfer without the consent of the landlord and gave the landlord the right of *khas* possession in case any such transfer took place.

Held—That, if the terms of the lease give the landlord a right of re-entry in the case of a transfer without his consent, that may raise a question between the purchaser, if any, at the Court-sale and the landlord, but does not

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clothe the raiyat with a right to object to the sale. *Lelong (Jumla) v. Rajani Kanta Chowdhury*, 22 C.W.N. 792—46 Ind. Cas. 417.

RICHARDSON and BEACHROFT, JJ.

Reference ;—42 C. 172, *Dist.*

(12) *Bengal Tenancy Act* (VIII of 1885), S. 105—S. 50, sub-Ss. (1), (2) and (3)—*Presumption in favour of raiyat if rebutted by acquisition of non-transferable holding as representing creation of a new tenancy—Sub-division and amalgamation of raiyati holdings—New kabulyat not varying the rent but stating it to be variable, if rebuts presumption.*

Where, in a proceeding instituted by the landlord for the settlement of fair rent under S. 105, *Bengal Tenancy Act*, the landlord contended that the presumption arising under S. 50, sub-S. (2), to the benefit of which the tenant was *prima facie* entitled, was rebutted by the acquisition of non-transferable holdings, which represented the creation of a new tenancy.

Held, that the purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as a matter of right, but, if he obtains recognition from the landlord whether by payment or otherwise, then, in the absence of special circumstances, he is admitted into the original tenancy with all its incidents and becomes the successor in interest of the vendor.

Per Richardson, J.—Cls. (1) and (2) of S. 50 of the *Bengal Tenancy Act* assume the continuity and identity of the tenure or holding throughout the whole period from the permanent settlement onwards.

In view of cl. (3), in the case of raiyat, the rule and the presumption contained in cls. (1) and (2) apply to land which, at the time when the question arises, may form part of the raiyat's holding. The rule and the presumption may thus be applicable to several parcels of land, of which the holding consists when the question arises. Part of the holding may be inherited land. Part may have been acquired by purchase from another raiyat. In either case the raiyat may tack on his own occupation of the land at an unvaried rent to the occupation at an unvaried rent of his predecessors-in-interest, who, as regards land acquired by purchase from another raiyat, will include his vendor and his vendor's predecessors.

The inclusion, in a kabulyat executed subsequently to the creation of the holding, of a condition purporting to make the rent variable without any variation in fact does not affect the presumption arising under cl. (2) of S. 50. The true question in such cases is, whether the instrument, on which the landlord relies, is merely confirmatory of the pre-existing interest or tenancy, or, whether it creates a new tenancy, and, in the case of raiyati holdings, this question must be considered with reference to

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the provision contained in cl. (3). *Abheya Sanker Mazumdar v. Rajani Mandal*, 22 C.W.N. 904—47 Ind. Cas. 369.

TEUNON and RICHARDSON, JJ.

References :—22 C.W.N. 321 (322) ; 18 C.W.N. 949, *R.*

(13) *Bengal Tenancy Act* (VIII of 1885), S. 86 (6)—*Vendee of portion of non-transferable raiyati holding, if may be evicted by landlord in whose favour vendor surrenders the portion after sale.*

A raiyat, who has sold a portion of his non-transferable occupancy holding, has parted with all his rights in the portion in favour of the purchaser, and has no interest in it to surrender.

Moreover, surrender may be looked upon as a transfer or grant and whatever binds the raiyat binds the landlord in whose favour he surrenders.

The landlord cannot on accepting a surrender of the part of the holding sold by the raiyat, sue to evict the transferee. *Ananda Mohan Roy Chowdhury v. Gurudayal Saha*, 22 C.W.N. 965.

WOODROFFE and MOOKERJEE, JJ.

References :—42 C. 172 ; 14 C.W.N. 229, *F.* ; 17 C.W.N. 1101, *Not F.*

(14) *Bengal Tenancy Act* (VIII of 1885), S. 86 (6)—*Sale of portion of non-transferable raiyati holding—Surrender by vendor of same and re-settlement taken by him of rest—Implied surrender—Landlord, if may evict purchaser.*

Where a raiyat expressly surrendered a part of his non-transferable holding, which, prior to such surrender, he had sold, and took a new settlement of the remainder.

Held, that this operated as a surrender of the whole holding (express as to a portion and implied as to the rest) and, as no fraud on the part of the landlord was established, he was entitled to evict the purchaser from the portion sold. *Shalkh Tamij Munshi x. Brojendra Kishore Roy Chowdhury*, 22 C.W.N. 967—46 Ind. Cas. 862 (F.B.).

WOODROFFE, CHITTY and SHAMSUL HUDA, JJ.

References :—42 C. 172 (F.B.) ; 14 C.W.N. 229 ; 17 C.W.N. 1101, *Rel. on* ; 18 C.W.N. 601, *R.* ; 30 Ind. Cas. 252 ; 19 C.W.N. 268 ; 20 C.W.N. 610, *Dist.*

(15) *Bengal Tenancy Act* (VIII of 1885), S. 86—*Non-transferable raiyati holding—Sale of a portion by raiyat—Subsequent surrender of same by him—Landlord if may eject transferee—Fraud—Knowledge.*

Per Teunon, J.—Irrespective of fraud, collusion or knowledge, a landlord, who accepts from a raiyat the surrender of a portion of the holding after the same had been sold by him, is not entitled to eject the transferee. The raiyat's rights in the portion having been extinguished, by the surrender or grant to the landlord, the latter took nothing.

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Sale of a part of a holding may be reasonably argued to be an incumbrance or limitation of the raiyat's rights in the whole and should, therefore, operate to prevent a surrender whether of the whole or the part.

Per *Richardson, J. (contra)*.—On the authorities sale of a part of a raiyati holding is not an incumbrance within the meaning of cl. (6) of S. 86 of the Bengal Tenancy Act.

On the authorities the landlord (apart from fraud) has the right to re-enter, if the whole or a part of a non-transferable raiyati holding be relinquished or surrendered by the raiyat after the same has been sold by him. (History of case-law on the subject reviewed). *Shelkh Dastur Ali v. Ram Kumar Gope*, 22 C.W.N. 972.

TEUNON and RICHARDSON, JJ.

(16) *Signification of Tiluka pitta—Permanent tenure—Liability to enhancement of rent—Construction of contract—Putni Regulation—arrears of rent recoverable according to revisions of, whether proves fixity of rent—Nonad lands and taraf lands. Upendra Lal Gupta v. Jogesh Chandra Roy*, 38 Ind. Cas. 56=22 C.W.N. 275. See Final Part, 1917, Col. 545.

(17) *Covenant by tenant not to transfer land, Effect of.*

Where there is no condition of forfeiture in a lease, a covenant by the tenant not to transfer the land cannot restrict the transfer of an interest unless proper conditions are put in for enforcing the rights of the landlord on a breach of the contract. *Anoda Charan Naya v. Dasarath Halder*, 40 Ind. Cas. 444.

FLETCHER and SMITHER, JJ.

(18) *Construction of lease—Agreement not to vary rent until actual measurement—Whether S 52 of the Bengal Tenancy Act is applicable.*

A landlord let out, by a permanent lease, a piece of land described as a plot of 1000 bighas then in a jungly state, rent free for six years, and thereafter, at a progressive rent rising to 8 annas per bigha. The lease further provided, "I shall pay Rs. 500 every year according to the *kists*. After the rent-free period and the period of progressive rent are over, on a measurement being made, for the land found to be in excess, I shall pay additional rent at the above rate from the time of measurement and shall, from that time, get an abatement of the above rate for the land which is found to be less, and I or my heirs or successors shall never have to pay an additional *jama* for the above lands and you or your heirs and successors shall never receive or be entitled to receive any additional *jama*."

Held, that, on a proper construction of the lease, until one or other of the parties applied for measurement, the rent was fixed at Rs. 500 per annum.

Held, further, that S. 52 of the Bengal Tenancy Act did not apply to the case, as the lease was a permanent one, and, under the terms of the lease, what was demised was the land lying within the boundaries mentioned in

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the schedule to the lease, at Rs. 500 per annum, with option to the tenant or the landlord to have an actual measurement made of the land, and, until that was done, the tenant had to pay at the rate mentioned. *Raj Kumar Misra v. Rama Nath Singh*, 40 Ind. Cas. 491.

FLETCHER and NEWBOULD, JJ.

(19) *Non-transferable occupancy holding—Purchaser in execution of money decree not recognised by landlord—Suit by such purchaser to recover possession from another purchaser recognised by landlord.*

Plaintiff purchased a non-transferable occupancy holding in execution of a money decree, but he was not recognised as tenant by the landlord. He filed a suit for possession. Defendant pleaded a purchase from the widow of the ryot and he had been accepted by the landlord as a tenant.

Held that plaintiff could not succeed, as the acceptance of the defendant as a tenant by the landlord amounted to a settlement. *Janaki Nath Saha v. Kallash Chandra Singha*, 40 Ind. Cas. 498.

CHATTERJEA and NEWBOULD, JJ.

(20) *Ejectment—Title of plaintiff proved—Relief—Adverse possession of undertenant against lessee, whether adverse against lessor—Pleadings, determination of case on grounds taken. Ishan Chandra Dhupi v. Nihal Chandra Dhupi*, 41 Ind. Cas. 378=22 C.W.N. 853. See Final Part, 1917, Col. 549.

(21) *Occupancy holding, Non transferable—Transfer of portion whether constitutes abandonment of the whole holding—Landlord's right to re-enter—Position of tenants holding undivided shares*

As regards tenants, the occupancy holding is one and an entire holding of a particular piece of land though it may be that different persons are entitled in different and undivided shares as between themselves.

Where a raiyat transfers or abandons his undivided share in a non-transferable occupancy holding without parting with the remainder of the holding belonging to his co-sharers, the co-sharer landlord, under whom that share was held, cannot re-enter as there has been no abandonment of the holding. *Swarna Moyi Das v. Gayratulla Sardar*, 41 Ind. Cas. 704.

FLETCHER and NEWBOULD, JJ.*

(22) *Suit for rent—Persons acquiring interest in tenancy prior to suit—Effect of non-joinder of parties in rent suit.*

In a suit for arrears of rent of a tenure, the plaintiff, if he desires to affect or override the interest of a person in the tenure acquired prior to the institution of the suit, must, if he becomes aware of such interest subsequent to the institution of his suit, join such person as a party to the suit.

A landlord brought a suit for arrears of rent of a tenure against the tenure-holder, whose interest in a part of the tenure had been purchased by the defendants before the institution

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of the suit at a sale in execution of a money-decree against the tenure-holder, but the landlord's fee was not deposited till after the confirmation of the sale. After the institution of the suit, the landlord became aware of the defendants' interest in the tenure, but did not make them parties to the rent suit. In execution of that decree, the landlord purchased the tenure.

Held that, having regard to the terms of the Validation Act, the defendants acquired an interest in the tenure before the plaintiff instituted the suit for rent and as he did not make the defendants a party to that suit when he became aware of that interest subsequent to the institution of the suit, he could not affect or override that interest of the defendants by his purchase of the tenure in execution of his decree for rent against the original tenure-holder. **Kall Charan Shaha v. Gobinda Sunder Sanyal**, 41 Ind. Cas. 733.

FLETCHER and RICHARDSON, JJ.

(23) *Transfer of occupancy holding by way of gift, whether binding on heirs of donor—Revocation of gift.* **Behari Lal Ghose v. Sindhuqala Dassi**, 41 Ind. Cas. 878=45 C. 434=22 C.W.N. 210=27 C.L.J. 497. See Final Part, 1917, Col. 546.

(24) *Transfer of Property Act (IV of 1882), S. 112—Landlord and tenant—Forfeiture for non-payment of rent—Ejectment suit—Claim for rent of subsequent period—Waiver of forfeiture—Interest on arrears at 6½ per cent. per mensem—Whether penalty.*

Where, in a suit for ejectment under an express covenant under which the tenant is liable to ejectment on default in payment of rent, a claim for rent for a period subsequent to the default, which, according to the plaintiff, gave him the cause of action for the suit, is included, the suit for ejectment must fail, as the plaintiff must be deemed to have waived the forfeiture under S. 112 of the Transfer of Property Act by making such claim for rent.

A stipulation for payment of interest at 6½ per cent. per mensem on arrears of rent is enforceable and cannot be regarded as a penal rate in the absence of special circumstances. **Abdul Rashid Khan v. Safar Ali**, 42 Ind. Cas. 614.

N.R. CHATTERJEE and RICHARDSON, JJ.

(25) *Failure of co-sharer landlord to secure entire possession of holding to tenant—Co-sharer landlord not entitled to full rent.*

Where a co-sharer landlord failed to secure to the tenant the peaceful possession of the whole property, and the tenant was held liable to other co-sharer landlords for their shares the co-sharer landlord is not entitled to recover full rent from the tenant. **Nara Narain Kapali v. Kall Mohan Das Kapali**, 43 Ind. Cas. 47.

FLETCHER and NEWBOULD, JJ.

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(25-a) *Rent, Suit for, by mortgagee of ijara—Purchaser at Revenue sale of the proprietary interest, Payment to, Plea of Admissibility of—Bengal Tenancy Act (VIII B.C. of 1885), Ss. 60, 72—Applicability of S. 72.*

In a suit for recovery of rent on the strength of an ijara executed by the original proprietor in favour of the plaintiff's predecessor-in-interest.

Held, (1) that the plaintiff being a registered mortgagee, plea of payment to the purchaser at revenue sale of the proprietary right cannot be admitted under S. 60 of the Bengal Tenancy Act (1885), and (2) that S. 72 of the Bengal Tenancy Act was inapplicable to the case. **Mukhdnman v. Khairat Ahmed**, 43 Ind. Cas. 182=3 Pat. L.W. 245.

CHAMBER, C.J. and SHARFUDDIN, J.

(26) *Holding, meaning of—Ejectment suit—Landlord's right to enter—Occupancy right—Transferability—Splitting up of occupancy holding by transferees—Effect on landlord's right in regard to holding.*

A holding is a parcel of lands for which a definite contract for rent has been made. Where there is no contract for payment of rent for a house, it is not a part of the holding.

In ejectment suits the landlord is entitled to enter into possession of lands secured to the payment of the revenue in which no relationship of landlord and tenant subsists.

It is settled law that where an occupancy holding is transferable the occupancy right passes with the transfer.

Where an occupancy holding is transferred to several persons and the holding is split up into parts, the landlord's right to regard the holding as still intact and liable to be sold in its entirety for arrears of rent is not prejudiced and landlord's suit in ejectment is not barred.

A raiyat may have a saleable interest in his entire holding. He has no saleable interest as against the Zamindar in a part of it only. **Ramji Prasad Sahu v. Mahammad Anwar Ali Khan**, 43 Ind. Cas. 377=3 Pat. L.W. 299.

ROE and JWALA PRASAD, JJ.

References:—3 C. 774, F.; 26 C. 615, Appr.; 43 C. 172, R.

(27) *Three persons having interest in a holding—Rent suit—Decree against only one tenant—Whether decree is rent decree or money-decree.*

Where three persons had an interest in a holding, being entered in the record of rights as tenants and the landlord obtained a decree against only one of them, *held* that the decree in question should be treated as a money-decree and not as a rent decree. **Devanand Lal v. Maharajah Kesho Prasad Singh**, 43 Ind. Cas. 748=4 Pat. L.W. 37.

ROE and IMAM, JJ.

Reference:—37 Ind. Cas. 913, F.

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- (28) *Contract to pay rent in any form—Contract to pay rent in sikka rupees—Validity of—Res judicata—Presumption—Document establishing relation of landlord and tenant—Res judicata.*

A party is entitled to contract to pay rent in any form he pleases and he will be bound by that contract.

Where rent is capable of variation by contract, the decision in a previous suit is *res judicata* only to this extent that the issue, that was rent in the years for which the previous suit was brought, cannot be re-opened and that it should be presumed until the contrary has been proved that there has been no variation in the rent in subsequent years.

The document by which the relationship of landlord and tenant was established having been once construed in a rent suit, that construction is *res judicata* for all time. **Raja Dhakeswar Prasad Narain Singh v. Ram Prasad Singh**, 43 Ind. Cas. 753=4 Pat. L.W. 47.

ROE and IMAM, JJ.

References:—20 C. 505, P.; 7 C. L. J. 202; 19 C. L. J. 348, *Appr.*

- (29) *Landlord aware of transfer of tenancy to plaintiff—Landlord obtains rent decree against heirs of original tenant and gets the land sold in execution—Plaintiff's right to land decreed.*

A tenant bequeathed by will his land to plaintiff, who entered into possession thereof. When the plaintiff was dispossessed from the land by the heirs of the original tenant, plaintiff sued the trespassers and the landlord and got his claim decreed. Subsequently the landlord brought a rent suit against the heirs of the original tenant, obtained a decree and purchased the land in execution of the rent decree. When the plaintiff brought the present suit to recover possession of the land from the landlord, *held* that the landlord's rent suit against the heirs of the original tenant was fraudulent and collusive action and plaintiff was entitled to recover possession of the land in question. **Raja Jagadishchandra Dhabaldeo v. Seldam Mahata**, 44 Ind. Cas. 26.

CHITTY and SMITHERS, JJ.

Reference:—21 W. R. 94, F.

- (30) *Tenant spending money and reclaiming waste land—Landlord acquiescing—Presumption of lease.*

It is clear that where a plea of acquiescence or of standing by has been raised, a tenant who is encouraged to spend money may claim the protection given by a Court of Equity.

A Court of fact may, if the circumstances of the case justify, come to the conclusion that the landlord had expressly or implicitly contracted

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to lease the land to a tenant whose reclamation of waste land has not been objected to for some years. The length of possession without objection on the part of landlord to justify a plea of lease depends upon the facts of each case. **Sawal Singhai Nathuram v. Kalloo**, 44 Ind. Cas. 517.

MITTRA, A.J.C.

Reference:—**Ramsden v. Doyson**, (1866) 1 H. L. 129=14 W.R. 926, *Appr.*

- (31) *Mokurari tenure—Lessor dispossessing tenure-holder—Right to withhold entire rent.*

When the lessor is directly or indirectly concerned in the dispossession of a tenure-holder from a *mokurari*, the tenure-holder is entitled to withhold payment of the entire rent to the superior landlord. **Moondan Potdar v. Sattu Chandra Roy**, 44 Ind. Cas. 658=3 Pat. L.W. 364.

SHARFUDDIN and ROE, JJ.

- (32) *Occupancy holding—Usufructuary mortgage of the holding—Landlord's consent not obtained for mortgage—Death of tenant without heirs—Landlord's right to eject mortgagees.*

Held, that landlords were entitled after the death of the tenant without heirs, to eject the usufructuary mortgagees who were in possession of a non-transferable occupancy holding when the consent of the landlord was not obtained for the mortgage transaction. **Harapalli Sarkar v. Rajabali Mia**, 44 Ind. Cas. 721.

RICHARDSON and BEACHCROFT, JJ.

- (33) *Ante-jaghir tenant in Berar—His rights to land—Trees standing on ante-jaghir holding—To whom belongs.*

An ante-jaghir tenant is the owner of his land subject to the payment of the rent of Jaghirdar. As long as this is paid the Jaghirdar cannot evict him.

Any trees planted in the ante-jaghir holding by ante-jaghir tenant or planted with his permission by any one else is not a question that affects the jaghirdar who, as long as the rent is regularly paid, cannot claim either the land or the trees. Unless express agreement is established, the general law is that proprietorship of the land carried with ownership of the trees standing thereon. **Shan Rao Kumbi v. Sitaram Maharaj**, 44 Ind. Cas. 969.

PRIDEAUX, A.J.C.

- (34) *Consent decree between landlord and tenant providing ejectment of tenant in case he refuses to cultivate—Nature of the clause—Landlord's right to sue for arrears of rent.*

A landlord obtains a consent decree which provides that in the event of the tenant refusing to cultivate the land and to render the landlord his share of the produce, the only remedy which the landlord has is to eject the tenant.

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Held, that, under such circumstances, the clause relating to ejectment was in the nature of a clause for re-entry and the document had not the effect of depriving the landlord of his ordinary right to sue as landlord for arrears of rent due by the tenant. **Proboodh Chandra Mitra v. Indra Chandra Chaule**, 44 Ind. Cas. 925.

RICHARDSON and BEACHCROFT, JJ.

- (35) *Landlord granting oral lease and the possession of land to the tenant—Landlord granting subsequent lease to a third person—Validity and effect of subsequent lease.*

Where a tenant entered into a land by oral lease granted by the landlord and subsequently paid some cash in pursuance of certain terms of settlement and thereby continued in the possession thereof, the landlord is not entitled to grant a fresh lease of the same land to a third person, who gets nothing by such a lease. **Edon Mollah v. Badan**, 45 Ind. Cas. 49.

FLETCHER and SHAMSUL HUDA, JJ.

- (36) *Receipt of rent by gomasta of landlord—Its effect—Presumption—Performance of duties by gomasta.*

Even if a gomasta of a landlord had no authority to grant the *amabarah* or to settle the holding with the tenant, nevertheless if the rent was received from the rent tenant and found its way into the pocket of the landlord, that would be evidence of ratification by the landlord of the gomasta's act on which the Court might act.

In the absence of the evidence the ordinary presumption would be that the gomasta performed his duty and duly delivered the rent to his employer. **Jaharmul Babu v. Keramutullah Molla**, 45 Ind. Cas. 196.

RICHARDSON and BEACHCROFT, JJ.

Reference :—15 C.W.N. 583, R.

- (37) *Document granting lease for particular term—Not a mere recognition of pre-existing tenancy—Presumption under S. 50, Bengal Tenancy Act.*

A document which gave tenants a lease for a particular term at a fixed rent and gave to the landlord the right at the expiration of that term to settle the land with whomsoever he pleased, cannot be taken as a mere recognition of the pre-existing tenancy. The document negatives the presumption under S. 50 of the Bengal Tenancy Act. **Dharavi Kanta Lahiri Chowdhuri v. Ismail Sheikh**, 45 Ind. Cas. 221.

FLETCHER and SHAMSUL HUDA, JJ.

- (38) *Acts between tenants inter se, not binding on landlord.*

A tenancy, so far as the landlord is concerned, is indivisible and cannot be affected by an act to which the tenants alone are parties. A mortgage effected by tenant in favour of

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another is not binding on the landlord. **Anand Rao v. Giridharlal**, 45 Ind. Cas. 474.

BATTEN, A.J.C.

Reference :—3 N.L.R. 182, F.

- (33) *Partial ejectment of tenant, whether valid—Whether co-sharer landlord can eject a tenant—Ejectment of trespasser—Joint possession by landlord and tenant.*

No co-sharer can sue to put an end to a tenancy unless he represents the entire proprietary body.

Any co-sharer may sue to eject a trespasser from the entire area covered by the trespass. Only the full landlord can sue to eject a tenant.

A man who was put on the land as a tenant by any co-sharer and who has remained thus with his status undisputed for many years is *prima facie* a tenant who has been accepted as such by the proprietary body.

There can be no such thing as the partial ejectment of a tenant to the extent of the share of the co-sharer claiming joint possession nor can there be joint possession by landlord and tenant. **Dhansolai v. Rawlail**, 45 Ind. Cas. 496.

STANYON, A.J.C.

Reference :—3 N.L.R. 161, R.

- (39 a) *Service tenure—Lease providing option of landlord to receive money rent or eject tenant on failure by tenant to render service—Effect.*

Where a lease provides that the tenant should render certain services to the landlord and gives the landlord either to recover a fixed money rent, if the tenant fails to perform his services or to eject him, the landlord is not bound to accept the money rent on tenant's failure to perform the stipulated service; he can eject the tenant, if he so pleases. **Sanchiam De Bogari v. Hara Priya Thakurani**, 45 Ind. Cas. 511.

FLETCHER and SHAMSUL HUDA, JJ.

- (39-b) *Letting out land at certain rent "including the cesses"—Effect of*

Where a landlord let out lands at certain rent per annum "including the cesses," held that the landlord undertook by contract as between himself and the tenant that he would bear the cesses. **Jogendra Nath Mitra v. Aparaj Prosad Mukerjee**, 45 Ind. Cas. 616.

FLETCHER and SHAMSUL HUDA, JJ.

- (39-c) *Tenant denying landlord's title—Forfeiture of tenancy—How to determine tenancy.*

Where a tenant denied the title of the landlord to the lands, he forfeits his rights of tenancy and is liable to be ejected therefrom.

Where a tenant denied the title of the landlord and the landlord chose to determine the tenancy, it is not necessary that any notice

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should be given to the tenant nor any prescribed act done on the part of the lessor; it is sufficient, if something is done by the lessor to show his intention to determine the lease. *Muhammad Abdul Latif v. Habibul Rahman*, 45 Ind. Cas. 642.

JWALA PRASAD, J.

References:—34 M. 161; 38 M. 445; 25 C. L.J. 332; 34 C. 922; 2 C.W.N. 755, *Appr.*

(39-d) *Dowl Kabuliyaat*—Landlord entitled to take possession under certain circumstances—Effect—Tenant's permanent interest in land.

Where a *Dowl Kabuliyaat* contained a clause, entitling the landlord to take possession in the event of the parties not being able to arrive at a new rate of rent after the expiration of the temporary term covered by the *Dowl Kabuliyaat*, held that such a term is absolutely inconsistent with a fact that the tenant has a permanent interest in the land. *Mohin Chandra Pal v. Pradyat Kumar Tagore*, 45 Ind. Cas. 651.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—21 C.W.N. 809, *F.*

(40) *Grant of village for maintenance*—Grantee, a tenant under special agreement—Rent, Arrears of, Interest on—Oudh Rent Act (XXII of 1886), Ss. 52, 141.

An ancestor of the defendant was granted certain villages for his maintenance by an ancestor of the plaintiff on condition (1) that he paid the revenue assessed on the same and 16 per cent. *malikana* and 7 per cent. *sawat* to the taluqdar, (2) that the grant was resumable, if the grantee failed to maintain the members of his family, and (3) that while the grant was hereditary, the grantee should not sell or mortgage the villages.

Held, that the grantee was a tenant holding under special agreement within the meaning of S. 52 of the Oudh Rent Act and was, therefore, liable to pay interest on the arrears of rent due from him under S. 141 of the Act. *Sheora Singh v. Sriprakash Singh*, 45 Ind. Cas. 855=5 O.L.J. 141.

KANHAIYA LAL, A.J.C.

(41) *Arrears of rent, suit for*—Decree in, if could be passed prohibiting execution personally.

In a suit for rent, the Court should pass a decree in favour of the landlord-plaintiff without any limitation that it should not be executed against the tenant personally or should dismiss the suit altogether, according to the nature of the plaintiff's evidence. *Dwarkanath Dey Chowdhury v. Sallaja Kanta Mullick*, 45 Ind. Cas. 702.

FLETCHER and SHAMSUL HUDA, JJ.

(42) *Occupancy holding*—Transferability of, subject to payment of Nazar—Custom—Essentials of custom—Nazar, Tender of, Necessity of, for validity of transfer.

In order to establish a custom of transferability of an occupancy holding subject to the

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payment of a customary *nazar*, the evidence must show that the landlord is bound to recognise the transfer when *nazar* of the amount or at the rate determined by custom is tendered to him.

A custom which leaves the amount or rate of the *nazar* indefinite is void for uncertainty, because no one knows what the tenant has to pay by way of *nazar* and the landlord can demand what he pleases and refuse his consent unless he is satisfied.

Where a custom of transferability of an occupancy holding on payment of a customary rate of *nazar*, which the landlord is bound to accept, is proved to exist, the transferee can have no title under that custom until he has paid or tendered *nazar* at that rate. *Minu Kumari Saheba v. Ichamoyee Chowdhurani*, 45 Ind. Cas. 747=27 C.L.J. 587=22 C.W.N. 929.

RICHARDSON and WALMSLEY, JJ.

(43) *Under proprietary right, Acquisition of, by adverse possession*—Sir, land held as—Sirdar, description as, in rent receipts, Effect of—Proprietary title, Decision as to, against mortgagee—Mortgagor, if bound by—Res judicata.

While there can be no doubt that under-proprietary rights may be acquired by long adverse possession, extending over the necessary period, it is at the same time necessary that the person, who claims to have acquired a title in this way, must give definite evidence to show that he asserted an under-proprietary title.

Where it was found that certain persons had managed to escape ejectment by notice on the ground that they had been holding their land as *sir* and that they had been described as *sirdars* in the rent receipts given them by the landlord;

Held, that, under the circumstances, they were not under-proprietors of the *sir* land.

A decision in respect of a question as to proprietary title against the mortgagee alone cannot bind the mortgagor. *Khunnu Singh v. Abbas Bandi Bhai*, 45 Ind. Cas. 849=5 O.L.J. 121.

LINDSAY, J.C.

Reference:—9 O.C. 33, *Expl.*

(44) *Bengal Tenancy Act* (VIII of 1885 B.C.), Sch. III, Art. 3—*Tenant*—Dispossession of, by landlord—Suit to recover possession of holding, Limitation for—Ryot's interest in holding, Recognition of, Effect of.

Where, after a ryot was dispossessed of his holding by some of the co-sharer landlords, his right to redeem the holding was recognised by the Court in a mortgage suit by another of the co-sharer landlords.

Held, that such a recognition of the right by the Court could not extend the period of two years' limitation which the ryot had, under Art. 3, Sch. III of the Bengal Tenancy Act, for bringing a suit for recovery of possession of the holding. *Girish Chandra Mitra v. Giribala Debi*, 45 Ind. Cas. 937=28 C.L.J. 219.

FLETCHER and SHAMSUL HUDA, JJ.

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- (45) *Tenancy, Origin and incidents unknown*
— *Nature of*—*Tenant holding over under*
dowl kabuliya, if a permanent tenure-
holder.

In the case of the tenants holding under the terms of a *dowl kabuliya*, dated 1170 B S, the origin and the nature of the tenancy existing prior to that date being unascertainable

Held, that the nature of the tenancy should be determined from the terms of the *dowl kabuliya* under which the tenants were holding over, but not from the conduct of the parties. **Prodhot Kumar Tagore v. Bhuvan Moyee Dasya**, 46 Ind. Cas. 1.

FLETCHER and SHAMSUL HUDA, JJ.

- (46) *Permanent and heritable lease, Grant of*
— *Alienation, Restraint on* — *Validity* —
Construction of document — *Grant, Breach of*
conditions of — *Forfeiture, if landlord can*
claim.

A restraint as regards alienation might be void where the property is transferred in other respects in absolute right. But where land is merely granted for use or cultivation, either free of rent or at a favourable rate of rent, any condition restraining alienation would not be inconsistent with the rights conferred or necessarily void.

Hereditary rent free tenancies of a perpetual character might exist without any right of alienation attaching to them.

Where the entries in the under proprietary register and the *wajib-ul-uz* prepared at the time of the old settlement show that what was granted was a right to hold a land in hereditary right at a fixed rate of rent without any power of alienation.

Held, that the fact that the right of alienation was withheld showed that a grant of only hereditary and perpetual tenancy was intended.

Where a landlord grants a permanent and heritable tenure in land, so long as the tenancy subsists no estate is left in him unless he reserves to himself a right of re-entry in case of a breach of the conditions of the grant, and the lessor cannot claim a forfeiture of the lease by reason of such breach. **Katesar Estate v. Muhammad Amir**, 46 Ind. Cas. 73 = 5 O. L. J. 149.

KANHAIYA LAL, A.J.C.

- (47) *Lease, Surrender of, if document in*
writing necessary—*Registration, Necessity*
of—*Surrender by operation of law, what*
amounts to.

In surrendering a lease, no document in writing is necessary, nor need it be registered.

Where a person took a new lease from Government of land under a periodic settlement by another but made over to him by that other this taking of the new lease operates as a surrender of the interest of the previous settlement holder by operation of law, so that there was no outstanding interest. **Brojonath Sarma v. Maheswar Gahabi**, 46 Ind. Cas. 100 = 28 C.L.J. 220.

FLETCHER and SHAMSUL HUDA, JJ.

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- (48) *Tenancy created before passing of*
Transfer of Property Act—*Tenancy*
neither kaemi mokurari nor agricultural—
Transferability of

Unless the custom of transferability is proved, a tenancy created before the passing of the Transfer of Property Act is not transferable, when it is neither *kaemi mokurari* nor for agricultural purposes. **Tara Kanta Das Chowdhury v. Gopal Chandra Sii**, 46 Ind. Cas. 191.

WOODROFFE and SMITHER, JJ.

- (49) *Riayats holding at fixed rates—Bengal*
Land Revenue Sales Act (XI of 1859).
S. 37, proviso—*Protected interest of, under.*
Riayats holding at fixed rates have a protect-
ed interest within the meaning of proviso to
S. 37, Bengal Land Revenue Sales Act, 1859.
Kali Prasad Chatterjee v. Rash Behari Lalk,
46 Ind. Cas. 254.

FLETCHER and SMITHER, JJ.

- (50) *Rent suit—Tenancies in accordance with*
Record of Rights—Bengal Tenancy Act
(VIII of 1885), Ss. 104-A to 105-F, Rent
settled under, Correctness of, if can be
questioned—*"Shall be deemed to have been*
correctly settled" in S. 104-F, Meaning of.

In a suit for rent in respect of two tenancies in accordance with the Record of Rights published under the provisions of the Bengal Tenancy Act, 1885, on the defendant's questioning the correctness of the rent sued for (which rent had been settled under the provisions of Ss. 104-A—105-F of that Act).

Held that the words "deemed to have been correctly settled" meant an irrebuttable presumption and as such it was not open to the defendants to show that this rent was not correctly settled. **Balkuntha Nath Ghose v. Somananda Mohapatra**, 46 Ind. Cas. 287.

FLETCHER and SHAMSUL HUDA, JJ.

- (51) *Ryot, Planting of trees by, without*
permission—*Perpetual lessee, Right of, to*
maintain suit—*Ikrarmalikhan, Statement*
in, Evidentiary value of, as to custom.

When a ryot plants a large number of trees without obtaining permission of the perpetual lessee or of the superior proprietor and consequently interferes with the possession of the perpetual lessee, the latter is perfectly competent to maintain a suit against the former to have the trees removed. The statement in an *Ikrarmalikhan* of a village which declared that no tenant (*ryot*) was entitled to plant fresh trees without the permission and that if he did so, the trees might be removed or the proprietor of the village might take possession of them was held to constitute sufficient proof of that custom. **Raghubar v. Suraj Baksh**, 46 Ind. Cas. 357.

LINDSAY, J. C.

- (52) *Rent, Fixity of, Presumption as to,*
arising under Bengal Tenancy Act (VIII
B. C. of 1895), S. 50 (2)—Ol. tenure, Sub-
division or amalgamation of, presumption
if destroyed by fresh kabuliya in respect of

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old tenancy—Execution of, if rebuts such presumption.

Even in the case of a *tenure*, a mere subdivision or amalgamation does not necessarily mean the creation of a new tenure and does not destroy the presumption under S. 50 (2) of the Bengal Tenancy Act regarding fixity of rent (a).

The presumption regarding the fixity of rent arising under S. 50 (2) of the Bengal Tenancy Act on proof of payment of rent at a uniform rate for over 20 years could be rebutted by the landlord's showing that the tenants had subsequently to the permanent settlement executed *kabuliyats* agreeing to accept a fresh lease at the *jama* which might be assessed in future upon a measurement of the *Jote*. **Prosanna Deb Roykot v. Safuruddin Ahmed**, 46 Ind. Cas. 433.

FLETCHER and SHAMSUL HUDA, JJ.

References:—(a) 1 Ind. Cas. 4=13 C.W.N. 410=36 C. 257, *Not F.*; 35 Ind. Cas. 229=18 C. W.N. 949, *F.*

(52-a) *Rent, Calculation of, for excess area, mode of—Measurement, Deduction on—Appellate Court, Power of, to allow Bengal Tenancy Act (VIII B.C. of 1885), Ss. 52 (5), 105.*

In an appeal arising out of proceedings instituted under S. 105, Bengal Tenancy Act, the lower appellate Court is entitled to allow a deduction on the measurement on the ground that the former measurement was not a scientific measurement.

S. 52, sub-S 5 of the Bengal Tenancy Act is an enabling section authorising the Court to calculate additional rent for excess area in the way laid down, if it thinks that to be the most convenient way of arriving at what is the fair and equitable rent between the parties. There is nothing to preclude the Court from adopting other methods of calculation for the purpose of arriving at what is the proper excess rent. **Midnapore Zemindary Company, Ltd. v. Kristo Prosad Sukul**, 46 Ind. Cas. 544.

FLETCHER and SMITHER, JJ.

(52-b) *Non-transferable occupancy holding, Purchaser of—Mesne profits, Liability for—Assessment of mesne profits, Basis of—Civ. Pro. Code (1908), S. 2 (12).*

In a suit for *Khas* possession and mesne profits, by a landlord against the purchaser of a non-transferable occupancy holding, it was held that mesne profits should be assessed on the basis of the rent received by the purchaser during the period of his possession but not on what the landlord used to get from his tenant prior to the sale. **Purnananda Datta v. Abinash Chandra Chatteraj**, 46 Ind. Cas. 624.

N. R. CHATTERJEE and NEWBOULD, JJ.

(52-c) *Tenancy, Creation of, by Kabuliyat executed and registered without sanction or acceptance of landlord, Validity of.*

No valid tenancy can be created by the execution and registration of a *kabuliyat* without

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the landlord's sanction or acceptance either before or after registration, even though there may have been some previous talk of a settlement. **Edon Mollah v. Badan**, 46 Ind. Cas. 869.

CHITTY and WALMSLEY, JJ.

(52-d) *Lease of ordinary tenant right—Tenant right, Bequest by will of, Validity of—Ouster of real tenant—Implied surrender, Rule of, Applicability of, where rent paid in advance—Mere non-cultivation—C. P. Tenancy Act (XI of 1938), Ss. 35 (4), 94.*

In a lease of the ordinary tenant right by one co-sharer to another co-sharer, for 149 years, a sum of Rs. 1,490 being the rent for the period of the lease, was paid in advance. The lessee bequeathed all his property at the time of his death to his mother. A suit for possession of the holding was brought by his widow on the death of the mother on the ground that her husband had no power to will away the ordinary tenant right and that notwithstanding the bequest she remained in law the ordinary tenant of the field:

Held, (1) that a tenant right cannot be willed away;

(2) that the ouster, if any, being admittedly not at the instance of the landlord, S. 94 of the C. P. Tenancy Act will not apply;

(3) that one condition essential for the application of the rule of implied surrender laid down in S. 35 (4) of the C. P. Tenancy Act is wanting, that is, there has been a payment of rent in advance on behalf of the real tenant.

A mere non-cultivation by or on behalf of the tenant is not in itself sufficient to constitute an implied surrender. **Sham Rao v. Satya Bhawan Bai**, 47 Ind. Cas. 23.

MITTRA, A.J.C.

(52-e) *Holding, Abandonment of—Re-entry, Right of, of landlord—Bengal Tenancy Act (1885), S. 87—Non-transferable occupancy holding, Transfer of, by heirs of tenant and also by relation—Settlement by landlord with both the purchasers—Effect of.*

A landlord need not have recourse to the provisions of S. 87 of the Bengal Tenancy Act and is entitled to enter upon land which has in fact been abandoned.

A non-transferable occupancy holding was purchased by the plaintiff from the heirs of the original tenant and the same holding was also purchased a few days later by the defendants from a relative of the tenant, which relative had no right, title or interest in the holding. The landlord having made a settlement with both of them, that with the defendants being prior:

Held, that the settlements might be regarded in the light that they merely signified the consent of the landlord to the transfers respectively set up by the parties. In that view the consent operates to validate and confer the title derived from the true owner but can have no validating effect upon the title derived by

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the defendant from the pretended owner.
Wahid Ali Bhuya v. Mahamad Ansar Ali,
47 Ind. Cas. 147.

TEUNON and RICHARDSON, JJ.

(52-f) *Ijara, Expiry of—Ejectment suit against ijaradar—Lease by ijaradar during pendency of ejectment suit—Lis pendens, Doctrine of, Applicability of, to—Transfer of Property Act (IV of 1882), S. 52.*

A settlement of the lands covered by the *ijara* by the *ijaradar* after the expiry of the *ijara* and during the pendency of a suit for his ejectment therefrom, was held not to be made in good faith and the raiyats with whom the settlement was made were therefore liable to be ejected therefrom. **Felu Sarkar v. Hemanta Kumari Debysa**, 47 Ind. Cas. 365.

WALMSLEY and PANTON, JJ.

(52-g) *Under-raiyati lease, Grant of permanent—Bengal Tenancy Act (VIII of 1885), S. 85—Validity of lease, under—"San ba san"—Interpretation of.*

A permanent under-raiyati lease ought not to be registered in contravention of S. 85 (2) of the Bengal Tenancy Act and even if registered, it is not operative as against the grantor.

A registered under-raiyati lease, which made provision for the holding passing from generation to generation and for the holding being sold and which contained the only stipulation with regard to ejectment without notice on the ground of the under-raiyat ever reducing the rent by raising any objection was held, though it was described as a *San ba san* (year to year) lease, to be a permanent lease contravening the provisions of S. 85, Bengal Tenancy Act, and therefore invalid. **Karim Baksha v. Abdul Jabbar Miaji**, 47 Ind. Cas. 416.

WALMSLEY and PANTON, JJ.

(52-h) *Tenant's house in village abadi—Ejectment of tenant from agricultural holding—Right of tenant to occupy house against will of zamindar.*

Where a tenant is ejected from his agricultural holding in the village, he has no right to occupy a house in the village *abadi* against the will of the zamindar. **Ghokrao v. Karam Singh**, 47 Ind. Cas. 645.

LINDSAY, J.C.

(53) *Occupancy right—Presumption—Ryotwari waste lands—Ejectment, suit in—Burden of proof—Presumptions as aids to—Temple lands—Breach of trust.*

Where the Courts below had inferred occupancy rights from the facts that the tenants have been in possession of the lands for nearly 50 years paying a uniform rent, being equivalent to the Government assessment on a single crop land, that the tenants have been selling and mortgaging their lands to the knowledge of the landlord without any objection, that there has been devolution of the property from father to son, the landlord recognising the son as tenant in the father's place and that there

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has been no successful attempt to raise the rent during all the period.

Held, that the presumption that the tenancy was a permanent one was properly raised.

It does not follow, as a matter of law, that, because the lands were unoccupied Government ryotwari lands at one time, cultivating tenants can never acquire occupancy rights in them (a).

A grant of a lease in perpetuity of temple lands is not necessarily a breach of trust. An arrangement by which tenants are given occupancy rights in waste lands belonging to the temple in return for their bringing such waste lands under cultivation may be beneficial to the temple and binding on the temple (b).

In a suit in ejectment based on a terminated tenancy, ordinarily the plaintiff landlord has to prove not only that the defendants were tenants but also his right to eject. He must show that the tenancy is a terminable one and has been terminated validly. This is not affected by any defence of permanent tenancy.

Presumptions as to the nature of tenancy considered and discussed. **Muthusami Aiyar v. Nalnar Ammal**, 7 L.W. 194 = (1918) M.W. N. 219 = 43 Ind. Cas. 977.

SPENCER and KRISHNAN, JJ.

References:—(a) 21 M.L.J. 845; 24 M.L.J. 659, R. (b) 6 L.W. 222 (P.C.); 33 M.L.J. 84 (55), R.

(54) *Copy of document exhibited by consent of parties in first Court—Appellate Court. Power of, to reject such copy—Jurisdiction of Civil and Revenue Courts—Madras Estates Land Act, Ss. 45, 163, 6 (2), 26 (1)—Suit for rent against occupiers of ryoti land—Evidence Act, S. 34.*

Where the copy of a document was exhibited in the trial Court, with the consent of both parties an appellate Court should not reject it, but should give the parties an opportunity of producing the original if it be of opinion that the original should be referred to (a).

Ss. 45 and 163 read together with the explanation to S. 6 (2) of the Madras Estates Land Act make it clear that a claim for rent against persons within the estate, who occupy ryoti land either by legal right or otherwise, must be instituted in a Revenue Court.

A document purporting to have been written by a clerk of the Collector's office, reciting the statement of a karnam who in the discharge of his duty compiled a list, is receivable in evidence as being an official record compiled in the course of business under S. 34, Evidence Act.

A comprehensive and indefinite grant embodying an oral promise said to have been made to the tenants for a former Zamindar to allow them to cultivate wherever and whatever they liked is not what a law will recognise as conferring a heritable right even if the grant be capable of conferring a permanent right, it is not available against the successors of the Zamindar who granted it, but it is open to the tenants—on whom the onus lies—to show that the grant was made for the purpose mentioned

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in cl. 1 of S. 26 of 'the Estates Land Act (b).
Kamula Ammal v. Authikari Sangall Subba Pillal, 35 M.L.J. 11.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 19 A. 76; 11 B. 320; 6 C. 666; 29 M.L.J. 307; (19'6) 1 M.W.N. 9; 38 M. 160, *Rel. on.* (b) 3 B. 452; 39 B. 635, *R.*

- (55) *Forfeiture by denial of landlord's title—Transfer of Property Act, Ss. 105, 111 (g)—Permanent leases, if liable to forfeiture—Disclaimer of title—What amounts to—Honest inquiry, limit of—Forfeiture if enures in favour of lessor's transferee—Landlord denying tenant's rights—Tenant if justified in denying landlord's title on that account—Forfeiture, if accrues—Leases granted before the Transfer of Property Act—Overt act, if necessary to determine the lease on forfeiture—Institution of suit in ejectment, if sufficient—Denial of landlord's title by adult members of joint Hindu family—Minor members, if bound by such denial and consequent forfeiture—Pleadings in India—Rule of construction as to—Deed—Construction—Kayam Saswatham Patta, meaning and scope of—If confers a permanent estate—Surrounding circumstances and subsequent conduct of parties, evidence of—If admissible to prove nature of tenancy.*

In the Madras Presidency, with reference to Kayam Saswatham deeds, the rule of interpretation adopted by the Privy Council in *Tulshi Pershad Singh v. Ramnaram Singh* as regards istemrari mokurari pattas must be followed with the result that when the words Kayam Saswatham alone are used without such phrases as 'including children or descendants' or 'generation to generation' they import only a life-interest and not a permanent one but in construing such deeds, the terms of the instrument, the circumstances under which it has been made and the conduct of the parties may be considered in order to ascertain whether the grant was intended to be a perpetual one (a).

Where it appeared on the evidence that the lessees under a Kayam Saswatham patta effected several private and Court auction sales of their lease right for a consideration too large to be paid for a mere yearly tenancy and the lessors had recognised those sales and that the leasehold interest was on the death of the original lessee being enjoyed by his heirs as of right and that one uniform rate of rent had been paid for about 60 years.

Held that the tenure contemplated by the patta was of a permanent and heritable character.

Even in the case of permanent leases, the general rule relating to forfeiture of lease by denial of landlord's title applies since the provisions of Ss. 105 and 111 of the Transfer of Property Act apply also to permanent leases and further leases granted before the Act are governed by the same principles regulating the relation of landlord and tenant and are therefore subject to the rule of forfeiture (b).

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Under the Transfer of Property Act, even a permanent grant is liable to forfeiture on account of any verbal expressions used by the lessee, if they can be construed as amounting to a direct repudiation of the relation of landlord and tenant and the rule of forfeiture had therefore to be applied with great caution in this country.

Distinction between 'disclaimer' and 'forfeiture' by denial of title in English Law pointed out.

But a tenant honestly inquiring into the title of a claimant landlord is not thereby guilty of disclaimer and the question depends on the language used by the tenant and his conduct in each case whether he has transgressed the limits of honest inquiry and if he has clearly identified himself with the person claiming adversely to his landlord so that his conduct amounts to renunciation of his character as tenant, then forfeiture will follow.

In India where the character of legal advice available especially to mufussil litigants is very inadequate and motusil drafting of pleadings is more or less in its primitive stage the expressions used by the tenants and alleged to amount to denial of title should not be too strictly construed.

Denial by the lessee of the title of the lessor's transferees would work forfeiture under S. 111 (g) of the Transfer of Property Act inasmuch as S. 109 of the Act provides that the lessor's transferee shall have all the rights and be subject to all the liabilities of the lessor and the right to determine the lease and to re-enter upon the premises is an incident of ownership thereof and vests in every person in whom the title to the property has vested either by transfer or by operation of law (c).

The fact that the landlord denied the rights claimed by the tenant under the tenancy would not justify the conduct of the tenant in denying the landlord's title to the land and would not take the case out of the rule regarding the forfeiture, since the disclaimer which entails forfeiture is denial of the landlord's title to the land and not the denial of the landlord's claim that the lessee is his tenant.

In the case of leases granted before the Transfer of Property Act and consequently not governed by it the mere institution of a suit in ejectment is a sufficient determination of the lease where the lessee has forfeited the lease by denial of the lessor's title and no other previous overt act, such as a notice to quit, is necessary to determine the lease and to sustain the suit (d).

Where the managing adult members of a joint Hindu family who were the tenants made certain statements denying their landlord's title, the other minor members of the family are also bound by the consequences of the act of the adult members and forfeiture can be

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enforced even as against them. *Rama Aiyangar v. Anga Gurusami Chetti*, 35 M.L.J. 129—8 L.W. 109—46 Ind. Cas. 62.

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 12 C. 117; 15 M. 199; 21 M. 503; 28 M.L.J. 510, *F.* (b) 14 C. 440; 36 C. 1003, *F.* (c) 9 M. & W. 48. *F.* (d) (1913) M.W.N. 655; 16 M.L.T. 444, *F.*

(56) *Permanent lease—Demand of title—Forfeiture—Transfer of Property Act, S. 111 (g).*

Where in a lease the words "sasawatom" and "kayam" are used the tenure may be inferred to be permanent.

In order to work a forfeiture by denial of the landlord's title the denial must be in respect of the lands from which it is sought to evict the tenants and it is not sufficient that the denial of title to those lands, can be inferred from the tenant's denial of the landlord's title to other lands. *Venkatachariar v. Narasimha Iyengar*, 55 M.L.J. 647=24 M.L.T. 469=(1918) M.W.N. 846.

WALLIS, C.J. and FISHAGIRI AIYAR, J.

References:—15 M. 199; 21 M. 503; 17 M.L.T. 269; 8 L.W. 109, *R.*; *Doe & Davies v. Evans*, (1841) 9 M. & W. 48; *Doe Phillips v. Rollings*, (1847) 4 C.B. 188, *Dist.*

(57) *Permanent tenancy, burden of proof of—Permanent structures, compensation for—Thayal Ammal v. Salal Ammal*, 22 M.L.T. 530=7 L.W. 178=(1918) M.W.N. 46=35 M.L.J. 281=43 Ind. Cas. 615. See Final Part, 1917, Col. 543.

(58) *Occupancy right—Presumption—Applicability of Estates Land Act—Muchilikas given by tenants.*

The trustees of Sri Navaneetha Iswaraswamy temple near Negapatnam in the Tanjore District brought this suit for the recovery of lands, house-sites and houses in the village of Sellur belonging to the temple alleging that the defendants were tenants from year to year and that they refused to quit after proper notice. The tenants contended that they had occupancy rights in the cultivable lands of the village. It was found that the temple was not merely the assignee of the Government revenue but the proprietor of the soil of the village of Sellur. In 1831 the predecessors in title of the present tenants had accepted a lease from and executed a 'tharam faisal muchilika' to the temple agreeing to accept the village lands for the purpose of cultivation from that year, to pay the revenue due to Government and Swamibhogam due to the temple, to pay additional revenue and Swamibhogam when waste lands were newly brought under cultivation, to supply labour for repairs and for carrying the temple paraphernalia and to continue to make the payments agreed upon as long as the lands were in their possession. The Subordinate Judge decreed the plaintiff's suit. The defendants appealed.

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Held:—If the inamdar or assignee in whole or in part of the Government revenue on a village owns the Kudivaram, that is to say, is also the landowner in the village, the Estates Land Act is not applicable to his case and the question whether those holding under him have occupancy right is left to be decided by the Court, the presumption being that they have not. In all the Tanjore temple villages which have come before the Court except one, occupancy right has been held not to exist and in that case no muchilikas taken by the Collector after 1830 was put in evidence. The onus of establishing occupancy right is therefore very strongly on the defendants and they have not established it (a).

The fact that the trustees raised no objection of late years, to the transfer by the tenants of the holdings by mortgage or sale would not by itself confer any occupancy right (b).

Even if the tenants possessed permanent occupancy rights the tenants have relinquished those rights when they executed the muchilikas (c). *Muna Muhamed Kowther v. Muthu Alagappa Chettiar*, 23 M.L.T. 161=7 L.W. 360=34 M.L.J. 234=44 Ind. Cas. 891.

WALLIS, C.J. and SADASHIVA AIYAR, J.

References:—(a) 7 M.L.J. 1; 23 M. 318, *F.* (b) 27 M. 291, *R.* (c) 33 M.L.J. 84; 6 M.H.C.R. 164, *R.*

(59) *Agricultural lease—Incidental denial of title—Forfeiture.*

Where the denial of a landlord's title by the tenant was contained in an incidental statement in a document intended to convey some other property of the lessee to a person other than the landlord.

Held: There was no such denial of the landlord's title as would affect a forfeiture of the tenancy. To have that effect the denial must amount to a renunciation of the tenancy, i.e., it must be unequivocal and some act tending to the giving up of the relationship of tenant must have been committed (a).

Per *Seshagiri Aiyar, J.*—Even in the case of agricultural leases, to which the Transfer of Property Act is not applicable, a sufficient disclaimer of title by the tenant will effect a forfeiture of the tenancy; and the Court has no power to relieve against such forfeiture. Even if the Court should be held to have power to relieve against such forfeiture, it can only be where the disclaimer was occasioned by fraud, accident or mistake (b). *Avaram Marakakath Kizakkekath Komalukutti v. Pullikalakath Puthlakath Muhammad*, 23 M.L.T. 178=34 M.L.J. 170=7 L.W. 291=(1918) M.W.N. 200=41 M. 629=45 Ind. Cas. 743.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 35 A. 145, *R.* (b) 16 M.L.T. 442; *Barrow v. Isaacs and Son*, (1891) 1 Q.B. 417, *R.*

(60) *Encroachment by tenant on neighbouring land of stranger—Presumption that acquisition is for landlord's benefit—Onus—*

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Acceptance of patta from Government—If extinguishes landlord's title.

Where a tenant during the continuance of the tenancy encroaches upon lands belonging to a stranger, the possession of the encroached grounds is *prima facie* held by him for the benefit of the landlord.

It is open to the tenant to prove that in making the encroachment he was making an acquisition for his own exclusive benefit. The burden is on him to prove the same.

A mere grant of patta by Government will not put an end to the original tenancy nor extinguish any right of the landlord. *Ammu Amma v. Puthiaparambath Moldin*, (1918) M.W.N. 38=43 Ind. Cas. 677.

SESHAGIRI AIYAR & 1 KUMARASWAMI SASTRI, JJ.

References:—10 C. 920; 32 C.L.J. 129; 15 M.L.J. 368, R.

(61) *Contract Act, S. 74—Lease—Deposit—Sum of money agreed to be forfeited by lessee in case of breach—If S. 74, Contract Act, applies.*

Where, under a rental agreement for five years, the lessee made a deposit of Rs. 150 being one half-year's rent with the lessor and agreed that the deposit should be forfeited in case of breach of contract by him: *Held*, that the sum of Rs. 150 must be held to be a deposit under the law in the circumstances of the case to which S. 74, Contract Act, is not applicable. A stipulation for its forfeiture in case of breach is, therefore, not a penalty (a).

In determining whether a particular sum of money agreed to be forfeited was a deposit or not, the Court must be guided by the reasonableness or unreasonableness of the amount. *N. Venkatachari v. Ramalinga Tevau*, (1918) M.W.N. 197=7 L.W. 404=45 Ind. Cas. 417.

AYLING and PHILLIPS, JJ.

References:—(1) (1915) M.W.N. 24; 38 M. 178 (F.B.), F.; 39 M. 181, R.

(62) *Continuance of tenancy—Act of third parties, if can put an end to the tenancy—Patta granted by Government to the tenant—If tenancy ceases.*

When a tenancy has been created by the grant of a lease of certain lands by the landlord, it cannot be put an end to by the act of third parties who may claim an interest in the lands against the landlord.

The grant of a patta by Government in favour of the tenant does not therefore put an end to the tenancy, and, in a suit for ejectment, the tenant cannot set up the title of Government and the acceptance of patta from them (a). *Kunhuni Meenon v. Kandan Thava*, (1918) M.W.N. 376=7 L.W. 574=8 L.W. 44=24 M.L.T. 79=45 Ind. Cas. 656.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 12 M. 224, Diss.; 2 M. 226, Not F.; (1917) M.W.N. 38; S.A. 1007 of 1916 S.A. No. 320 of 1915, F.

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(63) *Sub-letting by occupancy tenant—Sub-tenant holding from year to year—Notice to quit if necessary to terminate tenancy.*

In a suit by an absolute occupancy tenant for possession of the holding against his sub-tenant from year to year, *held* that the intention of the parties must have been that the tenancy could not come to an end without reasonable notice being given by one side or the other and that the suit must be dismissed if no notice was given. *Sheomangal v. Nanhelal*, 14 N.L.R. 3=43 Ind. Cas. 392.

BATTEN, A.J.C.

References:—13 W.R. 190; 17 C.W.N. 1073, R.; 4 O.P.L.R. 173, 97, 47, Dist.

(64) *Tenancy of undivided share of land—Suit by tenant for possession of land alleging illegal dispossession—Suit if lies under C. P. Tenancy Act.*

There can be no tenancy within the meaning of the Central Provinces Tenancy Act of a share of land, if that share is not divided off by fences and bounds. *Sumera v. Pemchand*, 14 N.L.R. 62=44 Ind. Cas. 815.

BATTEN, A.J.C.

(65) *Sub-lease by tenant—Effect on such sub-lease of forfeiture or surrender of lease—Surrender, implied, Effect of—Plea of implied surrender, who can raise—Central Provinces Tenancy Act, S. 35 (4).*

It is a rule of law that there is a lessee and he has created an under-lease or any other legal interest, if the lease is forfeited, then the under-lessee of the person who claims under the lease loses his estate as well as the lessee himself; but if the lessee surrenders, he cannot by his own voluntary act in surrendering prejudice the estate of the under-lessee or the person who claims under him (a).

A statutory surrender, under S. 35 (4) of the C. P. Tenancy Act is analogous to forfeiture and a mortgage granted on the tenant right becomes annulled by operation of law on the extinguishment of the tenant right.

It is not necessary that a party pleading implied surrender must be the malguzar himself; it may be pleaded by a person put in possession as a purchaser from the tenant. *Sarjee Row v. Thuka Ram*, 14 N.L.R. 107=46 Ind. Cas. 244.

MITRA, A.J.C.

Reference:—(a) 2 Ch. D. 235, F.

(66) *Surrender for consideration of occupancy holding to landlord—Nearest heir of tenant put in possession by Revenue Officer—Landlord's right to recover consideration—Surrender if transfer—C. P. Tenancy Act, S. 36, 46—Interest.*

When an occupancy tenant surrenders his holding for consideration under S. 35, C. P. Tenancy Act, and his nearest heir is placed in possession of the holding by a Revenue Officer under sub-S. 1 of S. 36 of the Act, the landlord can in a civil suit recover from the surrendering tenant the consideration he has paid, less,

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the amount paid to the landlord by the heir under the sub-section. It cannot be said that a surrender to the landlord can ever be in actual contravention of the law, though, in certain circumstances, it may be remedied just as a transfer in contravention of S 46 may be avoided. If the heirs make no application under S. 36, the surrender remains good (a). S. 36 of the Tenancy Act is only exhaustive as to what the claimant is liable to pay, and it does not deal with any remedy the landlord may have, against a tenant who surrenders for valuable consideration, and certainly does not say he has no such remedy.

In a suit by the landlord for refund of the purchase-money paid by him to his tenant for surrender of his occupancy holding on the setting aside of such surrender under S. 36 (1), O. P. Tenancy Act, it was found that there was no agreement for interest and no demand for the refund of the purchase-money, and that at the time of the surrender, both the parties were aware that the surrender might be defeated by the heirs. In these circumstances the Judicial Commissioner disallowed the claim for interest. *Jalram v. Gopekisan*, 14 N.L.R. 125=47 Ind. Cas. 32.

BATTEN, J.C.

References.—*Shanker v. Ramlal*, C.P. Rev. Manual, Vol. I, p. 239. Ruling dated 22-8-1916 of Financial Commissioner, J.P., F.

(67) *Berar Land Revenue Code*, S. 79 (2) —*Tenancy for a year—Notice to quit if necessary to determine tenancy.*

Held that S. 79 (2) of the Berar Land Revenue Code does not apply to a tenancy for a year, and no notice by either party to the contract of tenancy is necessary to be given to the other before the tenancy can be determined in such a case. *Kisheo v. Mausha*, 14 N.L.R. 129=44 Ind. Cas. 212.

KOTWAL, A.J.C.

(68) *Sub-lease by occupancy tenant binding on landlord—Transfer of such sub-lease if requires landlord's consent also—C.P. Tenancy Act*, 1898, S. 41 (7)—*Transfer of Property Act*, S. 108 (j).

Where the sub-lessee of an absolute occupancy tenant transfers his sub-lease to another, in the absence of any contract, usage or law to the contrary, the principle of S. 108 (j) of the Transfer of Property Act will apply, although the section itself is not applicable to agricultural tenancies.

The provisions of the O. P. Tenancy Act require the consent of the landlord to transfers only by absolute occupancy tenants, and it is nowhere laid down that the transfer of a sub-lease, which is valid and binding against the landlord, also requires the landlord's consent. *Seth Narayandas v. Krishnarao*, 14 N.L.R. 188=43 Ind. Cas. 970.

KOTWAL, A.J.C.

Reference.—5 N.L.R. 186, R.

Landlord and Tenant—(Continued).

(69) *Custom, unreasonable—Zamindar's right to eject—Occupants of houses in town area—Ejectment, liability to. Rabiunissa v. Muhammad Ali*, 20 O.C. 299=43 Ind. Cas. 189. See Final Part, 1917, Col. 543.

(70) *Under-proprietary right in land—Dahiyak, cash—Birtdar's right to deduct dahiyak, from rental.*

A cash dahiyak is distinguishable from a birt right in the land, entitling the birtdar to hold possession of the land and to deduct the dahiyak from its rental. The former may, in a sense, be an under-proprietary right, but it is not an "under-proprietary right in the land" like the latter. *Mohammed Abdul Hasan Khan v. Ishwar Nath*, 21 O.C. 244.

LINDSAY and KANHAIYA LAL, J.CS.

References.—10 O.C. 318=34 I.A. 142; 19 O.C. 124; 14 O.C. 335, R.

(71) *Tenant's house in village abadi land—Tenant ceasing to cultivate village land—Tenant's right to retain his house against the wishes of landlord.*

Where a tenant is found occupying a house in the abadi of an agricultural village, the village site being the landlord's property, there is a presumption that he holds the site appurtenant to his tenancy and he has no right to retain it against the wishes of the landlord on ceasing to be a tenant in the village. *Ram Harakh v. Bhaya Ambika Datt Ram*, 21 O.C. 257.

LINDSAY, J.C. and DANIELS, A.J.C.

References.—13 A.L.J. 745; A.W.N. (1909) 243; 27 A. 31; 28 Ind. Cas. 649; 11 A.L.J. 445; S.A. No. 259 of 1917 (Oudh), R.

(72) *Central Provinces Tenancy Act*, 1898, Ss. 46, 47, 95, 36—*Surrender by tenants to some co-sharers—Lease by latter of surrendered lands—Ejectment of lessees by lambardar through Revenue Court—Suit by co-sharers for declaration and possession—Surrender, if transfer—Lambardar's rights—Ejectment, right of, suit for.*

Certain co-sharer landlords, to whom their tenants had surrendered their holdings, leased them to others, but on the application of the remaining co-sharer landlord who was also the lambardar, under Ss. 46, 47 of the Central Provinces Tenancy Act, the Revenue Court ejected the lessees. In a suit by the co-sharer landlords' under-lessees against the lambardar for a declaration that the plaintiffs had a proprietary right in the lands and were entitled to recover them from the lambardar, held that the surrender was not a transfer within the purview of Ss. 46 and 47, C.P. Tenancy Act, that the Revenue Court's order putting the lambardar into possession was *ultra vires* and that the plaintiffs were entitled to maintain this suit, to which S. 95 of the Act was no bar.

A surrender can in no sense be called a transfer much less a transfer within the meaning of S. 46 of the C.P. Tenancy Act. The Act, while it makes provision for the recovery of possession by the heir of a surrendering tenant, makes none for such recovery by a co-sharer

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landlord under the circumstances of this case. The transfer contemplated by S. 46 must be either a sale or a gift or a mortgage or a sub-lease, and the words "otherwise transfer" in sub-S. 3 must be limited to transactions of a similar nature.

In seeking ejectment, be it in a suit before a Civil Court or an application before a Revenue Officer, the entire body of landlord must be represented; and if the *lambardar* seeks to prosecute such a claim he can do so only as the agent for the entire body, and has no authority to represent co-sharers. The institution of a suit for ejectment against a purchaser is not one of the duties which the *lambardar* can be held to have to perform as the representative of the co-sharers. *Tellochan Panda v. Dinabandhu Panda*, 3 Pat. L.J. 88=44 Ind. Cas. 317.

MULLICK and ATKINSON, JJ.

Reference:—37 C. 694, Rel. on.

(73) *Contract with Government by landlord—Condition imposed on landlord to maintain rights of tenure holders entered in record-of-rights—No waiver of such condition either by tenant or Government—Suit for declaration that a tenure-holder had obtained entry in record fraudulently—Maintainability of suit—Third party's right to claim benefit of contract between two others—Right of tenant to take advantage of condition imposed by Government on landlord.*

Certain persons contracted with the Government to maintain the rights of all tenure-holders entered in the record-of-rights prepared prior to the giving of a *Kabuliyat* by such persons. They nevertheless brought an action for a declaration that one of the tenure-holders covered by this record-of-rights had obtained a fraudulent entry therein and had no such rights as those recorded. Held that the conditions imposed upon the landlord by the Government prevailed, that advantage might be taken of them by the tenant and that the action was not maintainable, until the conditions were removed by waiver on the part of the tenants on the estate or by the Government who were parties to the original contract. *Maharaja Kunwar Manmath Nath Roy v. Sheikh Ameer Khan*, 3 Pat. L.J. 394=46 Ind. Cas. 98.

CHAPMAN and ROE, JJ.

References:—*Tweedle v. Atkinson*, 1 E. and S. 393; 39 L.A. 7, Not E.; *Rogers v. Hosegood*, (1900) 4 Ch. D. 388; 37 L.A. 152; 17 C.L.J. 70, N; 5 C. J. 67; 11 C.L.J. 68, R.; 32 C. 463; 1 C.L.J. 364, Expl. and Dist.

(73-a) *Occupancy rights, Acquisition of—Tenant, Power of, to contract preventing himself the right of—Nig Chas land, Occupancy rights, Acquisition of, in—Orissa Tenancy Act (B. and O. II of 1913), Ss. 154, 232—Tenant if can contract himself*

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out of provisions of Bengal Tenancy Act (1885), Ss. 20, 21.

Under S. 154 of the Orissa Tenancy Act of 1913, a landlord is not entitled to a declaration that the lands were *Nig chas* or rather proprietor's private lands unless the land was recorded as *Nig chas* not only in the Provincial Settlement but also in the settlement between the years 1906 and 1912.

A distinction between the expression *Nig chas* and *nig jol* is apparent from the terms of S. 154.

Where the defendants, the lessees, were introduced into the land under *Kabuliyats* of May and June 1906, under an express stipulation that after the expiry of the term they would leave the land to the *Khas* possession of the landlords, the plaintiffs, held that this express stipulation must be interpreted to amount to a contract that the defendants should not acquire occupancy rights in that land. At the date when the *Kabuliyats* were executed, Ss. 20 and 21 of the Bengal Tenancy Act were in force in Orissa and the latter section recognised the power to contract out of the application of the law under which rights of occupancy could be acquired and there was not then any express law forbidding a tenant to contract himself out of the provisions of Ss. 20 and 21 and prevent himself from acquiring rights of occupancy. The provisions of sub S. (2) of S. 252 of the Orissa Tenancy Act of 1913 also make it clear that the Legislature meant to give effect to contracts made between the landlord and tenant under which tenants could be prevented from acquiring occupancy rights in land, provided the contracts had been made more than six years before the commencement of the Act. *Sheikh Akbar Ali v. Gopal Prasad Chole*, 3 Pat. L. J. 475=46 Ind. Cas. 556.

CHAPMAN and ROE, JJ.

Reference.—17 W.R. 62=9 B.L.R. 165, Ref. to.

(73 b) *Sub tenant—Origin of tenancy, If can criticise—Hindu Law, Joint family—Sub lease by father, Presumption arising from—Bengal Tenancy Act (1885), S. 48, "Holding at a money rent," In, if refers to landlord or under raiyat.*

Where a tenant is recognized by his superior landlord, it is not for the sub tenant to criticise the origin of the tenancy.

Where the father of a Hindu joint family living by cultivation enters into a sub lease, it may be presumed that he is doing so for the purposes of the family.

The words 'holding at money rent' in S. 48 of the Bengal Tenancy Act (1885) refer to the under raiyat and not to the raiyat (a). *Kallaspati Choudhury v. Maneshwar Choudhury*, 8 Pat. L.J. 576=43 Ind. Cas. 965=4 Pat. L.W. 109.

ROE and JWALA PRASAD, JJ.

Reference:—(a) 10 C.L.J. 144, Ref. to.

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(74) *Punjab Tenancy Act (XVI of 1887), S. 13*
—Commutation of rent in kind into cash
rent—Consent of mortgagees and tenants is
sufficient to validate commutation.

In a suit by a landlord against his tenants for value of rents in kind, the latter pleaded that the mortgagees of the land, had, prior to its redemption, commuted the rent in kind for a rent in cash. *Held* that, S. 13 of the Punjab Tenancy Act did not confer any such authority on the mortgagees and that the landlord was not bound by the arrangement. *Sauwan Singh v. Buta*, 3 P.R. 1918 (Rev.) 192 P.L.B. 1918=46 Ind. Cas. 6.

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(75) *Appraisement of produce, Proceedings for—No assent given by tenants for appraisement—Omission by Revenue Officer to confirm appraisement order—S. 19 (2), Punjab Tenancy Act—Suit by landlord for share value of produce rents—Appraisement record, Admissibility in evidence of.*

A zamindar made honestly and with due care, an appraisement of the produce of certain land, for which a landlord had applied. The Revenue Officer omitted to pass an order under S. 19 (2), Punjab Tenancy Act, because the tenant did not accept the appraisement. In a suit by the landlord for his share value of the produce rents, the Courts below did not take the appraisement record into consideration, but gave a decree for the value of the produce, each Court making a calculation of its own; the Commissioner, on appeal to him, observing that the award made below was not in accordance with the Financial Commissioner's Standing Order No. 2, para. 12. *Held*, on revision, that the refusal by a tenant to accept the result of an appraisement was not an adequate reason for declining to confirm it under S. 19 (2), Punjab Tenancy Act, that the object of the executive instructions referred to was to provide the Revenue Courts with a means of calculating the probable produce and its probable selling value, from the records of crop inspection, the Settlement Officer's estimate of average outturns and other available sources, in those cases in which reliable evidence of the actual produce and actual selling price is not available as there is no conclusive presumption in favour of the calculation for which the said executive instructions provided, was that the omission of the Revenue Officer did not affect the admissibility or the value of the evidence contained in the appraisement record and that a decree in accordance with the appraisement should be made. *Firmulk Shah v. Nathu*, 4 P.R. 1918 (Rev.)=1 P.W.R. 1918 (Rev.)=45 Ind. Cas. 980.

MAYNARD, F.C.

(75-a) *Darpatnidar's payment to superior landlord and his payment on behalf of superior landlord.*

Money payable by darpatnidar under a darpatni lease to superior landlord of his patnidar is rent; and money paid by darpatnidar to Government on behalf of and by the

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direction of the superior landlord as revenue and cess should be credited to the darpatnidar in respect of rent to be paid by him. *Nagendra Bala Dasal v. Amrita Lal Chattopadhyaya*, 47 Ind. Cas. 753.

WOODROFFE and SMITHER, JJ.

(75-b) *Cultivator's belief as to his settlor's right to settle, effect thereof.*

A bona fide honest belief on the part of an actual cultivator as to the right of his settlor to settle him on land may entitle the cultivator as a raiyat in due course of time, notwithstanding the settlor having really no such right to settle. *Amar Chandra v. Noor Khatun*, 47 Ind. Cas. 777.

FLETCHER and PANTON, JJ.

(75-c) *Tenure holder changing status to that of raiyat—Effect on tenants.*

A tenure-holder, by changing to a raiyat, can prejudice neither the actual tenants on land at the time of the change, nor the subsequent tenants in the event of the change being with regard to, not the whole tenancy, but an undivided portion thereof. *Annada Prasanna Lahiri v. Badulla Mandal*, 47 Ind. Cas. 985.

WALMSLEY and PANTON, JJ.

References:—36 Ind. Cas. 884; 23 C.W.N. 89; 24 C.L.J. 963; 44 C. 555, R.

(76) *Tenant's right to house site in the Abadi—Consent of malguzar—Failure to object the tenant's occupation—Effect. See ABADI*, No. 1, 43 Ind. Cas. 508.

(77) *Resumption by Government of Chaukidari Chakaran lands—Subsequent transfer thereof to Zamindar—Title acquired by Zamindar—Liability of putnidars to take fresh settlement from Zamindar after resumption. See BEN. ACT VI OF 1870 (VILLAGE CHAUKIDARI), No. 3, 22 C.W.N. 660.*

(78) *Patni lease—Sum recoverable by plaintiff described as malikana—Provision for recovery of such sum by summary procedure mentioned in Patni Regulation—Such sum is rent—Suit for recovery of arrears governed by what law. See BEN. ACT VII OF 1876 (LAND REGISTRATION), No. 5, 27 C.L.J. 474.*

(79) *Necessity to register before instituting suit for rent, if applies to usufructuary mortgagees. See BEN. ACT VII OF 1876 (LAND REGISTRATION), No. 1, 42 Ind. Cas. 585.*

(80) *Suit instituted before Settlement Officer—Transfer to Civil Court—Appeal, if lies to the special Judge—Fixity of rent, presumption of—Non-payment of rent for some years, if deprives tenant of the benefit of the presumption. See BEN. ACT VIII OF 1885 (TENANCY), No. 28, 27 C.L.J. 281.*

(80-a) *Bengal Tenancy Act (1885), S. 66, 1. (2)—Non-occupancy raiyat, Ejectment of, Execution of decree for—Payment by judgment-debtor, Necessity of—Under-raiyat, payment by, Validity of. See BEN. ACT VIII OF 1885 (TENANCY), No. 38-a, 27 C.L.J. 478.*

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(81) Mortgage of share of non-transferable occupancy holding if an incumbrance—Purchaser of holding at rent sale—How far bound by mortgage—Suit to enforce mortgage against tenants and purchaser—Landlord not essential party. See BEN. ACT VIII OF 1885 (TENANCY), No. 78, 22 O.W.N. 665.

(81-a) Bengal Tenancy Act (1885), Ss. 30, 50—Enhancement of rent, Suit for, under S. 50—Presumption under S. 50—Payment of rent at uniform rate for 20 years—Proof as to—Rent receipts, Value of, when Zamindar's papers evidence the fact. See BEN. ACT VIII OF 1885 (TENANCY), No. 12-a, 22 C.W.N. 999.

(82) Ryot holding at fixed rate of rent—Right of such ryot to create permanent sub-lease—Custom validating sub-lease—Proof of document creating sub-lease if admissible in evidence. See BEN. ACT VIII OF 1885 (TENANCY), No. 21, 42 Ind. Cas. 531.

(83) Lease for term of years of chur land—Rent payable for such land as is capable of cultivation—Law governing parties—Lessee not ryot holding under custom of utbandi—Lessee a non-occupancy raiyat. See BEN. ACT VIII OF 1885 (TENANCY), No. 90, 42 Ind. Cas. 546.

(84) Sub-lease granted by raiyat for more than nine years after passing of Bengal Tenancy Act—Registration against provisions of S. 85 (2) of that Act—Admissibility of sub-lease to prove tenancy—Proof of sub-lease how else given—Service of notice under S. 49 (b) upon under-raiyat in possession—Tenancy if can be relied upon in suit for ejectment. See BEN. ACT VIII OF 1885 (TENANCY), No. 22, 42 Ind. Cas. 621.

(85) Landlord not entitled to claim additional rent for excess land when it lies within specified boundaries given in pattab. See BEN. ACT VIII OF 1885 (TENANCY), No. 29-a, 41 Ind. Cas. 24.

(86) Tenant is liberty to contract out of the Bengal Tenancy Act—Diluvion—Reduction of rent not claimable by tenant, when contract imposes full liability irrespective of diluvion. See BEN. ACT VIII OF 1885 (TENANCY), No. 30, 44 Ind. Cas. 222.

(87) Kambiyat containing clause in the nature of threat that rent at the full nominal rate would be levied—Landlord not entitled to claim rent at the nominal rate. See BEN. ACT VIII OF 1885 (TENANCY), No. 9, 41 Ind. Cas. 574.

(88) Landlord purchasing occupancy holding in execution sale and under private alienation, no difference. See BEN. ACT VIII OF 1885 (TENANCY), No. 8, 41 Ind. Cas. 922.

(88-a) Arrears of rent—Interest from what date—Bengal Tenancy Act. See BEN. ACT VIII OF 1885 (TENANCY), No. 34-a, 45 Ind. Cas. 532.

(89) Suit to eject a recorded tenant in Central Provinces—Burden of proving that defendant was not tenant. See C. P. ACT XVIII OF 1881 (LAND REVENUE), No. 3, 45 Ind. Cas. 470.

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(90) Implied surrender—Knowledge of landlord, whether necessary—Joint tenants—Payment by one—Presumption. See C. P. ACT XI OF 1893 (TENANCY), No. 3, 43 Ind. Cas. 180.

(91) Contract as to value of improvements—Reclamation of forest into paddy lands—Tenant's right to compensation for improvement. See MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS), No. 7, (1918) M.W.N. 141.

(91-a) Madras Estates Land Act (I of 1908). Ss. 9, 153, 163—Non-occupancy tenant of old waste under lease, Suit against—Lease entered before Act and expired after Act—Jurisdiction of Court, Civil or Revenue—Tenant, if a trespasser under S. 163. See MAD. ACT I OF 1908 (ESTATES LAND), No. 8-a, 33 M.L.J. 757.

(92) Considerations to be given weight to by Courts in determining commutation of rent. See MAD. ACT I OF 1903 (ESTATES LAND), No. 12, 35 M.L.J. 547.

(93) Right of landlord to claim rent for land left uncultivated. See MAD. ACT I OF 1908 (ESTATES LAND), No. 5, 33 M.L.J. 183.

(94) Status of under proprietor and of tenant—Under-proprietor declared by Decree to be without right of transfer—Effect. See OUDH ACT XIX OF 1863 (RENT), No. 1, (1918) M.W.N. 638.

(95) Oudh Rent Act—Right to decide questions of under-proprietary title or the right to under-proprietary possession—Jurisdiction of Revenue and Civil Courts. See OUDH ACT XXII OF 1886 (RENT), No. 7, 44 Ind. Cas. 357.

(96) Improvement by tenant—Compensation claimed by tenant—Amount of. See OUDH ACT XXII OF 1886 (RENT), No. 1, 45 Ind. Cas. 227.

(97) Landlord and lessor reserving only right to annual rent and re-enter on default—Lessee and tenant's right to resume musli land as proprietor. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 13, 16 A.L.J. 619.

(98) Tenancy, Accretion to, by formation of chur in river—Tenant, Rights of, as to—Alluvion and diluvion on Regulation (XI of 1875), S. 4, sub-S (4). See ALLUVION AND DILUVION, No. 2, 46 Ind. Cas. 929.

(98-a) Relationship of, Question at issue—Rent suit—Second appeal if lies—Bengal Tenancy Act (1885), S. 153. See APPEAL (SECOND APPEAL), No. 10-d, 47 Ind. Cas. 105.

(99) Mortgage with mortgagee in possession—Lease of mortgaged property to mortgagor for monthly rent—Right of mortgagee to evict mortgagor on month's notice expressly stated—Registration of mortgage and lease-deed on same day—No reference to lease in mortgage deed—Transactions different—Right of mortgagee to evict mortgagor and to recover arrears of rent—Relationship of, if created. See APPEAL (SECOND APPEAL), No. 25, 161 P.W.R. 1918.

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(100) Suit for apportionment of rent and for recovery of arrears at certain rate—Deposit in Court of rent by tenant owing to difficulty of obtaining receipts—Validity of deposit. See **APPORTIONMENT OF RENT**, 27 C.L.J. 438.

(101) Ejectment of tenants who are not *ante isara* tenants—Commencement of tenants after 1867—"Antiquity," meaning of. See **BERAR LAND REVENUE CODE**, No. 4, 42 Ind. Cas. 691.

(102) Tenant claiming rights to remain in land against the wishes of landlord—Burden of proof. See **BERAR LAND REVENUE CODE**, No. 2, 44 Ind. Cas. 531.

(103) Suit for enhancement of rent—Possession by tenant of land in excess of formerly understood area—Burden of proof on landlord. See **BURDEN OF PROOF**, No. 2, 22 C.W.N. 526.

(104) Resumption of Chowkidari ohakaran lands situate within ambit of patni granted by plaintiff to defendant's predecessor in interest and transfer thereof to plaintiff as Zamindar—Suit by Zamindar to have rent assessed on such lands and to recover arrears with cesses and interest from patnidars entitled to possession under patni lease—Principle on which amount of additional rent should be determined. See **CHOWKIDARI CHAKARAN LAND**, No. 1, 27 C.L.J. 532.

(105) Patni lease—Clause reserving power to Zamindar to appoint and dismiss Chowkidars—Chowkidari Chakaran land if excluded from patni and reserved to Zamindar. See **CHOWKIDARI CHAKARAN LAND**, No. 2, 22 C.W.N. 487.

(106) Tenants induced by Zamindar on land vacated by chowkidar, to trespasser. See **CHAUKIDARI CHAKARAN LAND**, No. 3, 22 C.W.N. 597.

(107) Transfer of a non-transferable holding Sale in execution of a rent suit—Deposit of the sale amount by transferee of the holding—Landlord withdrawing the deposit amount—Whether landlord can question, in a subsequent suit, the validity of the transfer. See **CIV. PRO. CODE** (1882), No. 3, 43 Ind. Cas. 742.

(108) Suit for rent against co-tenants—No substitution of heirs of deceased co-tenant—Decree whether good money-decree against survivors—Liability, if joint or joint and several—Right of co-tenant to insist on all co-tenants being impleaded. See **CONTRACT ACT** (IX OF 1872), No. 28, 22 C.W.N. 289.

(109) Rent suit—Plea of custom of exemption from rent *vs* some lands in years of inundation—Validity of custom. See **CUSTOM**, No. 2, 22 C.W.N. 422.

(110) Landlord giving up in favour of his occupancy tenant his proprietary right over portion of occupancy holding—Tenant in return giving up his occupancy rights in portion remaining—Nature of transaction—Character

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of land received by tenant in exchange, ancestral or not—Right of tenant to alienate such exchanged land to the prejudice of reversioners. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 6, 120 P.R. 1918.

(111) Transferee of portion of non-transferable holding, if can make deposit. See **DEPOSIT**, No. 1, 23 C.W.N. 192.

(112) Ejectment suit—Determination of tenancy—Plea of title in third person—Tenancy, Existence of, Proof of. See **EJECTMENT**, No. 4, 46 Ind. Cas. 238.

(113) Lease, forfeiture of—Rent, non-payment of, for two consecutive years—Waiver—Transfer of Property Act (IV of 1882), S. 111 (g)—Overt act—Institution of suit. See **EJECTMENT**, No. 2, 27 C.L.J. 277.

(113 a) Occupancy holding, Purchasers of, Failure of, to attorn to landlord—Ejectment, Suit for—Bengal Tenancy Act (1885), S. 88—Suit, allegation as to filing of, by agent of plaintiff, a lady, without her knowledge—Burden of proof in case of. See **EJECTMENT**, No. 4-b, 47 Ind. Cas. 575.

(114) Enhancement of rent claimed by landlord—Denial by tenants of occupancy status and claim up proprietary right—Ejectment suit based on denial of occupancy tenure—Admission by tenants of occupancy tenure before judgment—Occupancy tenure is liable to forfeiture. See **EJECTMENT**, No. 6, 32 P.R. 1918.

(115) Occupancy tenure—Change of area of holding—Enhancement of rent—Agreement between landlord and tenant in violation of statutory provisions. See **ENHANCEMENT OF RENT**, No. 1, 28 U.L.J. 142.

(115 a) Undivided tenancy—Death of one tenant—Surrender by survivor of deceased's rights to landlords—Collaterals of deceased, Right of—Possessory suit by surviving tenant, maintainability of. See **ESTOPPEL**, No. 6-b, 154 P.L.R. 1917.

(115 b) Register of mirchaidari (revenue free) villages—Admissibility of, in evidence to show nature of tenant's holding. See **EVIDENCE ACT**, No. 10-a, 20 Bom. J.R. 712.

(116) Application by landlord for enhancement of rent—Ryots' plea of holding at fixed rents of fixed rates of rent—Collection and other zemindari papers produced by landlords to rebut plea, Admissibility in evidence of. See **EVIDENCE ACT**, No. 6, 3 Pat. L.J. 306.

(117) Rent suit—Tenure comprising several villages—Sale in execution of rent decree—What papers. See **EXECUTION OF DECREE**, No. 15, 43 Ind. Cas. 594.

(118) Execution by landlord of decree for arrears of rent—Purchase of such holding by landlord in execution—Delivery of possession taken by landlord through Court if disposesession—Suppression of notice and process intended for judgment debtors—Omission to serve

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notice under r. 22, O. XXI, Civ. Pro. Code, 1908—Execution sale not valid—Limitation for application to cancel sale. See **EXECUTION SALE**, No. 1, 27 C.L.J. 528.

(118-a) Non-transferable occupancy holding. Sale of, in execution of money-decree—Co-sharer raiyat, Right of, to object. See **EXECUTION SALE**, No. 3-a, 46 Ind. Cas. 781.

(118-b) Occupancy raiyat, acquisition of portion of proprietary right in estate by, if causes merger of the two interests. See **HINDU LAW (REVERSIONERS)**, No. 6-a, 3 Pat. L.J. 426.

(119) Grant of inam—Presumption of grant of—Melwaram alone, if proper. See **INAM**, No. 1, (1913) M.W.N. 853.

(120) Application for commutation of rent made to Sub-Divisional Officer—Competency of such Officer to transfer application to another—Validity of order made by Officer to whom application transferred. See **JURISDICTION (GENERAL)**, No. 1, 45 C. 769.

(120-a) Declaration by Revenue Court under Oudh Rent Act (XXII of 1886). S. 107-G, that a person is a tenant—Suit by such person for a declaration that he is under-proprietor not a tenant, maintainability of, by Civil Court. See **JURISDICTION (OF CIVIL COURTS)**, No. 9, 47 Ind. Cas. 652.

(121) Under-proprietary plots, Suit for possession of—Heirship in dispute—Suit if maintainable in Civil Court—Jurisdiction once vested if ousted by subsequent admission of fact. See **JURISDICTION (OF CIVIL AND REVENUE COURTS)**, No. 4, 46 Ind. Cas. 8.

(122) Suit by dispossessed tenant for compensation against landlord after more than one year from dispossession having obtained decree from possession—Suit is cognisable by Civil or Revenue Court. See **JURISDICTION (OF REVENUE COURTS)**, No. 8, 90 P.R. 1918 (F.B.).

(123) Suit for mesne profits for period during which plaintiff, though entitled to land was not in possession of it, maintainability of in Revenue Court. See **JURISDICTION (OF REVENUE COURTS)**, No. 7, 53 P.R. 1918.

(124). Breach of condition involving forfeiture by tenant—Transfer by landlord of his right subsequent to breach—Transferee can enforce forfeiture. See **LEASE**, No. 4, 20 Bom. L.R. 767.

(125) Ben. Act VIII of 1885, S. 49, (a)—Lease for nine years—Covenant for renewal, if valid. See **LEASE**, No. 8, 28 C.L.J. 507.

(126) Lease—Rent, Stipulation for payment of, as well as commission in respect of goods sold on boat or road—Construction of lease. See **LEASE**, No. 10, 45 Ind. Cas. 875.

(126 a) Lease of land to proprietor of Indigo Factory—Sale of Factory to stranger—Fresh lease to purchaser—Status of purchaser—Non-occupancy raiyat, Ejectment suit by landlord

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against purchaser—Limitation—Lease, option to renew. See **LEASE**, No. 11-a, 46 Ind. Cas. 580.

(126 b) Lease—Rent, change in rate of—Change in actual amount paid to lessor—Effect of. See **LEASE**, No. 11-c, 46 Ind. Cas. 794.

(126-c) Lease, Covenant in, for renewal after expiry of original term, Validity of. See **LEASE**, No. 11-a, 46 Ind. Cas. 924.

(126-d) Raiyat with right of occupancy—Execution of fresh lease—Expiry of term—Landlord, Right of, to eject. See **LEASE**, No. 11-e, 47 Ind. Cas. 157.

(126-e) Rent decree, Sale of holding in execution of, Auction-purchaser at a, Suit to recover possession of holding from, Limitation applicable to—Bengal Tenancy Act (1885), Sch. III, Art. 3. See **LIMITATION**, No. 10, 46 Ind. Cas. 975.

(127) Land entered in record of rights as liable to assessment—Suit by co-sharer landlord to assess rent if maintainable. See **LIMITATION ACT (1908)**, No. 170, 22 C.W.N. 685.

(127-a) Occupancy tenant mortgaging his holding to landlord—Landlord selling the mortgaged land to third person—Tenant suing to redeem mortgage—Nature of suit. See **MORTGAGE (GENERAL)**, No. 6-b, 45 Ind. Cas. 549.

(128) Lease of mortgaged land on condition of holding so long as rent paid—Remission of rent for fixed term in consideration of receipt of certain amount in advance—Lessee only permanent sub-tenant not entitled to any proprietary interest in land—Lessee's right to redeem. See **MORTGAGE (REDEMPTION)**, No. 18, 14 N.L.R. 117.

(129) Usufructuary mortgage of Zamindari—*Theka* granted by mortgagee for rent during term of mortgage—Equity of redemption for arrears of rent—Mutation not made in purchaser's favour—Subsistence of *Theka*—Suit for arrears of rent under *Theka*—Right of suit. See **MORTGAGE (USUFRUCTUARY)**, No. 1, 16 A.L.J. 384.

(130) Zarpeshji ijara, Construction of—Mortgagor and mortgagee or landlord and tenant, Relationship of, if created by—Determination of. See **MORTGAGE AND MORTGAGEE**, No. 1-a, 44 Ind. Cas. 153.

(131) Notice to quit—Requisites of valid notice—Service by registered post—Effect—Service on one joint tenant, effect of. See **NOTICE TO QUIT**, No. 1, 16 A.L.J. 969.

(132) Suit to eject under-raiyat—Notice to quit signed by one co-sharer landlord, Validity of. See **NOTICE TO QUIT**, No. 3, 23 C.W.N. 76.

(132-a) House of agriculturist—Whether appurtenance to occupancy holding or not—Question of fact. See **OCCUPANCY HOLDING**, No. 2, 45 Ind. Cas. 546.

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(138) Occupancy rights, Acquisition of, in service tenure—Tenure, Surrender, of, on cessation of service—Zamindar's right. See OCCUPANCY RIGHTS, No. 2, 46 Ind. Cas. 341.

(134) Under-raiyat's interest if heritable—Form of decree in suit for ejectment against descendants of tenant, holding under *shayee karsha kabala* from person whose interest is described as *kayemi karsha jote*—Right of occupancy tenant to grant heritable under raiyati interest—Raiyat holding at fixed rate of rent if may create permanent heritable interest in favour of his grantee an under-raiyat. See OCCUPANCY TENURE, No. 2, 27 C.L.J. 579.

(135) Ghatwali tenant if can acquire occupancy tenure. See OCCUPANCY TENURE, No. 5, 22 C.W.N. 763.

(136) Transfer of occupancy tenure—Custom of payment of Nazar to landlord on transfer to be definite. See OCCUPANCY TENURE, No. 6, 22 C.W.N. 929.

(137) Occupancy right, if can be acquired in kotwali jaigir. See OCCUPANCY TENURE, No. 7, 23 C.W.N. 136.

(138) Transfer of occupancy holding—Duty of transferee to deposit registration fee—Default—Right of landlord to sue for it. See OCCUPANCY TENURE, No. 8, 3 Pat. L.J. 351.

(139) Promise not to eject if gives rise to occupancy status. See OCCUPANCY TENURE, No. 9, 5 P.R. 1918 (Rev.) and App.

(140) Death of one of joint tenants recorded as having defined shares—Single tenancy with benefit of survivorship collectively constituted—Occupancy right if extinguished by death. See OCCUPANCY TENURE, No. 11, 95 P.W.R. 1918.

(141) Takiadar whether can build paoosa mosque on any part of takia land—Consent of proprietors. See OCCUPANCY TENURE, No. 13, 108 P.W.R. 1918.

(142) Deposit of rent by darpatnidar—Possession given to darpatnidar—Payment of patni rent by darpatnidar—Right of darpatnidar to lien and to add to his demand of advance paid by him rent paid to superior landlord. See PATNI TENURE, No. 1, 27 C.L.J. 480.

(143) Landlord in S. 4 (6) of Punjab Tenancy Act includes mortgagee in possession. See PRE-EMPTION, No. 29, 149 P.W.R. 1918.

(144) Suit by Zamindar for price of oil due under terms of tenancy from tenant—Suit not cognisable by Small Causes Court. See PROVINCIAL SMALL CAUSES COURTS ACT (IX OF 1887), No. 11, 16 A.L.J. 644.

(144-a) Re-entry, Right of, of landlord on sale of non-transferable occupancy holding to a Zarposhgidar. See RE-ENTRY, 47 Ind. Cas. 192.

(145) Compromise between landlord and tenant purporting to create a lease—Necessity of registration. See REGISTRATION ACT (1908), No. 8, 44 Ind. Cas. 638.

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(146) Money paid by holder of tenure under patni tenure, if can claim lien for amounts paid by him as rent to superior landlord. See REG. VIII OF 1819 (BENGAL), No. 2, 41 Ind. Cas. 694.

(147) Tenure-holder put in possession of patni whether landlord—Limitation for recovery of rent by tenure-holder—Bengal Tenancy Act, Sec. III, Art. 2. See REG. VIII OF 1819 (BENGAL), No. 4, 41 Ind. Cas. 711.

(148) Non-cultivation of leased land and non-payment of rent resulting from landlord's obstruction to tenants taking possession—Implied surrender under C.P. Tenancy Act, S. 35 (4), if arises. See RELINQUISHMENT OF PORTION OF CLAIM, No. 2, 14 N.L.R. 176.

(149) Rent, arrears of, Suit for—Maintainability against one of several heirs of a deceased tenant. See RENT, No. 1, 45 Ind. Cas. 732.

(150) Rent, Enhanced rate of, Agreement to pay—Tenancy, Term of, Expiration of, after—Validity of. See RENT, No. 2, 45 Ind. Cas. 901.

(151) Rent, Arrears of, Suit for—Intervener, Payment of rent to, during period of suit—Effect of. See RENT, No. 3, 46 Ind. Cas. 6.

(152) Tenure, Auction sale of—Enhancement of rent, proceedings for, while pending—purchaser at sale, Liability of, to pay enhanced rate—Sale if can be set aside. See RENT, No. 4, 46 Ind. Cas. 136.

(153) Landlord, Joint letting of tenancy by one of several, to one tenant—Tenant disposed by act of one landlord—Rent, Suspension of. See RENT, No. 5, 46 Ind. Cas. 539.

(153-a) Rent, Payment of, in paddy or in default in money—Kabuliyat—Landlord if entitled to recover market price of paddy or amount fixed in Kabuliyat. See RENT, No. 6, 47 Ind. Cas. 134.

(153-b) Rent decree—When *res judicata*. See RENT SUIT, No. 1, 45 Ind. Cas. 416.

(153-c) Bengal Cess Act (1880), Forms prescribed under, Tenant's holding, Wrong entry as to, in—Rent suit under S. 20 (a) of Act if barred by. See RENT, SUIT, FOR, No. 1, 43 Ind. Cas. 501.

(154) Decision in previous suit as to annual rent payable—Subsequent suit for rent—Previous decisions as to rent if operates as *res judicata*. See RES JUDICATA, No. 10, 40 Ind. Cas. 460.

(155) Decision of Revenue Court in proceeding under S. 105-A, Bengal Tenancy Act, finding absence of relationship of landlord and tenant—Suit on basis of such decision for ejectment of defendants—Decision of Revenue Court under S. 105-A if bars defendants from raising same question—"Shall be final" in S. 107 of Bengal Tenancy Act, Effect of words, on decisions of Revenue Courts. See RES JUDICATA, No. 34, 9 Pat. L.J. 379.

(156) Tenant contumaciously holding over—Double ordinary rent assessed. See RES JUDICATA, No. 38, 11 P.L.R. 1918.

Landlord and Tenant—(Concluded).

(157) Institution of ejectment suit in Revenue Court—Denial of relationship of landlord and tenant—Decree—Appeal from decree, Dismissal of—Revision, if lies. See REVISION, No. 9, 16 A.L.J. 859.

(158) Bhumak if village servant—Right to hold lands as bhumak. See SERVICE TENURE, No. 1, 14 N.L.R. 152.

(159) Tenancy, Contract of, Kinds of—Implied and express—Implied, Instance of. See TENANCY, 46 Ind. Cas. 909.

(160) Landlord suing tenant in ejectment—Denial of landlord's title—Assertion of denial in plaint—Sufficient intention to determine lease—Forfeiture. See TRANSFER OF PROPERTY ACT, No. 92, 20 Bom. L.R. 29.

(161) Subordinate tenure, Grant of—Trespass committed against tenant—Grantor when bound to sue—Cause of action when accrues. See TRESPASS, 46 Ind. Cas. 587.

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See BEN. ACT VIII OF 1869.

Land Redemption and Foreclosure.

See BEN. REG. XVII OF 1806.

Land Registration Act.

See BEN. ACT VII OF 1876.

Land Revenue Act.

See C. P. ACT XVIII OF 1881.

See OUDH ACT XVII OF 1876.

See PUN. ACT XVII OF 1887.

Land Revenue Code.

See BOM. ACT V OF 1879.

Land Revenue Salca.

See BEN. ACT XI OF 1853.

Laws Act.

See BUR. ACT XIII OF 1899.

See C. P. ACT XX OF 1875.

Laws and Regulations.

Expression includes not only power to make them and but also the power to create the machinery or Court to enforce such laws. See DEFENCE OF INDIA ACT, 3 Pat. L.J. 537 (F.B.).

Lease.

(1) Marupat, nature of—Stamp necessary for marupat—Stamp Act (II of 1899), S. 25.

Held that a marupat, being a counterpart of a lease or a deed executed by a tenant promising certain rent, must, where it makes the arrears of rent a charge on the improvements he might make, be stamped both as a counterpart and as a mortgage. Govindan Nambudiri v. Moida, 41 M. 469 (F.B.).

WALLIS, C.J., AYLING and KUMARA-SWAMI SASTRI, JJ.

Lease—(Continued).

(2) Priority—Occupancy holding—Usufructuary mortgage—Mortgages in possession—Proceedings for compulsory registration of mortgage—Lease granted by mortgagee during pendency of those proceedings—Lease registered—Lessee entitled to recover possession of leased plots without payment of mortgage-money.

Where an occupancy tenant made a usufructuary mortgage of certain plots of land, but during the pendency of proceedings to get the mortgage-deed registered granted a registered lease of some of those plots of land, and no fraud or collusion on the part of the lessee was proved, and the lessee sued to recover possession from the mortgagee who had been put in possession, held that the lessee was entitled to possession without having to pay the mortgage-money (a). Habib-ul-lah v. Manrup, 16 A.L.J. 137=40 A. 228=43 Ind. Cas. 514.

PIGGOTT and WALSH, JJ.

Reference:—(a) 8 A.L.J. 931, D.

(3) Assignment of—Option given to the lessee to purchase the land leased enures to the benefit of the assignee—Estoppel by conduct. Ladhahai Lakshmi v. Sir Jamsetji Jijeebhoy, Bart, 19 Bom. L.R. 813=42 B. 103. See Final Part, 1917, Col. 556.

(4) Transfer of Property Act (IV of 1882), Ss. 6 (b), 109, 111 (g)—Breach of condition involving forfeiture by tenant—Transfer by landlord of his right subsequent to breach—Transferee can enforce forfeiture..

In 1896, defendants Nos. 3, 7 granted a mortgage lease of their lands to defendant No. 1 on condition that, if the latter alienated his rights under the lease to anybody, the lease was to come to an end. Defendant No. 1 sold his right under the lease to defendant No. 2 in 1908. Defendants Nos. 3, 7 took no action; but sold their right to the plaintiff in 1911. The plaintiff having sued in 1912 to recover possession of the land on breach of the condition:

Held, that the plaintiff was entitled to recover possession of the lands from defendant No. 2. Vishveshvar v. Mahableshvar, 20 Bom. L.R. 767=47 Ind. Cas. 198.

BEAMAN and HEATON, JJ.

References:—Hunt v. Bishop, (1853) 8 Exch. 675; Cohen v. Tannar, (1909) 69 L.J. Q.B. 904, Not F.

(5) Transfer of Property Act (IV of 1882), S. 115—Sub-lease or under-lease—Effect of forfeiture on under-lease—Assignment of the lessee's interest—Repudiation of lessor's title by the original lessee does not work a forfeiture against the assignee.

The plaintiff's father let permanently the land in dispute to the grandfather of defendants Nos. 1 and 2. Later on, defendants Nos. 1 and 2 assigned the permanent lease to defendant No. 3. Defendants Nos. 1 and 2 having denied the plaintiff's title, it was contended that the denial operated to forfeit the interest of defendant No. 3 in the land:

Lease—(Continued).

Held, negating the contention, that the mere repudiation by defendants Nos. 1 and 2 of the plaintiff's title, did not work a forfeiture against defendant No. 3 who was an assignee of the lease. *Gopal v. Shrinivas*, 20 Bom. L.R. 880—42 B. 734—47 Ind. Cas. 635.

BEAMAN and HEATON, JJ.

(6) Admissibility in evidence—Document varying rent—Bengal Tenancy Act (VIII of 1885), S. 103-B, sub-S. (3)—Mode of proof.

A document which embodies a contract for variation of rent payable in respect of a lease, is in essence a lease, and is compulsorily registrable. If it is not registered in accordance with law, it is not only not admissible in evidence, it does not even constitute a valid and operative contract between the parties (a).

If it is established that the only evidence whereon the entry under sub-S. (3) of S. 103-B of the Bengal Tenancy Act, was made by the Settlement Officer, does not support his conclusion, that is the strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof; he can prove *aliunde* that the entry is in fact, incorrect. He can prove that the material whereon the Settlement Officer based his decision, does not in law justify his conclusion as to the relative rights and obligations of the parties. *Bogba Mower v. Ram Lakhan Misser*, 27 C.L.J. 107

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 35 C. 1010; 39 C. 284, R.

(7) Construction—Covenant for renewal—Erroneous admission by counsel, Effect of.

A settlement was made with the predecessor of the plaintiff for a term of 22 years on a progressive rate of rent from 1285 to 1306. The *kabuliyat* executed by the grantee contained a covenant to the following effect: "If I agree to the enhancement of rent to be fixed at the time of the next settlement in future, the Government shall have the power to settle the lands with me, or if I do not agree, then with others".

Held, that the clause in the lease was in essence a covenant for renewal, and that the lessee was entitled, at the expiration of the term, to obtain a renewal of the lease on the same terms as were contained in the original lease except as to the amount of rent and the covenants for renewal (a).

An erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the appellate Court (b). *Secretary of State v. Shibaprasad*, 27 C.L.J. 447—45 Ind. Cas. 983.

MOOKERJEE and BRACHCROFT, JJ.

References:—(a) 16 C.L.J. 217; 20 C.W.N. 948, P. (b) 9 B.L.R. 377—I.A. Sup. Vol. p. 47—8 W.R. 869; 27 O. 166 (163)—26 I.A. 216; 7 C.L.J. 152 (168); 11 C.W.N. 340; *Holms v.*

Lease—(Continued).

Johnston, (1873) 12 Heisk (59 Tenn) 155; *Mitchell v. Cotton*, (1850) 3 Fla. 134; *Urguhart v. Butterfield*, (1887) 37 Ch.D. 357, R.

(8) Under-riyat—Bengal Tenancy Act (VIII of 1885), S. 42 (a)—Lease for nine years—Covenant for renewal, if valid.

A stipulation in a lease executed by a riyat in favour of an under-riyat to the effect that after the expiry of the term of nine years, for which the lease was granted, the riyat would grant the under-riyat, a fresh lease of the land on the same terms as the original terms and for same number of years, is valid (a). *Aminuddi Dafadar v. Ananda Chandra Pal*, 28 C.T.J. 507.

FLETCHER and PANTON, JJ.

References:—(a) 15 C.L.J. 122; 20 C.W.N. 948, P.

(9) Surrender or relinquishment of, if requires a document—Co-sharer working mines—Other co-sharer's remedy—Accounts or partition—Equities.

A surrender or relinquishment of a lease does not require to be in writing but can be inferred from the acts of the parties.

In the absence of proof of actual ouster or destruction of property one co-sharer cannot demand accounts from another co-sharer for minerals taken by him out of joint property unless it is shown that he had worked more than his fair share.

No claim for account is maintainable where the co-sharer knowing that the other co-sharer had been spending large sums of money to develop the mines acquiesced. His remedy is by a suit for partition in which the other co-sharer should, if possible, be maintained in possession of the portion of the property upon which he has spent money. *Elias Meyer v. Manoranjan Bagchi*, 22 C.W.N. 441—44 Ind. Cas. 297.

FLETCHER and SHAMSUL HUDA, JJ.

References:—32 C. 837; (1864) W.R. 270, *Rel. upon*.

(10) Rent, Stipulation for payment of, as well as commission in respect of goods sold on boat or road—Construction of lease—Landlord and tenant.

The defendant took a lease of a certain property, to which the provisions of the Transfer of Property Act applied, for the purpose of carrying on a shop. The lease provided for the payment of a certain amount of rent and for the payment, besides the stipulated rent, of a certain commission in respect of the goods that should be sold in the shop or on boat or on road on certain terms:

Held, on a reasonable construction of the lease that commission could be levied not only in respect of the goods sold in the shop but also in respect of goods taken from the shop to the nearest boat or road would be sold there, but that his liability could not be extended to the case of

Lease—(Continued).

goods sold on boats and roads far away from the shop. *Kishore Lal Goswami v. Tarapada Bhattacharjee*, 45 Ind. Cas. 875.

FLETCHER and SHAMSUL HUDA, JJ.

- (11) *From generation to generation, for digging up tank for benefit of men and cattle—Tank dug but subsequently silted up—Forfeiture of lease, if—Re-entry, Right of, if proper.*

The defendant dug a tank under a lease of a plot of land from generation to generation on condition of digging up a tank for the benefit of men and cattle and dedicating it with a view to please God but on its subsequently being silted up, the plaintiff claimed the right of entry on the ground of forfeiture of the lease for breach of its condition:

Held that there was no right of re-entry as there was no obligation cast on the lessee to maintain the tank in a good condition, his only duty being to excavate it and as there is no clause authorising re-entry. *Khilde Chand & Ghose v. Midnapore Zemindary Co., Ltd.*, 46 Ind. Cas. 507.

FLETCHER and SMITHER, JJ.

- (11-a) *Proprietor of Indigo Factory, Of land to—Sale of Factory to stranger—Grant of fresh lease to purchaser—Status of purchaser—Non-occupancy raiyat—Ejectment suit by landlord against purchaser on expiry of lease—Limitation—Renewal of lease, Option to.*

The proprietor of an Indigo Factory having held the lands in dispute for a considerable time by virtue of leases renewed from time to time sold the factory to the defendant, after the expiry of the last lease and the defendant obtained a fresh lease for nine years. On a suit being brought by the plaintiffs, the landlords, to eject the defendant, more than six months after the expiry of the lease:

Held, (1) that even if the proprietors of the factory had had occupancy rights, those rights would not have passed to the defendant by virtue of his purchase of the factory; and

(2) that the defendant entered upon the land as a *raiyyat* and his status was of a non-occupancy *raiyyat*, and as no suit was brought within six months of the expiry of the lease, the plea of limitation was a sufficient answer.

There is a time limit for an option to renew and a tenant's failure to come to terms within three years of the expiry of the lease amounted to a failure to avail himself of that option. *Brijnandan Singh v. Rameshwar Singh*, 46 Ind. Cas. 580.

ROE and JWALA PRASAD, JJ.

- (11-b) *Homestead, Of a — Transferability of — Transfer of Property Act (IV of 1882), S. 108 (j).*

Under the Transfer of Property Act, a lease of a homestead is transferable, unless the interest was in existence prior to the coming into operation of the Act. *Mohendra Lal Sinha v. Kishna Kumari Devi*, 46 Ind. Cas. 656.

FLETCHER and SMITHER, JJ.

Lease—(Continued).

- (11-c) *Rent, Change in the rate of—Original grant, if operates to extinguish—If incapacitates lessee from showing that original grant was permanent.*

A mere change in the rate of rent or in the amount actually paid to the lessor does not necessarily operate to extinguish the original grant and after the rent is once enhanced, the lessee is not incapacitated from showing that the original grant was intended to be permanent. *Madho Rao v. Govindbhat*, 46 Ind. Cas. 794.

DRAKE BROOKMAN, J.C.

- (11-d) *Under-raiyati kabuliyyat, Covenant in, for renewal after expiry of original term, Validity of.*

A contract for renewal in an under-raiyati kabuliyyat for nine years under which the parties undertook that a further term of nine years would be granted to the under-raiyat on the same terms as the original term is a perfectly valid contract and the under-raiyat being in possession under the terms of that contract is not liable to be ejected. *Amlaudli v. Ananda Chandra Paul*, 46 Ind. Cas. 924.

FLETCHER and PANTON, JJ.

- (11-e) *Raiyat with right of occupancy, Execution of fresh lease by—Landlord if can eject on expiry of lease.*

A raiyat who has been holding a land for more than twelve years prior to the execution of a kabuliyyat acquires a right of occupancy in the land when he subsequently executes a fresh lease, the landlord cannot eject him on the expiry of the term of the lease. *Salad Sha Maldal v. Sridhar Dullei*, 47 Ind. Cas. 157.

FLETCHER and SHAMSUL HUDA, JJ.

- (11-f) *Minor, To a — With a condition to pay rent, if null and void—Person in possession under such a lease, Ejectment of—Chota Nagpur Tenancy Act (VI of 1908), S. 41.*

A transfer to a minor by way of a lease, he agreeing to pay rent and to perform particular covenants which form an essential part of the transaction is null and void. A person who claims to hold the land and to have entered into possession thereof under such a lease is a mere trespasser and is liable to be ejected by the landlord and he cannot claim protection under S. 41 of the Chota Nagpur Tenancy Act (1908). *Pranila Ball Das v. Jogeshwar Mandal*, 3 Pat. L.J. 518=46 Ind. Cas. 670=5 Pat. L.W. 147.

JWALA PRASAD and COUTTS, JJ.

References:—39 O. 232; 30 O. 539; 32 A. 25; 33 M. 312; 20 O.W.N. 130; 38 A. 62; 40 M. 308. *Ref. to.*

(12) *Agreement to cut and take timber for railway sleepers for royalty during fixed term—Lease or license. See AGENCY RULES (GANJAM), No. 1, (1918) M.W.N. 772.*

(13) *Of share in joint proprietary right—No specific plot mentioned in lease—Lease only*

Lease—(Continued).

tenure. See BEN. ACT VIII OF 1885 (TENANCY), No. 6, 45 Ind. Cas. 706.

(14) Perpetual lease taken by one co-sharer from some of other co-sharers—Lease if binding on remaining co-sharers—Proper decree in such cases, when remaining co-sharers sue to eject lessees. See CO-SHARERS, No. 6, 35 M.L.J. 402.

(15) Covenant for renewal of—Terms for renewal not stated in option—Construction of new lease. See CROSS-OBJECTIONS, No. 1, 27 C.L.J. 443.

(16) Forfeiture of—Rent, non-payment of, for two consecutive years—Waiver—Transfer of Property Act (IV of 1882), S. 111 (g)—Overt act—Institution of suit. See EJECTMENT, No. 2, 27 C.L.J. 277.

(17) Grant by landlord of permanent and heritable tenure in land—Right to re-enter, if should be reserved—Construction of lease. See LANDLORD AND TENANT, No. 7, 28 C.L.J. 278.

(18) Tenant spending money and reclaiming waste land—Landlord acquiescing—Presumption of lease. See LANDLORD AND TENANT, No. 30, 44 Ind. Cas. 517.

(19) Grant of oral lease and possession of land to tenant—Subsequent grant of lease to third person—Validity and effect of subsequent lease. See LANDLORD AND TENANT, No. 35, 45 Ind. Cas. 49.

(20) Whether document granting lease for particular term, is a mere recognition of pre-existing tenancy. See LANDLORD AND TENANT, No. 37, 45 Ind. Cas. 221.

(21) Permanent and heritable, Grant of—Alienation, Restraint on, Validity of—Construction of document—Grant, Breach of conditions of, no provision for in lease—Forfeiture, if landlord can claim. See LANDLORD AND TENANT, No. 46, 46 Ind. Cas. 73.

(22) Surrender of, if document in writing necessary for—Registration, Necessity of—Surrender by operation of law, what amounts to. See LANDLORD AND TENANT, No. 47, 46 Ind. Cas. 100=28 C.L.J. 220.

(22-a) Tenant right, Of—Bequest by will of right, Validity of—Ouster of real tenant—Implied surrender, Rule of, applicability of, where rent paid in advance—Mere non-cultivation no surrender—C.P. Tenancy Act (1898), Ss. 35 (4), 94. See LANDLORD AND TENANT, No. 52-d, 47 Ind. Cas. 28.

(23) Permanent lease—Denial of title—Forfeiture, Doctrine of, extension of. See LANDLORD AND TENANT, No. 56, 35 M.L.J. 647.

(24) Fresh lease of surrendered lands during pendency of mortgagee's suit—Burden of proving that lease did not affect mortgagee's rights on lessee—Validity of lease. See LIS PENDENS, No. 3, 14 N.L.R. 133.

(24-a) Notice to quit, Necessity of—Provision in lease for re-entry on payment of full compensation, Notice unnecessary—Transfer of

Lease—(Concluded).

Property Act (1882), S. 106. See NOTICE TO QUIT, No. 3-a, 47 Ind. Cas. 19.

(25) Document containing acceptance of written proposal for lease—Lease for more than one year—Paper containing list of bids with endorsement signed by the successful bidder to take lease—Endorsement by lessor confirming sale—Document if requires registration. See REGISTRATION ACT (1908), No. 14, 42 Ind. Cas. 629.

(26) Oral lease for more than one year—Letters confirming lease memoranda of *fait accompli*—Letters require no registration. See RES JUDICATA, No. 38, 11 P.L.R. 1918.

(27) Lease by manager of Hindu temple—Validity, Principles to test. See SERVICE GRANTS, No. 1, 14 N.L.R. 12.

(28) Document, if necessary to surrender. See SURRENDER, No. 1, 28 C.L.J. 220.

(29) Landlord suing tenant in ejectment—Denial of landlord's title—Assertion of denial in plaint—Sufficient intention to determine lease—Forfeiture. See TRANSFER OF PROPERTY ACT, No. 92, 20 Bom. L.R. 29.

Leave to sue.

When to be obtained under Provincial Insolvency Act of 1907. See PROVINCIAL INSOLVENCY ACT, 47 Ind. Cas. 771.

Legal Character.

Mother if can sue for declaration of legitimacy of child. See SPECIFIC RELIEF ACT, No. 21, 23 C.W.N. 171.

Legal Necessity.

(1) All owners joining in sale—Proof of major portion of consideration for sale being for necessity—Presumption that remainder also is for necessity. See APPEAL (SECOND APPEAL), No. 23, 27 P.W.R. 1918.

(2) Points to be considered in deciding question as to. See APPEAL (SECOND APPEAL), No. 19, 38 P.L.R. 1918.

(3) Suit for declaration that alienation of land was not binding on reversioners except to the extent of legal necessity—Pre-emptors if bound by such decree in favour of reversioners. See CUSTOMS (PUNJAB—ALIENATION), No. 4, 54 P.R. 1918.

(4) Alienation by Hindu widow—Strict proof of, after long lapse of time—Necessity, Recital of, in document. See HINDU LAW (ALIENATION), No. 7, 46 Ind. Cas. 344.

(4-a) Hindu joint family, Debt by Karta of—Legal necessity, Burden of proof as to—Gratification of sentimental ambition, or speculation not a. See HINDU LAW (DEBT), No. 2-a, 43 Ind. Cas. 193=3 Pat. L.W. 181.

(5) Doctrine of, if to be determined with reference to whole or part of estate—Consent to limited owner's alienation of next reversioner, if evidence of. See HINDU LAW (WIDOW), No. 8, 22 C.W.N. 846.

Legal Necessity—(Concluded).

(6) Value of recitals as to, in deed of alienation by widow. See **HINDU LAW (WIDOW)**, No. 2, 28 O.W.N. 64.

(7) Usufructuary mortgage executed by husband—Payment of, by widow a legal necessity—Grant of permanent lease for payment, Validity of. See **HINDU LAW (WIDOW)**, No. 11-a, 46 Ind. Cas. 876.

(8) Debt by Hindu widow for—Lender, Duty of. See **HINDU LAW (WIDOW)**, No. 11-c, 47 Ind. Cas. 106.

Legal Practitioners Act (1879).

(1) S. 12—Conviction of pleader for keeping a gaming house under S. 6 of the Towns Nuisance Act, III of 1889—If unfits him for the profession

A conviction of a pleader for keeping a common gaming house, under S. 6 of Act III of 1889, unfits him for the profession, and the offence is one which affects his character.

The Court, in an inquiry under the Legal Practitioners Act, cannot retry the case as to the former offence.

Under the circumstances of the case, the pleader was suspended for six months. *In re Sitaramiah*, (1918) M.W.N. 847=35 M.L.J. 650=8 L.W. 621=25 M.L.T. 71=42 M. 111=19 Cr. L.J. 1001=48 Ind. Cas. 341.

AYLING and SESHAGIRI AIYAR, JJ.

References:—22 A. 49 (P.C.), F.; *In re Weare*, (1893) 2 Q.B. 439; *In re Brownall*, 2 Comp. 829, R.

(2) S. 13 (b)—Pleader signing vakalat-namas and acting for both sides in same case—Improper conduct—Intentional disobedience of rules if enough to justify pleader's condemnation—Moral turpitude or actual injury to litigant if also must be proved.

The conduct of a pleader in signing the vakalatnamas of, and acting for, both sides in the same case was held to be grossly improper conduct within the meaning of cl. (b) of S. 13 of the Legal Practitioners Act. The proposition that in order to make a pleader liable to punishment under S. 13, it is not sufficient to prove that he has intentionally disobeyed the rules but that there must be some act involving a moral stigma or proof of actual injury to the litigant is not a correct statement of the law. *In re Bir Kishore Rai*, 3 Pat. L.J. 390=5 Pat. L.W. 229=19 Cr. L.J. 636=45 Ind. Cas. 684.

MULLICK, IMAM and THORNHILL, JJ.

Reference:—2 Pat. L.J. 259, F.

(3) S. 36—Touts—List of—Person seen canvassing and introducing litigants to members of the Bar—Inference from—Removal of previous list—Effect of—Order declaring a person as a tout—Revision.

It is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession

Legal Practitioners Act (1879)—(Concluded).

he is not rendering gratuitous service such as a casual friend and an acquaintance may do.

An order of a Judge declaring that the applicants are touts and putting up their names in list of touts is an order against which revision can be entertained. Mere removal of the list of touts exhibited in one Court or failure to exhibit them in one of the District has not the effect of cancelling the list altogether. *Kalka Prasad v. Emperor*, 16 A.L.J. 76=40 A. 153=19 Or. L.J. 269=44 Ind. Cas. 125.

WALSH, J.

References:—21 A. 281; 31 A. 59, R.; 26 M. 596, Appr.

(4) S. 36—Person declared tout—Procedure—Evidence, recording of.

If a Court has information that any person was a tout, the Court should call upon him to show cause why he should not be declared to be tout and should in his presence take evidence showing that he was a tout. *Abu Mahomed v. Emperor*, 19 Cr. L.J. 36=42 Ind. Cas. 996=5 Pat. L.W. 229.

CHAMBER, C.J., SHARFUDDIN and CHAPMAN, JJ.

(5) Rule 41—Fees for two vakils when may be allowed. See **TRANSFER OF PROPERTY ACT**, No. 67, 34 M.L.J. 489=24 M.L.T. 56=(1919) M.W.N. 371.

Legal Practitioners Act (1884).

Rule 41 of rules framed by High Court under—Vakils' fee for two vakils for respondents, Grant of. See **TRANSFER OF PROPERTY ACT**, No. 66-a, 8 L.W. 416.

Legal Process.

Money paid under compulsion of legal process, Recoverability of, as money had and received. See **AMENDMENT OF DECREE**, No. 5, 3 Pat. L.J. 465.

Legal Representative.

(1) Suit against—Assets not in hands of legal representatives, Effect of.

A suit against the legal representatives ought not to be dismissed on the ground that the defendants are not in possession of the estate of the deceased debtor. *Shankar Lal v. Abdul Rahman*, 40 Ind. Cas. 407.

KNOX, J.

Reference:—2 N.W.P. 449, F.

(1-a) Execution proceedings, Appeal arising out of—Respondent decree-holder, Death of—Legal representative not brought on record—Appeal if abates.

In an appeal arising out of the execution proceedings of a joint decree, the legal representatives of one of the deceased decree-holders-respondents must be brought on the record within the limitation period, and the appeal

Legal Representative—(Concluded).

cannot proceed against the surviving respondents alone. *Baksh Ali Sarkar v. Sarat Chandra Roy*, 46 Ind. Cas. 911.

WOODROFFE and SMITHER, JJ.

(2) Notice of appeal not served on respondent's legal representative—*Ex parte* decree of appeal if valid—Dismissal of appeal on death of appellant—Dismissal if bars legal representative's right to come on record. See *APPEAL (GENERAL)*, No. 33, 96 P.R. 1918.

(3) Duty of Court to decide who is, when question arises—No appeal from order deciding who is. See *CIV. PRO. CODE* (1908), No. 377, (1918) M.W.N. 199.

(4) Decree passed—Decree void—Decedent's representative's right to show decree incapable of execution. See *EXECUTION OF DECREE*, No. 4, 16 A.L.J. 327.

(5) Meaning of—If members of joint Hindu family included in its definition in *Civ. Pro. Code*. See *EXECUTION OF DECREE*, No. 5, 20 Bom. L.R. 660.

(6) Suit for account and for money if lies against deceased guardians. See *GUARDIANS AND WARDS ACT* (1890), No. 11, 55 P.R. 1918.

(7) Suit brought by reversioner, Nature of—Representative suit and that brought in representative capacity, distinction between. See *HINDU LAW (REVERSIONERS)*, No. 6, (1918) M.W.N. 889.

(8) Impleaded after death of party—Dispute by other side as to legal representatives' right—Duty of Court to determine dispute. See *PARTIES TO SUIT*, No. 1, 20 Bom. L.R. 902.

(9) Principal and agent—Suit for accounts—Death of agent—Liability of legal representatives—Procedure to be followed in suit. See *PRINCIPAL AND AGENT*, No. 5, 47 Ind. Cas. 371.

(10) Auction-purchaser in execution sale if decedent-holder's. See *RESTITUTION*, No. 1, 41 M. 467.

(11) Delivery of possession to plaintiff in his suit for possession—Appeal by defendant—Purchase and possession of property in sale in execution of mortgage decree against plaintiff—Right of defendant after succeeding in appeal to recover possession from auction-purchaser—Auction-purchaser if representative of plaintiff. See *RESTITUTION*, No. 3, 27 C.L.J. 489.

(12) Claim by rivals to be brought on record as legal representative of deceased plaintiff—Summary rejection of right of one of the claimants—Rejection illegal—Court bound to enquire on evidence adduced and to determine upon such claim—High Court, not Board of Revenue, has jurisdiction to revise order of rejection. See *REVISION*, No. 18, 35 M.L.J. 632.

Legitimacy.

(1) Person claiming jagir of deceased as posthumous son—Legitimacy to be proved beyond doubt—*Onus* of proof. See *CUSTOMS (PUNJAB—SUCCESSION)*, No. 9, 42 P.W.R. 1918.

Legitimacy—(Concluded).

(2) Presumption as to marriage and—Long cohabitation and treatment as husband and wife. See *EVIDENCE*, No. 4-b, 146 P.L.R. 1917.

(3) Presumption of—*Evidence Act*, Ss. 112 and 114—Burden of proof. See *EVIDENCE ACT*, No. 54, 43 Ind. Cas. 478.

(4) Mother if can sue for declaration of legitimacy of child. See *SPECIFIC RELIEF ACT*, No. 21, 23 C.W.N. 171.

Lessee.

Liability of, for rent after parting with his interest. See *TRANSFER OF PROPERTY ACT*, 47 Ind. Cas. 800.

Lessor and Lessee.

(1) *Darpatni lease granted by patnidar on condition that, on sale for arrears of rent, subordinate tenures created by darpatnidar should determine—Default by darpatnidar—Rent sale—Person claiming under derivative title from patnidar, Right of, to avoid permanent under-tenures granted by darpatnidar—Condition in darpatni lease, if illegal under S. 159 of Bengal Tenancy Act and S. 10 of Transfer of Property Act—Darpatni created by Receiver of estate of patnidar in administration suit, without permission of District Judge, if valid—Civ. Pro. Code, 1882, Ss. 503, 505.*

M, the patnidar of a half share, granted, in 1886, a darpatni lease to D, under a darpatni kabulyat executed by D to M. A provision in the kabulyat recited that, while the darpatnidar should have full right to enter into any agreements, they should become extinct on the sale of the darpatni mehals for arrears of rent. In 1901, D granted a permanent under-tenure to the father of the defendants. In 1904, M purchased this darpatni interest at a sale in execution of a decree for arrears of rent due to him by D and in 1905, the sale was confirmed. A Receiver appointed, without the sanction of the District Judge, to the estate of M by the decree in an administration suit by M's creditors, granted a darpatni lease to the plaintiffs in 1906. Held, that, under S. 179, cl. (b), Bengal Tenancy Act, it was competent to M and D to enter into a contract of permanent tenancy, subject to the restriction actually imposed by the kabulyat, that subordinate interests carved out by D would be extinguished on a sale for arrears of rent, that this restriction was an incident of the under-tenure created in favour of D and that it ran with the land so as to be operative, not merely between the grantors and the grantees, but also between their representatives in interest and the holders of derivative titles from them and to extinguish the under-tenure granted by D to the defendants' father. Held, also, that the condition in the original darpatni kabulyat being not an absolute restraint on alienation but one obviously inserted for the benefit of the lessor, neither S. 159 of the Bengal Tenancy Act nor S. 10 of the Transfer of Property Act was applicable to

Lessor and Lessee—(Concluded).

it. *Held*, further, that the *darpatni* created by the Receiver in 1906 was valid and unassailable, as the Receiver was appointed, not under S. 503 of the old Code, but by the decree in the administration suit, and therefore no sanction by the District Judge was necessary. *Madhusudan Mahdon v. Midnapore Zemindari Co.*, 45 C. 940—27 O.L.J. 511 = 46 Ind. Cas. 139.

MOOKERJEE and BEACHCROFT, JJ.

(2) Covenant by lessee to pay building taxes—Lessor covenanting to pay land tax—Municipal tax on land as distinct from building. See *MAD. ACT III OF 1904 (CITY MUNICIPALITY)*, 7 L.W. 140.

(3) Landlord and lessor reserving only right to annual rent and re-enter on default—Lessee and tenant's right to resume *muafi* land as proprietor. See U. P. ACT II OF 1901 (*AGRA TENANCY*), No. 13, 15 A.L.J. 619.

(4) Sum of money agreed to be forfeited by lessee in case of breach—Sum if a deposit or penalty. See *LANDLORD AND TENANT*, No. 61, (1918) M.W.N. 197.

(5) Covenant in lease to file with lessor a set of *juma wasil baki* and *juma motussil* papers at the end of each year, if specifically enforceable. See *SPECIFIC RELIEF ACT*, No. 8, 42 Ind. Cas. 521.

Letters of Administration.

(1) Right to grant of letters, nature of—Such right derived from Court—Survival of such right to heir of residuary legatee of testatrix—*Civ. Pro. Code* (1908), O. XXII—Right of suit, Survival of—*Succession Act*, S. 197.

The right to a grant of Letters of Administration is a personal right derived from the Court and cannot devolve on or survive to the heir of the residuary legatee of the testatrix. Although the son of a residuary legatee, who had before his death applied for a grant of administration with a copy of the will annexed, may, if the will is established, be the proper person on the death of his father, to obtain, under S. 197 of the *Succession Act*, a grant, this would be so not by virtue of any right to administration, which he inherits from his father, but by virtue of the fact that as heir of his father to the residue he is the person most interested in the estate. *Hari Bhusan Datta v. Manmatha Natha Datta*, 45 C. 862.

GRAVES, J.

Reference:—36 C. 799, R.

(2) Grant of, Ordinary rule re—Where interest unequal.

Regarding the grant of Letters of Administration, the ordinary rule is that the grant should follow the interest and letters should be granted to the applicant whose interest is the greater. *Ma Sein Tin v. Ma Pwa*, 46 Ind. Cas. 875.

TWOMEY, C.J. and ORMOND, J.

Letters of Administration—(Continued).

(3) Application for letters by person claiming to be deceased's widow and also by person claiming to be sole heir of woman admitted to be surviving lesser wife of deceased—Status of person claiming to be widow disputed—Proper person entitled to letters—*Probate and Administration Act*, 1881, S. 23.

Two applications for Letters of Administration to the estate of a deceased person were made on the one hand by a person claiming to be his widow—which status was however disputed—and on the other hand by the mother and brother of the deceased's second lesser wife, who had survived the deceased but had since died, as the legal representatives and sole heirs of such lesser wife, whose status was admitted. There was also no denial of the allegation of their being the sole heirs. *Held* that as the brother of the lesser wife alone represented her estate and was her sole heir (a) Letters of Administration should be granted to him as standing in the shoes of the lesser wife and as her legal representative.

The rule of law governing such cases is that where two rival applicants apply for Letters of Administration, one of whom is admittedly entitled to a share in the estate under S. 23, *Probate and Administration Act*, and the status of the other is disputed, the Court should grant the letters to the heir whose status is admitted; and if the legal representatives of such acknowledged heir as such apply for letters to the estate of the deceased, they are entitled to stand in the shoes of such admitted heir (b). *Shive Yin v. Ma On and Ba Tin*, 43 L.B.R. 174 = 45 Ind. Cas. 935.

TWOMEY, C.J. and ORMOND, J.

References:—(a) 8 L.B.R. 1, F. (b) 5 L. B.R. 78; 162 E.R. 606, F.

(4) Application for Letters of Administration with Will annexed, nature of—Duty of Court—Court cannot refuse letters.

Held, that, an application for Letters of Administration with the Will annexed stands on the same footing as an application for Probate, and the Court is bound to grant the Letters unless it finds that the Will was not executed by the testator or that he was not of a disposing mind at the time of making it or that the Will was not his own voluntary act.

In an application for Letters of Administration to the estate of one D, with a copy of the Will annexed it appeared that N, the husband of D, made a Will dedicating certain property to a temple and directing that his widow be maintained out of his other property. After the death of N, D applied for Letters of Administration to his estate. The executors under the Will appeared in Court and consented to the widow being granted the Letters, which were granted accordingly. Later on D made a Will in which she appointed the applicants as executors, who after her death applied for Letters of Administration with a copy of her Will annexed. The executors under the Will of N lodged caveat urging that D had no power to make a Will.

Letters of Administration—(Concluded).

Held, that as it was proved that D executed the Will and as it was not contested that she was not of a disposing mind at the time she made it, the applicants were entitled to Letters of Administration with a copy of her Will annexed. **Basu Misra v. Umbe Parshad**, 110 P.W.R. 1918=45 Ind. Cas. 974.

SCOTT-SMITH, J. *

References :—233 P.W.R. 1911=20 P.R. 1912=10 Ind. Cas. 130, F.; 28 B. 644=6 Bom.L.R. 966, F.

(5) Sister of deceased and adopted daughter of deceased—Competition between, for letters—*Ratio decidendi*. See **BUDDHIST LAW (ADOPTION)**, No. 1, 9 L.B.R. 163.

(6) Court-fee payable on petition for grant of. See **COURT FEES ACT (1870)**, No. 24, 40 A. 279.

(7) Letters of Administration granted to minor sisters and their married sister and her husband—Letters granted to minors invalid—Sale by brother-in-law of minors as Administrator, Right of minor sisters-in-law to treat as void—Limitation—Sale by sisters of their share to another an act of avoidance. See **POSSESSION, SUIT FOR**, No. 2, 9 L.B.R. 186.

(8) Grant of, to a minor invalid—To sister, valid in case of intestacy. See **PROBATE AND ADMINISTRATION ACT**, No. 7, 10 Bur. L.T. 184.

(9) If and when can be granted for portion of estate bequeathed—Revocation of illegal and limited grant, Minor's right to. See **PROBATE AND ADMINISTRATION ACT**, No. 10, 3 Pat. L.J. 415.

(10) Letters of Administration, Grant of—Dismissal of administration suit on ground of limitation—Subsequent application for revocation of letters if barred as *res judicata*. See **RES JUDICATA**, No. 46, 9 L.B.R. 273.

Letters Patent.

- 1.—ALLAHABAD.
- 2.—BOMBAY.
- 3.—CALCUTTA.
- 4.—MADRAS.
- 5.—PATNA.

—1.—Allahabad.

S. 10—Decree in Letters Patent appeal—Review if lies from decree. See **REVIEW**, No. 1, 16 A.L.J. 964.

—2.—Bombay.

Cl. 15 — Judgment — Order by a single Judge refusing to excuse delay for appeal filed beyond time—Appeal against the order.

An order passed by a single Judge refusing to excuse the delay for an appeal presented beyond the time allowed by law is a judgment within the meaning of cl. 15 of the amended Letters Patent; and an appeal lies from the order under the clause. **Ramchandra Gangadhar Karve v. Mahadev Moreshwar Phadnis**, 90 Bom. L.R. 179=42 B. 260=42 Ind. Cas. 918.

HEATON and SHAH, JJ.

Letters Patent—(Continued).**—3.—Calcutta.**

(1) Cl. 15—Appeal—'Judgment'—Deduction of time—Review pending—Limitation Act (IX of 1908), S. 5.

The term 'judgment' in cl. 15 of the Letters Patent means "decree or order" and consequently an order of dismissal of an appeal without investigation of the merits may be a judgment (a).

An appellant is not entitled as a matter of right to a deduction of the period during which an application for review remained pending in the Court below. He has to seek extension of time under S. 5 of the Limitation Act (b). **Pragnan Kumar Baidya v. Ram Chandra De**, 28 O.L.J. 205=47 Ind. Cas. 677.

MOOKERJEE and BEACHROFT, JJ.

References :—(a) 2 Ind. Jur. (N.S.) 280 (296); 22 O.L.J. 452; 22 C.L.J. 525, R. (b) 33 C. 1323, R.

(2) Cl. 15—Order refusing leave to defendant to file written statement, if judgment from which appeal lies. See **APPEAL (GENERAL)**, No. 2, 45 C. 818.

(3) Cl. 15—Appeal, Disposal of by two Judges of a High Court—Review of, by one Judge, Validity of—Appeal from review order if lies under. See **APPEAL (LETTERS PATENT)**, 44 Ind. Cas. 999.

(4) Cl. 15—Application for review heard by one of two Judges who decided appeal—Dismissal of application—Appeal against dismissal. See **REVIEW**, No. 4, 22 C.W.N. 550.

(5) Cl. 15—Difference of opinion between Judges of Divisional Bench in disposing of civil rule—Appeal against prevailing opinion if lies. See **REVISION**, No. 12, 22 C.W.N. 627.

—4.—Madras.

(1) Cls. 15 and 36—Appeal from Bench differing *inter se* on appeal against land acquisition award, if lies, under Letters Patent—Procedure. See **LAND ACQUISITION ACT**, No. 20, 35 M.L.J. 110.

(2) Cl. 36. See No. 1, *supra*.

—5.—Patna.

Cl. 10 — Stay of criminal proceedings in Courts below by order of single Judge of High Court in criminal revisional jurisdiction—Order if judgment—Appeal from such order if lies—Government of India Act, 1915, S. 107—Letters Patent of Calcutta High Court compared.

An order directing that the proceedings in a trial under the Penal Code should be stayed pending the decision in certain proceedings taken under S. 145, Crim. Pro. Code, was made by a single Judge of the Patna High Court sitting on its criminal revisional side. *Held* that under cl. 10 of the Patna Letters Patent no appeal lay to the High Court against this order; the order staying proceedings not being a judgment within the meaning of this clause.

Letters Patent—(Concluded).**—5.—Patna—(Concluded).**

The intention of cl. 10 of the Patna Letters Patent was to restrict the right of appeal by prohibiting appeals (1) in respect of sentences or orders passed or made in the exercise of criminal jurisdiction and (2) in respect of orders made in the exercise of revisional jurisdiction in other cases, namely, civil cases.

Semble:—The result is that whereas in the Calcutta High Court, a Letters Patent appeal lies against the judgments of a Judge sitting alone in the exercise of civil revisional jurisdiction in the High Court of Patna, no such appeal lies. *Babujan Misir v. Seo Sahay Chaudhury*, 3 Pat. L.J. 509.

MULLICK and THORNHILL, JJ.

Reference:—17 W.R. 364, R.

Libel.

- (1) *Defamation—Fair comment—Facts commented upon by a journalist must in substance be truly stated—Trivial mis-statement of facts does not take away the plea of fair comment.*

A journalist does not transgress the limits of fair comment if all material facts are truly stated in the articles though it may be that there are one or two small deviations from absolute accuracy on minor points which have no influence on the conclusions, and the conclusions are such as ought to be drawn from the premises by a critic bringing to his work the amount of care, reason and judgment which is required of a journalist.

When a journalist is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the Judge must decide what impression would be produced on the mind of an unprejudiced reader, who, knowing nothing of the matter beforehand, read the articles straight through.

Facts upon which the comment is founded must be truly stated though later they may not turn out to be true at all. A fact may be truly stated and may yet be utterly untrue.

Comment to be fair need not take the form of an inevitable inference. Fair comment impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is required is that the inference from facts truly stated should be fair, that is, one possibly out of many equally or almost equally fair inferences (a). *Surajmal B. Mehta v. B. G. Horniman*, 20 Bom. L.R. 185=47 Ind. Cas. 449 (F.B.).

BACHELOR, A.C.J., BEAMAN and MARTEN, JJ.

References:—(a) *Hunt v. Star Newspaper Company, Limited*, (1908) 2 K.B. 309; *Dakhy v. Labouchere*, (1908) 2 K.B. 325, Note; *South*

Libel—(Concluded).

Hetton Coal Company v. North Eastern News Association, (1894) 1 Q.B. 133; *Risk Allah Bey v. Whitehurst*, (1868) 18 L.T. 615, R.

- (2) *Defamatory statements made by party in petition to Criminal Court—Civil action for damages for libel—Statements absolutely privileged. See DEFAMATION, No. 1, 16 A. L.J. 360.*

License.

- (1) *Agreement to cut and take timber for railway sleepers for royalty during fixed term—Lease or license. See AGENCY RULES (GANJAM, No. 1, (1918) M.W.N. 172.*

- (2) *Suit for ejectment of licensee in possession—Necessity of notice to quit. See NOTICE TO QUIT, No. 2, 27 C.L.J. 523*

Licensee.

Ejectment suit—Notice to quit, not necessary.

To maintain a suit for ejectment of a licensee who was not a tenant, no notice to quit was necessary. *Gobinda Chandra Ghose Biswas v. Narda Dulal Sirc*, 45 Ind. Cas. 317.

RICHARDSON and WALMSLEY, JJ.

References:—*Doe d Knight v. Quigley*, (1910) 2 Camp. 505

Lien.

- (1) *Advance of money to finance litigation—Agreement to share in profits—Default to pay full amount—Refund of money actually paid, Lender if entitled to—Lien in respect of money advanced—Lien on amount of compromise in a particular manner—Compromise in a different manner, Lien how affected by. See CONTRACT, No. 8, 47 Ind. Cas. 563.*

- (2) *Deposit of rent by darpatnidar—Possession given to darpatnidar—Payment of putni rent by darpatnidar—Right of darpatnidar to lien and to add to his demand of advance paid by him rent paid to superior landlord. See PATNI TENURE, No. 1, 27 C.L.J. 480.*

Life Estate.

Hindu if can create. See WILL, No. 15, 3 Pat. L.J. 199.

Light and Air.

Easements of — Right to open and shut window over another's land—Acquisition of easement by prescription—Injunction. See EASEMENTS ACT (1882), No. 2, 7 L.W. 332.

Limitation.

- (1) *Limitation Act (XV of 1877), Sch. II, Art. 109—Sale under Putni Regulation (VIII of 1819)—Purchaser given possession—Sale set aside—Decree, Reversal of.*

A putni was sold in October, 1901, under Putni Regulation for arrears of rent. The defendant purchaser was put into possession. The plaintiffs, the owners of the putni, instituted a suit for setting aside the sale on the 17th

Limitation—(Continued).

May, 1903. In that suit they made no claim for mesne profits which had accrued either before the suit or which accrued during the pendency of the suit. On the 18th August, 1903, the suit was decreed in the first Court, with the result that the sale was set aside. On appeal, the first appellate Court reversed the decree of the first Court on the 13th February, 1903. Then there was an appeal to the High Court and on the 11th of May 1905, the High Court remanded the case for further consideration and decision, to the first appellate Court. On the 11th September, 1905, the first appellate Court affirmed the decision of the first Court with the result that the sale was set aside. A second appeal to the High Court was dismissed on the 30th May, 1907. The plaintiff then instituted the present suit on the 16th September, 1907, for mesne profits from March 1903 to the date of suit.

Held, that Art. 109, Sch. II, Limitation Act, was applicable and that the plaintiff was entitled to mesne profits for 3 years from 16th September, 1904, to the 16th September, 1907, the date of the suit (a).

That the plaintiff was not entitled to deduct from the period of limitation the period from the 18th February, 1903 to 11th September, 1905. *Saraj Ranjan Chaudhuri v. Prem Chand Chaudhuri* 27 C.L.J. 277=22 C.W.N. 263=43 Ind. Cas. 781 (F B.).

SANDERSON, C.J., TEUNON and WALMSLEY, JJ.

References:—(a) 35 C. 996=8 C.L.J. 181; 3 C.L.J. 182; *Not F.*

(2) *Bengal Tenancy Act* (VIII of 1885), Sch. III, Art. 3—*Landlord favouring dispossession—Civ. Pro. Code (Act V of 1908), O. VIII, r. 2—Limitation not pleaded—General plea of limitation—Decision on special limitation not pleaded.*

Art. 3, Sch. III of the Bengal Tenancy Act has no application in a case where the dispossession was by a tenant under an authority conferred by the landlords (a).

Under O VIII, r. 2 of the Code of Civil Procedure, limitation should be specially pleaded.

When limitation has not been specially pleaded and the facts are not apparent on the face of the record, a Judge has no jurisdiction to go into the matter and enquire whether, on certain facts he found, the suit was barred.

Where a general plea of limitation that the suit was barred under the twelve years' rule, was pleaded, a Judge was not competent to decide a case on a special plea, that the suit was barred under Art. 3, Sch. III of the Bengal Tenancy Act, when such latter plea was raised for the first time in the Court of appeal, without raising an issue and allowing the plaintiff to adduce evidence on it. *Kedar Nath Mondal v. Mohesh Chandra Khan*, 28 C.L.J. 216.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—(a) 18 C.L.J. 86, F.

Limitation—(Continued).

(3) *Bengal Tenancy Act* (VIII of 1885), Sch. III, Art. 3—*Dispossession by landlord—Decision—Right to redeem.*

A decision in a mortgage suit that a tenant has a right to redeem, does not extend the period of limitation under Art. 3, Sch. III of the Bengal Tenancy Act. *Girish Chandra Mitra v. Giribala Debi*, 28 C.L.J. 219.

FLETCHER and SHAMSUL HUDA, JJ.

(4) *Execution of decree, for—Decree amount, Payment of portion of, by judgment-debtor, if gives a fresh starting point—Limitation Act* (IX of 1908), Sch. I, Art. 182 (5).

A decree-holder will have a fresh starting point for limitation for the execution of a decree within the meaning of Art. 182, cl. (5) of the Limitation Act, from the date of payment by the judgment-debtor of a portion of the decree amount. *Jotindra Kumar Das v. Gagan Chandra Pal*, 45 Ind. Cas. 903.

TEUNON and NEWBOULD, JJ.

(5) *Debtor and creditor—Payment by debtor without expressing how to be appropriated—Customary method of appropriation in such cases—Limitation, Fresh starting point of, if given by—Limitation Act* (IX of 1908), S. 20.

Payment of a certain sum on a certain day by a debtor to his creditor without expressing how it should be appropriated whether towards interest or principal but with the knowledge that according to the usual practice it would be appropriated to the interest then due was held to give rise to the inference that the payment so made, was made with the intention that it should be so appropriated, so as to give a fresh starting point of limitation under S. 20 of the Limitation Act. *Siva Kumari Debi v. Biswambar Roy*, 46 Ind. Cas. 532.

TEUNON and RICHARDSON, JJ.

(6) *Declaration of title, Suit for—Settlement Records, Omission of plaintiffs' name from—Limitation, Commencement of, from date of challenging of plaintiffs' title, not from date of omission—Limitation Act* (1908), Sch. I, Art. 120.

In a suit for declaration of title brought by the plaintiffs whose names as co-sharers in certain lands had been omitted from the Settlement Records.

Held, that under Art. 120 of the Limitation Act, time will not run against the plaintiffs from the date of the omission of their names from the Settlement Records but only from the date when the defendants interfered with the plaintiffs' right on the basis of the false entry. *Husan Mea v. Naun Mea*, 46 Ind. Cas. 796.

TEUNON and RICHARDSON, JJ.

(7) *C. P. Land Revenue Act* (XVIII of 1881), S. 69 (4) (1), *Suits under, Limitation for—Limitation Act* (1908), S. 6, *Applicability of, to—General scope of S. 6.*

S. 6 of the Limitation Act *prima facie* only applies to the period of limitation prescribed in the Schedule of the Limitation Act.

Limitation—(Continued).

The limitation for a suit brought under S. 69, sub-S. 4 (1) of the Central Provinces Land Revenue Act, is not prescribed in the schedule to the Limitation Act, but in the sub-section to S. 69 itself. *Balkrishna Laxman v. Bala*, 46 Ind. Cas. 879.

BATTEN, A.J.C.

- (8) *Chaukidari ohakran lands, Possession of, by patnidar through services rendered—Resumption of lands—Discontinuance of possession—Possession, Suit by patnidar for, Limitation for—Limitation Act (IX of 1908), Sch. I, Art. 142.*

Where a *patnidar* is in possession of *chaukidari chakran* lands through receipt of the services performed by the *chaukidars*, such possession is discontinued on resumption of the lands inasmuch as the services cease to be performed; so that a suit by the *patnidar* to recover possession of the resumed lands brought more than twelve years after the date of the resumption is barred by time under Art. 142 of Sch. I of the Limitation Act. *Mohendra Nath Sow v. Rajani Kanta Sow*, 46 Ind. Cas. 895.

FLETCHER and SHAMSUL HUDA, JJ.

- (9) *Secretary of State, Suit against, Bengal Tenancy Act (VIII B. C. of 1885), S. 104-H, Under—Civ. Pro. Code (1908), S. 80, Notice under—Two months during which notice current, if to be excluded in calculation of.*

The plaintiff, in a suit against the Secretary of State for India under S. 104-H of the Bengal Tenancy Act, is not entitled to exclude the period of two months during which a notice served under S. 80 of the Civ. Pro. Code, is current from the period of limitation six months mentioned in that section. *Secretary of State v. Lakhi Narain Das*, 46 Ind. Cas. 899.

FLETCHER and SHAMSUL HUDA, JJ.

- (10) *Sale of holding in execution of rent-decree, Auction-purchaser at a, Suit to recover possession of holding from, Limitation applicable to—Bengal Tenancy Act (VIII B. C. of 1885), Sch. III, Art. 3.*

A suit by a *raiyat* to recover possession of his holding from an auction-purchaser of the holding at a sale in execution of a rent-decree is not governed by the limitation prescribed in Art. 3, Sch. III of the Bengal Tenancy Act (1885). *Ganesh Chandra v. Beraja Sundarl*, 46 Ind. Cas. 975.

FLETCHER and SHAMSUL HUDA, JJ.

- (11) *Receiver in insolvency attaching and taking possession of property as property of insolvent—Third person, Claim of, Limitation for—Provincial Insolvency Act (III of 1907), S. 42—"Aggrieved," meaning of.*

A third person claiming to be the owner of the property attached and taken possession of by a receiver in insolvency as the property of the insolvent, becomes "aggrieved" within the meaning of S. 23 of the Provincial Insolvency Act; and he should under S. 22 therefore have made his application within 21 days from the

Limitation—(Concluded).

date of taking possession. *Chaya Chandra Bhattacharjee v. Hem Chandra Mookerjee*, 47 Ind. Cas. 62.

TEUNON and NEWBOULD, JJ.

- (12) *Bengal Tenancy Act—Appeal against decision of settlement officer—Commencement of limitation. See BEN. ACT VIII OF 1885 (TENANCY), No. 55, 44 Ind. Cas. 152.*

(13) *Extension of time by Court after expiry of statutory period—Bengal Tenancy Act—Whether valid. See BEN. ACT VIII OF 1885 (TENANCY), No. 34, 44 Ind. Cas. 473.*

(14) *Suit by person deeming himself aggrieved by proceedings under Land Encroachment Act—Starting point for limitation for such suit. See MAD. ACT III OF 1905 (LAND ENCROACHMENT), No. 2, 35 M.L.J. 410.*

(15) *Special rule of, not pleaded in written statement—Appellate Court, if can dismiss suit as barred by. See APPELLATE COURT, JURISDICTION OF, 46 Ind. Cas. 787.*

(16) *Application for execution of rent-decree—Execution sale set aside—Execution case dismissed for default—Fresh application for execution, if continuation of previous application. See EXECUTION OF DECREE, No. 13, 22 C.W. N. 766.*

(17) *Execution of decree, Limitation for, Commencement of, not from date of order dismissing appeal from decree for default but from date of original decree. See EXECUTION OF DECREE, No. 21-C, 47 Ind. Cas. 125.*

(18) *Remuneration of common manager, Suit for arrears of, on basis of District Judge's order re payment thereof under S. 98, Bengal Tenancy Act (1885). See JURISDICTION (OF CIVIL COURTS), No. 5, 46 Ind. Cas. 686.*

(19) *Vendee deprived of possession of land—Suit to recover purchase-money—Commencement of limitation. See LIMITATION ACT (1908), No. 132, 44 Ind. Cas. 719.*

(20) *Point of, if may be taken at any time suo motu by Court—Duty of appellate Court in this respect. See MINOR, No. 7, 14 P.W.R. 1918.*

(21) *Question of, a question of jurisdiction—Decree absolute for sale, Suit to set aside a, Maintainability of, on ground of application being barred by limitation—Limitation Act (1908), Ss. 4, 28. See MORTGAGE (SALE), No. 8-a, 3 Pat. L.J. 478.*

(22) *Suit for confirmation of possession, when can be treated as suit for recovery of possession. See POSSESSION, No. 2, 44 Ind. Cas. 996.*

(23) *Suit claiming relief alternately against two defendants—Decree against one—Appeal—No cross-objection against other defendant—Appeal allowed—Subsequent suit against other defendant—Limitation. See RES JUDICATA, No. 12, 42 Ind. Cas. 548.*

(24) *Denial of title to a right—Communicated to owner—Running of limitation period. See SPECIFIC RELIEF ACT (1877), No. 22, 43 Ind. Cas. 175.*

Limitation Act (1859).

(1) S. 1, cl. 12—*Dismissal of a Hindu mother's claim as barred by time—Effect of, in regard to the right of reversioners after her—Res judicata—Adverse possession.* Kunjaru Yenkataramanlah v. Dejjappa Kinde, 22 M.L.T. 233=6 L.W. 530=(1917) M.W.N. 679=34 M.L.J. 319. See Final Part, 1917, Col. 575.

(2) S. 1, cl. 15—*Act IX of 1871, S. 29 and Art. 148—Kanom mortgage—Limitation—Extinction of mortgagor's title—Acknowledgment.* Thacharath Parkum Etathatta Kannon Ramah Karup v. Thavath Veetli Parakum Kayathikkal Chappan Nair, 22 M.L.T. 419=(1917) M.W.N. 864=33 M.L.J. 753=43 Ind. Cas. 50. See Final Part, 1917, Col. 575.

Limitation Act (1908).

(1 & 2) Suits filed under special law—Period of limitation—General provisions of the Limitation Act not applicable. See COMMON CARRIERS, No. 2, 45 Ind. Cas. 168.

(3) Ss. 2 (7), 5—Good faith, meaning of, in filing memo of appeal with deficit Court-fee, if in good faith under—Vakil, Negligence of, if sufficient cause under S. 5. See COURT FEES ACT, No. 2-b, 3 Pat. L.J. 484.

(4) S. 3—Appellate Court, if bound to dismiss suits filed out of time in original Court—Failure by such Court to adjudicate on plea of limitation not pressed before it, if an irregularity justifying revision. See REVISION, No. 14, 42 Ind. Cas. 536.

(5) S. 3, Arts. 120, 132—*Pala of worship, whether immovable property—Art. 132, whether governs suit to enforce mortgage of pala—Question of limitation, if may be considered for the first time in appeal.*

A turn of worship is not an interest in immovable property. Consequently, a suit to enforce a mortgage of a turn of worship is not governed by Art. 132 but by Art. 120 of the Limitation Act.

The Court can, under S. 3, take notice of the question of limitation, although it has not been taken up in the Courts below. Narasingha Bana Goswami v. Prohbadman Teoari, 22 C.W. N. 994=47 Ind. Cas. 25.

CHITTY and WALMSLEY, JJ.

References :—4 C. 683; 39 C. 227, R.

(6) S. 4—Expiry of time for appeal under Provincial Insolvency Act on *dies non*—Exclusion of such day from computation. See PROVINCIAL INSOLVENCY ACT, No. 37, 35 M.L.J. 531.

(7) Ss. 1 and 14—*Suit filed in wrong Court after expiry of limitation.*

S. 4 of the Limitation Act is applicable only to cases where a suit is filed in a proper Court having jurisdiction, after expiry of the period of limitation on a holiday. S. 14 applies to a case where suit is filed before the expiry of the limitation but in a wrong Court. The two sections cannot be combined so as to enable a plaintiff to file a suit in a wrong Court after expiry of the period of limitation under S. 4

Limitation Act (1908)—(Continued).

and then claim a deduction under S. 14 of the period spent in the prosecution of the suit in such wrong Court.

The plaintiff filed a suit on the day after the last day of limitation the last day being a holiday in a Court within whose jurisdiction one only of the defendants lived. The Court declined to give leave under S. 20 (b) of the Code of Civil Procedure, and returned the plaint to be presented to the proper Court which was accordingly done but after the period of limitation had expired.

Held the suit was barred, as the plaint had not been presented to the proper Court on the day after the last day of limitation. Ramalinga Iyer v. S. Subba Iyer, 24 M.L.T. 214=8 L.W. 256=47 Ind. Cas. 624.

SADASIVA AIYAR and NAPIER, JJ.

Reference :—36 M. 131, F.

(7-2) Ss. 4, 28—Decree absolute for sale, Suit to set aside a, Maintainability of, on ground of application being barred by limitation—Limitation, Question of, a question of jurisdiction. See MORTGAGE (SALE), No. 8-a, 3 Pat. L.J. 478.

(7-b) S. 5—*Admission of appeal after period of limitation without notice to respondent—Practice of Indian Courts—Stage at which question of limitation should be finally decided.*

The admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour. Where therefore an order for such admission is made *ex parte*, it is open to re-consideration at the respondent's instance.

The question of limitation should not however be left open till the hearing of the appeal, although this may have hitherto been the usage in India. The Courts in that country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal. Krishnaasawmy Panikondar v. Ramasawmy Chetty, 16 A.L.J. 57=4 Pat. L.W. 54=34 M.I.J. 63=23 M.L.T. 1=7 L.W. 156=27 C.L.J. 253=2 P.L.R. 1918=30 Bom. L.R. 541=22 C.W.N. 481=(1918) M.W.N. 906=41 M. 412=43 Ind. Cas. 493 (P.C.).

LORD WADDINGTON, LORD WRENBURY,
SIR JOHN EDGE, MR. AMEER ALI and
MR. JENKINS.

(8) S. 5—*Practice—Rules and Orders for Civil Courts, cl. 15, r. 12—Application for copies before recess—Arrangement for delivery during recess—Notification—Whether party bound to pay printing charges during recess—Vacation period, if can be deducted.*

Application for printed copies of the judgment was made on 11th April, 1917, and printing charges were called for on 28th April, 1917. The Court closed for the annual vacation on the 29th of April. On the 5th May, the copy

Limitation Act (1908)—(Continued).

application was dismissed for default of payment of printing charges; and on the re-opening day, 2nd July, a fresh application for copies was put in, and they were supplied on the 6th August.

On the question whether the appellant was bound to pay the printing charges called for on the 28th April before the re-opening of the Court on the 2nd July.

Held that he was bound to do so and that the copy application was rightly dismissed on the 5th May for non-payment.

Where there was a notification that arrangements would be made for delivery of copies during the recess, printing charges could be received during recess and copies made ready and delivered; and the party would not be entitled to deduct the vacation period in computing the period of limitation for preferring an appeal.

The delay was however excused under S. 5 of the Limitation Act, on the ground that otherwise the party was quite diligent in prosecuting the appeal. **Kadr Moldeen Sahib v. Sayyed Abubakkar Sahib**, (1918) M.W.N. 586

PHILLIPS and KUMARASWAMY SASTRI, JJ.

References:—Mad. H.C. Unrep. S.A. No. 1545 of 1917, F.; 25 B. 584; 19 A. 342, R.

(9) S. 5—*Appeal filed with delay—Sufficient cause—Mistake in law on part of legal adviser.*

Held, that a legal adviser's mistake, in order to justify an extension of period prescribed for presenting an appeal, must be a *bona fide* one; and nothing shall be deemed to be done in good faith which is not done with due care and attention (a) **Ahmad Hassan v. Musammat Shams-ul-nisa** 10 P.L.R. 1918=45 Ind. Cas. 542=69 P.W.R. 1918.

BROADWAY, J.

References:—(a) 95 P.R. 1917, F.; 118 P.R. 1908; 9 P.R. 1914; 67 P.R. 1917; 104 P.R. 1917 (P.C.), R.

(10) S. 5—*Sufficient cause—Omission to file power of attorney and copy of judgment of first Court.*

Where the appellant's mukhtar omitted to file his power of attorney authorising him to present appeal and copy of first Court's judgment with the appeal, but filed them long after presentation of the appeal and no reasons were given for the delay, the appeal was dismissed as barred by limitation. **Dhanra v. Musammat Wazir**, 94 P.L.R. 1918.

WILBERFORCE, J.

(11) S. 5—*Appeal—Review, time spent in prosecuting, whether can be reckoned off—Reasonable diligence and expectation of success.*

Held, that, an application for review must not only have reasonable expectation of success, but must also be prosecuted with reasonable diligence in order to justify an appellant in reckoning off the days spent in the prosecution

Limitation Act (1908)—(Continued).

of the review from the period allowed for filing the appeal.

Where, therefore, the plaintiff's suit was dismissed on 15th August, 1914, and, on the 10th November, 1914, he presented an application for review, which was rejected on 15th December, 1914, without issue of notice: **Held**, that the plaintiff appellant had not prosecuted his application for review with reasonable diligence and was not entitled to deduct the time spent in the review proceedings in order to bring his appeal within time. **Aziz-ud din v. Bhag Mal**, 125 P.W.R. 1918=103 P.L.R. 1918=46 Ind. Cas. 29=107 P.R. 1918.

RATTIGAN, C.J. and LE-ROSSIGNOL, J.

(12) S. 5—*Appeal filed beyond time—Legal adviser, Mistake of—Proof.* See APPEAL (GENERAL), No. 20, 45 Ind. Cas. 725.

(13) S. 5—*'Sufficient cause' in, for extending period of limitation—Appeal, Filing of, Delay in—Mistake in calculation.* See APPEAL (GENERAL), No. 22, 46 Ind. Cas. 480.

(14) S. 5—*Insufficient Court-fee paid on appeal without any legal excuse—Court if bound to receive appeal and give time for making deficiency good—Difficulty in procuring stamps if sufficient cause.* See APPEAL (GENERAL), No. 28 3 Pat. L.J. 74.

(15) S. 5—*Privy Council, Leave to appeal to—Application by person disqualified, Rejection of—Second application after removal of disqualification but after limitation period—If sufficient cause to excuse delay.* See APPEAL (TO PRIVY COUNCIL), No. 5, 46 Ind. Cas. 68.

(16) S. 5—*Period during which review application pending in Court below it can be deducted by appellant.* See LETTERS PATENT (CALCUTTA), No. 1, 28 C.L.J. 205.

(17) S. 5—*Applicability of section to delay on account of error of law.* See MALABAR LAW, No. 6, 35 M.L.J. 51.

(18) S. 5—*Death of respondent—Application to bring legal representative on record not made within limitation—Appellant living at great distance from respondent—Sufficient cause.* See MORTGAGE (REDEMPTION), No. 21, 24 P.L.R. 1918.

(19) S. 5—*Application of section to appeals under S. 46. Provincial Insolvency Act.* See PROVINCIAL INSOLVENCY ACT, No. 36, 88 P.W.R. 1918.

(20) Ss. 5 to 25, 29—*Provincial Insolvency Act (III of 1907)—Petitions and appeals filed after time—General provisions of Limitation Act, whether applicable.* **Kopparth Lingayya v. Aravell Chinnaarayana**, 33 M.L.J. 566=41 M. 169=7 L.W. 443=44 Ind. Cas. 805 (F.B.), See Final Part, 1917, Col. 579.

(21) Ss. 5 and 14—*Review application—Sufficient cause for filing the application beyond time—Review, grant of—Discovery of new matter—Strict proof of absence of*

Limitation Act (1908)—(Continued).

negligence—Civ. Pro. Code (Act V of 1908), O. XLVII, r. 4 (2) (b).

The plaintiff, a Muhammadan female, filed a suit to establish her right of way, which was negatived by the trial Court on the strength of the certified copy of a map produced by the defendant. An appeal was preferred against this decree to the District Judge, but it was heard by the First Class Subordinate Judge, with appellate powers, who dismissed it on the 8th October 1915. The plaintiff applied to the Revenue authorities, on the 16th idem, for another certified copy of the map, and appealed against the decree to the High Court, on the 10th November. The certified copy was received by the plaintiff on the 4th January 1916; and, on the next day, he applied for a review of the judgment of the lower appellate Court. Pending the application for review, the appeal in the High Court was withdrawn. The review petition was transferred by District Judge to the First Class Subordinate Judge, who dismissed it on the 5th May 1916, on the ground that it was not made to the proper Court. The next day, the plaintiff made a second application to the First Class Subordinate Judge asking him to review his judgment in view of the correct certified copy of the map procured by her. The review having been allowed, the defendant appealed to the High Court contending that the application was barred by limitation and that it was wrongly granted:

Held, (1) that, assuming that in strictness the application was out of time, the case was one which called for the concession allowed by Ss. 5 and 14 of the Indian Limitation Act, 1908;

(2) that there was, as required by O. XLVII, r. 4 (2) (b) of the Civ. Pro. Code, strict proof which, if it be believed, was sufficient to discharge the burden, which lay on the plaintiff, of showing that she was not guilty of negligence in not collecting earlier the evidence upon which she wished to rely.

Per *Batchelor, J. C. J.*—"The expression 'strict proof' in O. XLVII, r. 4 (2) (b) of the Civ. Pro. Code of 1908, refers to the formal correctness of the evidence offered, and not to its effect or result. If the record does contain such strict proof, that is to say, such formal admissible evidence, it shall be for the trial Court only to assess its sufficiency."

Per *Kemp, J.*—"I am of opinion that we are entitled to satisfy ourselves under O. XLVII, r. 4 (2) (b) as to whether there was sufficient evidence before the lower Court, and whether such evidence has been properly appreciated by it when it granted the application." *Bal Nematbu v. Bal Nematullabu*, 20 Bom. L.R. 434=42 B. 295=46 Ind. Cas. 14.

BATCHELOR, A.C.J. and KEMP, J.

(22) Ss. 5, 14—*Bona fide prosecution of proceeding in wrong Court if sufficient ground for extending time for filing appeal.*
An appeal against the decision of a Munsif was filed within time in the Court of the

Limitation Act (1908)—(Continued).

District Judge; and, a question being raised as to which was the proper Court of appeal, the District Judge took time to consider it and ultimately determined that, under the notification of the High Court, the Subordinate Judge's Court was the proper Court and returned the appeal which was on the same day filed in the latter Court. The Subordinate Judge rejected the appeal as time-barred:

Held, that, although S. 14, Limitation Act, was inapplicable to appeals, the principle of that section has been recognised by Courts as applicable to appeals in this sense that the *bona fide* prosecution of a proceeding in a wrong Court has been regarded as a proper ground or as sufficient cause within the meaning of S. 5 Limitation Act, for extending the time for filing an appeal. *Rupa Thakurani v. Kumudnath Karmakar*, 22 C.W.N. 594=46 Ind. Cas. 116.

RICHARDSON and BRACHCROFT, JJ.

(23) Ss. 5, 14—*Time spent in applying for review, subsequently held to be wrongly granted, whether sufficient cause for not appealing within time prescribed by law—Mistake of law if per se sufficient cause within statute of limitation—Discretion of Court, meaning of—Remedy against wrong exercise—Abatement of suit, order for, if can be made ex parte—Notice—Substitution of parties in one stage of suit if sufficient for all stages thereof.* Civ. Pro. Code (1889), Ss. 365, 366, 371, 588. *Brij Indar Singh v. Lala Kanshi Ram*, 33 M.L.J. 486=22 M.L.T. 362=6 L.W. 592=19 Bom. L.R. 366=15 A.L.J. 777=26 C.L.J. 574=104 P.R. 1917=3 Pat. L.W. 313=127 P.L.R. 1917=126 P.W.R. 1917=45 C. 94 (P.C.). See Final Part, 1917, Col. 581.

(24) Ss. 5, 15—*Appeal to Privy Council—Decree in favour of appellant against respondent given as security for costs—Acceptance of decree as security if an implied stay of execution of the decree during the pendency of the appeal.*

In an appeal to the Privy Council, the appellant, whose suit had been dismissed by the High Court offered as security for costs a decree in another suit obtained by him against the respondent. *Held* that the acceptance of the decree as security did not involve any order staying its execution so as to entitle the appellant under S. 15, Limitation Act, to deduct the time that elapsed between the acceptance and his subsequent application for execution.

Limitation could not be extended even by express agreement and it certainly could not be extended by an agreement to be implied from circumstances similar to those above mentioned. S. 5, Limitation Act, does not apply to an application for the execution of such a decree in the absence of any enactment or rule which makes the section applicable to such an application. *Midnapur Zamindari v. The Deputy Commissioner of Manbhum*, 3 Pat. L.J. 132=44 Ind. Cas. 570.

OHAMIER, C.J. and CHAPMAN, J.

References:—5 M.I.A. 43 (70); 13 W.R. 44, B.

Limitation Act (1908)—(Continued).

(24-a) S. 5. See No. 3-a, *supra*.

(25) S. 6—Purchaser from minor if acquires such minor's rights under section. See APPEAL (GENERAL), No. 15, 22 O.W.N. 831.

(25-a) S. 6, Applicability of—Central Provinces Land Revenue Act (XVIII of 1881), S. 69 (4) (1), Suits under, Limitation for, if governed by S. 6 of the Limitation Act. See LIMITATION, No. 7, 46 Ind. Cas. 879.

(26) S. 6—Benefit conferred on minor by section—Assignee if can avail himself of it. See MINOR, No. 7, 14 P.W.R. 1918.

(27) Ss. 6, 7, 9 and 15—War—Alien enemy, suspension of right to sue—Whether the period of suspension to be excluded from the time prescribed by the Limitation Act—Disability or inability—License to sue.

The plaintiffs (appellants), a German Bank, were the endorsees of certain promissory notes payable on demand drawn by the defendants (respondents) dated June 1914. On 4th August 1914 war was declared with Germany and the plaintiffs were debarred from bringing any action to enforce their claim. In November 1915, the plaintiffs obtained license from the Government to bring this action and, on 9th May, 1918, the present suit was filed.

Held—That the suit was barred by limitation.

Under S. 9 of the Limitation Act once time has begun to run, no subsequent disability or inability in the shape of suspension of right to sue stops it. *Deutsche Aelatische Bank v. Hira Lal Burdhan and Sons*, 23 C.W.N. 157=47 Ind. Cas. 398.

SANDERSON, C.J. and WOODROFFE, J.

(28) Ss. 6, 7, 28, Arts. 44, 144—Guardian and minor—Alienation by guardian during minority—Suit by person claiming from such minor under sale-deed executed by him after attaining majority—Limitation—Civ. Pro. Code, 1908, O. I, r. 1. *Kandasami Nalcker v. Irusappa Nalcker*, 33 M.L.J. 309=41 M. 102. See Final Part, 1917, Col. 582.

(29) Ss. 6, 8, Sch. I, Art. 12—Minor, suit by—Limitation, extension of—Execution—Decree against son as representative of father—Sale—Suit to recover property sold—Suit to set aside sale, necessity of—Civ. Pro. Code (Act V of 1908), S. 47.

Held, that:—

(1) S. 6, Limitation Act, gives a minor the same period of limitation after his attaining majority as an ordinary person gets. There is nothing in S. 8 to extend the period.

(2) A suit by a minor to set aside the sale under Art. 12, Sch. I of the Limitation Act, must be brought within one year from the date of the plaintiff's majority.

(3) Where a decree is passed against the representative of a deceased person as such representative, and as being in possession of the estate of the deceased, and property forming part of the estate is sold in execution of the decree, the judgment-debtor is precluded by

Limitation Act (1908)—(Continued).

S. 47 of Act V of 1908 from bringing a separate suit to recover the property without getting the sale set aside. *Pala Singh v. Harnama*, 40 P.L.R. 1919=30 P.W.R. 1918=43 Ind. Cas. 712.

CHEVIS, J.

References:—11 W.R. (F.B.) 1=2 B.L.R. (F.B.) 73=1 Ind. Dec. (N.S.) 620; 9 C.L.R. 18; 8 Ind. Cas. 73=13 O.C. 297; 76 P.R. 1890, *Dist.*

(30) Ss. 6, 30, Sch. I, Art. 135—Shebait—Suit to recover debutter property—Permanent lease—'Transferred'—Time, running of.

A suit by a shebait in 1913, to recover possession of debutter property held by the defendant under a *makarrari* lease granted by a previous shebait in 1876, is barred by the provisions of Art. 134, Sch. I of the Limitation Act, as brought more than 12 years after the date of the lease (a).

The representation of an idol by shebait is a continuing representation and limitation runs against the idol continuously and not against each shebait individually as and when he succeeds to the office, the shebait not being holders of successive life estates in the management or in the property of the endowment (b).

The plaintiff had no vested right of suit when the Limitation Act of 1908 was passed.

If the passing of the Limitation Act of 1908 has cut down and made shorter the period of limitation, the plaintiff should have brought his suit within two years from the date of passing of the said Act, under S. 30.

Quære: Whether S. 6 controls S. 30 of the Limitation Act. *Monmotho Nath Laha v. Annoda Prasad Roy*, 27 C.L.J. 201=44 Ind. Cas. 567.

RICHARDSON and BEACHCROFT, JJ.

References:—(a) 36 I.A. 148=36 C. 1003; 38 O. 526 (P.C.), *Expl.* (b) 23 W.R. 253 (P.C.); 23 M. 271 (P.C.), *R.*

(31) S. 6, Art. 181—Civ. Pro. Code (Act V of 1908), O. XXXIV, rr. 4 and 5—Suit on mortgage—Decree passed by High Court in appeal—Application for decree absolute—Limitation.

An application for a decree absolute under O. XXXIV, r. 4 of the Civ. Pro. Code is beyond time when it is made more than three years after the date of the decree in appeal passed by the High Court, and S. 6 of the Limitation Act does not save limitation inasmuch as an application for a final decree in a mortgage suit is not an application in execution (a). *Nizamuddin Shah v. Bohra Bhim Sen*, 16 A.L.J. 85=40 A. 203=40 Ind. Cas. 870.

RICHARDS, C.J. and BANERJI, J.

References:—(a) 15 A.L.J. 731; 37 A. 22, *R.*

(32) S. 6. See No. 20, *supra*.

(33) S. 7—Discharge—Manager of joint Hindu family—If can give a valid discharge on behalf of others—Attachment—Dismissal of

Limitation Act (1908)—(Continued).

execution petition—*If attachment continues.* Chivikula Venkatasubbish v. Gollapudi Venkateswatalu, (1917) M.W.N. 816=44 Ind. Cas. 566. See Final Part, 1917, Col. 583.

(34) S. 7—Existence of Manager of joint Hindu family competent to give valid discharge for himself and minor co-parcener—Minority of co-parcener will not prevent his claim being barred. See HINDU LAW (ADOPTION), No. 3, 20 Bom. L.R. 161.

(35) S. 7, Art. 182 (6)—*Decree—Execution—Date of issue of notice—Time runs from date of order by Court to issue notice—Minority—Subsequent disability.*

A decree under O. XXXIV, r. 6 of the Code of Civil Procedure was passed on March 4, 1911. Application for execution was put in on March 3, 1914, and, on the same date, the Court passed the order that notices issue to the judgment-debtors. The notices were actually drawn up and signed on March 4, 1914, and that was the date which the notices bore. The application for execution was struck off on March 24, 1914. The next application was made on March 5, 1917, by one of the original decree-holders, and the legal representatives of two of the other decree-holders, the legal representatives being minors. March 4, 1917, was a Sunday. The Court below held that the application was within time: *Held* that the application was time-barred, the time running from the date on which the order of the Court issuing notice was passed.

Held, also, that the time having already commenced to run from 1914, the decree-holders were not entitled to the benefit of S. 7 of the Limitation Act by reason of the minority of some of the decree-holders (a). Kalika Baksh Singh v. Ram Charan, 16 A.L.J. 693=46 Ind. Cas. 584=40 A. 630 (F.B.).

RICHARDS, C.J., KNOX and BANERJI, JJ.

References:—(a) 27 A. 199, R.; 22 A. 199, Dist.

(36) S. 7. See Nos. 20, 27 and 28, *supra*.

(37) S. 8. See Nos. 20 and 29, *supra*.

(38) S. 9. See Nos. 20 and 27, *supra*.

(38-a) Ss. 9, 15—Applicability of S. 9 to alien enemies—"Disability" and "inability." Difference between—S. 15, Applicability of, to judicial orders or injunctions, not to Royal proclamation—Statutes of Limitation, Construction of. See ALIEN ENEMY, 47 Ind. Cas. 122.

(39) S. 10—Difference between old and new section—Suit against trustee for an account of property lost to trust by his negligence or default—If S. 10 applies—English Law. Tholasingam Chetty v. Vedachelayya, (1917) M.W.N. 651=6 L.W. 523=22 M.L.T. 389=41 M. 319. See Final Part, 1917, Col. 583.

(40) S. 10—Trust—Assignment of land for a fixed period—Suit for recovery of possession on expiry of the period.

Limitation Act (1908)—(Continued).

When land is assigned for a fixed term, a suit for its recovery on expiry of the term is governed by S. 10, Limitation Act (a). Musammam Sooti v. Bhagirath, 12 P.L.R. 1918=66 P.R. 1918=70 P.W.R. 1918=45 Ind. Cas. 325.

LESLIE JONES, J.

References:—(a) A.W.N. (1905) 89, F.; 78 P.R. 1875; 38 P.R. 1878; 141 P.R. 1889; 85 P.R. 1909; 4 A. 187, Dist.

(41) S. 10—Applicability of section to a suit by minor against administrator of his estate during minority. See CIV. PRO. CODE (1908), No. 150, 45 Ind. Cas. 182.

(42) S. 10, Arts. 60, 145—Trust—Loan—Deposit.

The plaintiff sent some money from America to his father-in-law, to be repaid to him on demand and to be kept in deposit till then: *Held*, that S. 10 of the Limitation Act was not applicable to the suit and that Art. 60 and not Art. 145, governed the claim. Dalipa v. Laban Ram, 65 P.L.R. 1918=166 P.W.R. 1918=47 Ind. Cas. 592.

RATTIGAN, C.J.

References:—34 P.R. 1898; 37 M. 175, F.; 20 C.W.N. 232; 6 C.L.J. 535, Not F.

(43) S. 10, Arts. 124, 134, 144—Applicability of S. 10 to suit for recovery of trust property by trustee of idol from trustee to whom idol's property was transferred—Scope of section. See RELIGIOUS ENDOWMENTS, No. 8, 3 Pat. L.J. 327.

(44) S. 10, Art. 134—Temple property—Gift of temple property for valuable consideration—Consideration consisting in performance of religious service at the temple—Suit to recover the property—Limitation.

The predecessors-in-title of the plaintiffs, who were managers of a temple, made a gift of a portion of the temple property to the defendants' predecessors in 1868 in consideration of the latter performing certain religious services at the temple. In 1913, the plaintiffs averring that they were no longer willing to accept the services of the defendants in connection with the temple, sued to recover possession of the land from the defendants. A question having arisen whether the suit was governed by S. 10 or Art. 134 of the Limitation Act:

Held, (1) that the suit was governed by Art. 134 of the Limitation Act, for the defendants had relied on a transfer for a valuable consideration, which was the performance of recurrent religious ceremonies at the temple;

(2) that S. 10 of the Act had no application, inasmuch as the management of the lands in the hands of the defendants had not resulted in any form of breach of trust or in any misapplication of trust funds.

Limitation Act (1908)—(Continued).

S. 10 and Art. 134 of the Indian Limitation Act must be read together. S. 10 is, in the main, designed to meet a suit brought for the purpose of following misapplied trust funds for the benefit of the trust. The section does not apply to assigns for valuable consideration from express trustees. **Ramacharya Venkat-ramanacharya v. Shrinivasacharya Venkat-ramanacharya**, 20 Bom. L.R. 441=46 Ind. Cas. 19.

BATCHELOR, A.C.J. and KEMP, J.

References:—27 B. 369, F.; 36 C. 1003, Dist.; *Currie v. Misa*, (1875) L.R. 10 Exch. 159 (162), R.

(45) S. 10. See No. 20, *supra*.

(46) S. 11. See No. 20, *supra*.

(47) S. 12—*Appeal—Time requisite for obtaining copy of judgment and decree. Deduction of—Copy of judgment first applied for—Subsequent application for copy of decree—Total time taken for obtaining copies of judgment and decree separately if can be deducted or if only time taken for obtaining copy of judgment to be deducted—What time is "requisite"—Questions of fact and law.*

Under S. 12, Limitation Act, an appellant can deduct from the period of limitation for an appeal only the time actually requisite for obtaining copies. The question whether, when it is open to a party to apply for both copies of judgment and decree at once, he can apply first for one and then for the other and claim to exclude the two periods as both being requisite is a question of fact on the circumstances of the particular case. Where, therefore, the Court below decided that, in this case, two periods were not requisite and made only one allowance, his decision that in this case a double period was not necessary, whether he was right or wrong, was held not to be a question of law. **Sher Singh v. Pem Raj**, 100 P.R. 1918=195 P.W.R. 1918.

CHEVIS, J.

References:—6 P.R. 1894, F.; 8 M.L.J. 148; 17 Ind. Cas. 393; 28 Ind. Cas. 366, Dist.; *Punjab Civil Appeal No. 155 of 1879 (Unrep.)*, R.

(48) S. 12. See No. 20, *supra*.

(49) S. 13—*Suit against partners—One defendant absent from British India for portion of limitation period—Plaintiff's right to deduct such period against defendants absent and not absent.* See **PARTNERSHIP**, No. 3, 34 M.L.J. 41.

(50) S. 13. See No. 20, *supra*.

(51) S. 14—*Due diligence—Joint tenants—Decree for arrears satisfied by plaintiff—Suit for contribution filed in Small Cause Court—Plaint ordered to be returned for presentation to proper Court—Plaintiff refusing to take back plaint—Revision to*

Limitation Act (1908)—(Continued).

High Court dismissed—Plaintiff waiting for three months thereafter—Time between filing suit and taking back plaint not allowed.

A decree for arrears of rent having been passed against the plaintiff and the defendants who were joint occupancy tenants was realised from the plaintiff alone to a large extent, on August 19th, 1910. The plaintiff thereafter brought a suit against the defendants for contribution. The suit was instituted on May 20th, 1913, in the Court of Small Causes. On November 27, 1913, the Small Cause Court ordered the return of the plaint for presentation to the proper Court. The plaintiff refused to take it back, and on February 19, 1914, filed a revision against the order to the High Court, which was dismissed on March 16, 1915. On June 15, 1915, the plaintiff having applied for the return of the plaint it was so returned to her on June 30, 1915, and was filed on the same day in the Munsif's Court. The Munsif dismissed the suit as time-barred. The lower appellate Court reversed the Munsif's decree, and held the suit, within time, allowing to the plaintiff the period between May 20, 1913 and June 30, 1915: *Held* that the plaintiff was not entitled to the interval between May 20, 1913, and June 30, 1915, being allowed to her, inasmuch as she could not be deemed to have been prosecuting her case with due diligence in view of the fact that she waited for more than three months after the dismissal of the revision before she applied for the return of the plaint. **Hamida Bibi v. Fatima Bibi**, 16 A.L.J. 429=45 Ind. Cas. 991.

TUDRALL and ABDUL RAOOF, JJ.

(52) S. 14—*Exclusion of time—Proceedings before Collector—Bombay Hereditary Offices Act (Bom. Act III of 1874)*, S. 11-A.

An application to the Collector to take action under S. 11-A of the Bombay Hereditary Offices Act, 1874, is not a civil proceeding in a Court within the meaning of S. 14 of the Indian Limitation Act, 1908. Hence, the time taken up in prosecuting such an application cannot be excluded under S. 14 from the period of time prescribed by the Indian Limitation Act, 1908. **Laxman v. Keshav**, 20 Bom. L. R. 918.

HEATON and HAYWARD, JJ.

References:—12 B. 36; *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, (1893) 1 Q. B. 431; 8 B. 264; 2 B. 370; 26 A. 382, R.

(53) S. 14—*Execution of decree—Application for transfer dismissed—Subsequent application for attachment of judgment-debtor's property—Computation of limitation—Time taken up by previous application, whether to be deducted.* **Sri Yidhya Varuthi Theertha Swamikal v. Venkatarama Aiyar**, 38 M.L.J. 682=45 Ind. Cas. 460. See Final Part, 1917, Col. 588.

(54) S. 14, Art. 36—*Decree holder in ejectment suit against Malabar tenant, suit by, for,*

Limitation Act (1908)—(Continued).

compensation for damages done to property by tenant between decree and decree-holder's entry upon land—Decree-holder is entitled to deduct time spent in seeking some relief in execution proceedings—Limitation for suit—Court executing the decree in ejectment suit also competent to award compensation—Inconsistent pleas in two successive proceedings, rule as to, if applies to pleas based on abstract questions of law—Estoppel—Malabar Compensation for Tenants Improvements Act (I of 1900), Ss. 5, 6. Puthiyapandikasalayil Abdulla Koya v. Kallumpurath Kanaran, 33 M.L.J. 463=(1917) M. W.N. 834=6 L.W. 696=43 Ind. Cas. 6. See Final Part, 1917, Col. 589.

(54-a) S. 14. See Nos. 7, 21, 22 and 23, *supra*.

(55) S. 15—No execution of mortgage decree against some only of owners of equity of redemption during pendency of case against others—Limitation in regard to execution.

As there can be no execution of a mortgage-decree against some only of the owners of equity of redemption when the case against the others is still *sub-judice* under an appellate order, limitation in regard to execution of the decree does not commence until the decision is given in the case against the others. *Satish Mohini Debya v. Pabna Bank, Ltd.*, 47 Ind. Cas. 907.

FLETCHER and SHAMSUL HUDA, JJ.

(56) S. 15—Delay due to error of law—Condonation of delay. See *MALABAR LAW*, No. 6, 35 M.L.J. 51.

(57) S. 15—Partial stay of execution if justifies exclusion of time. See *STAY OF EXECUTION*, No. 1, U.B.R. (1918), 1st Qr., 73.

(58) S. 15. See Nos. 20, 24, 27 and 38-a, *supra*.

(59) S. 15 (2)—Suit under S. 104-H, of the Bengal Tenancy Act (VIII of 1885)—Plaintiff, if can deduct two months for notice given under S. 80 of Civ. Pro. Code (Act V of 1908).

The provisions of S. 15, sub-S. (2) of the Indian Limitation Act does not apply to a suit instituted under the terms of S. 104-H of the Bengal Tenancy Act, against the Secretary of State for India. He is not entitled to exclude the time during the currency of the notice to the Secretary of State under S. 80 of the Civ. Pro. Code. Hence a suit against the Secretary of State under S. 104-H, of the Bengal Tenancy Act is barred, if brought after six months (a). *Gangadhar Nanda v. Secretary of State for India in Council*, 28 C.L.J. 537=22 C.W.N. 817=47 Ind. Cas. 524.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—27 C.L.J. 374=45 C. 934, F.

(60 & 61) Ss. 15 (2), 29 — Publication of Record-of-Rights—Objection to such record taken by plaintiff—Service of notice under S. 80 Civ. Pro Code, on defendant—Secretary of State—Suit under S. 104-H, Bengal

Limitation Act (1908)—(Continued).

Tenancy Act, against Secretary of State instituted more than six months after publication of Record—Bengal Tenancy Act, Ss. 104-H, 184, 185—Suit, if barred.

The Record-of-Rights relating to a village was finally published on the 2nd June, 1910. The plaintiff instituted, on the 16th December, 1910, a suit under S. 104-H of the Bengal Tenancy Act, against the Secretary of State, after serving a notice as required by S. 80, Civ. Pro. Code, on the Secretary of State. The plaintiff claimed the benefit of S. 15 (2) of the Limitation Act, contending that S. 29 of the Limitation Act and Ss. 184 and 185 of the Bengal Tenancy Act made S. 15 (2) of the Limitation Act applicable to suits under S. 104-H of the Bengal Tenancy Act. Held that there was no force in this contention and that the suit was barred by limitation.

S. 15 (2) of the Limitation Act, which is made applicable to suits, appeals and applications mentioned in the third schedule annexed to the Bengal Tenancy Act by virtue of S. 185, sub S. (2) of the latter Act, cannot possibly apply to suits instituted under S. 104-H thereof which are not mentioned in the third schedule. A question of this description must be determined by a reference to the terms of the special statute, and on a plain reading of the provisions of S. 185 of the Bengal Tenancy Act taken along with S. 15 (2) of the Limitation Act, there is no doubt that S. 15 (2) cannot possibly be applied to extend the period of six months provided for the institution of suits under S. 104-H of the Bengal Tenancy Act. *Secretary of State for India v. Gangadhar Nanda*, 45 C. 934=27 C.L.J. 374=45 Ind. Cas. 528.

MOOKERJEE and WALMSLEY, JJ.

References:—18 C.W.N. 31=18 C.L.J. 538, *Rel. on*; 34 A. 496; 26 C. 564; 16 C.W.N. 904; 38 M. 92, *Dist.*; 35 A. 410; 18 M.L.T. 200; 34 M. 505; 27 C.L.J. 334, R.

(62) Ss. 15 (2), 29—Bengal Tenancy Act, S. 104-H, period of limitation for a suit under—Limitation Act (IX of 1909), S. 15, cl. 2 and S. 29, time of the currency of a notice under S. 80, Civ. Pro. Code (Act V of 1908), if can be excluded, in calculating the period of limitation for such a suit.

The provisions of S. 15, sub-S. (2) of the Indian Limitation Act, do not apply to a suit instituted under the terms of S. 104-H of the Bengal Tenancy Act. A suit under S. 104-H must be brought in any event, within six months as specified in that section and the plaintiff is not entitled to exclude the time during the currency of a notice to the Secretary of State whom he has joined as a defendant. *Gangadhar Nanda v. Janakimoni Das*, 22 C. W.N. 817=47 Ind. Cas. 524.

FLETCHER and SHAMSUL HUDA, JJ.

References:—27 C.L.J. 374; 22 C.W.N. 902, F.; 5 C. 110, *Diss.*; 13 C. 368, R.

(62-a) S. 15 (2). See No. 104, *infra*.

Limitation Act (1908)—(Continued).

(63) S. 15, Art. 182—Against decree-holder in case of execution of decree against insolvent during insolvency proceedings. See **PRESIDENCY TOWNS INSOLVENCY ACT**, 47 Ind. Cas. 798.

(64) S. 16. See No. 20, *supra*.

(65) S. 17. See No. 20, *supra*.

(66) S. 18, Art. 181—Execution sale brought about by fraudulent suppression of every process intended to notify judgment-debtor of execution—Application by judgment-debtor for cancellation of execution sale, Limitation for. See **EXECUTION SALE**, No. 1, 27 C.L.J. 528.

(67) S. 18. See No. 20, *supra*.

(67-a) S. 19, Sch. I, Art. 78—Acknowledgment—Payment by cheque—Cheque dishonoured—Limitation—Civ. Pro. Code (Act V of 1908), O. VI. r. 17—Amendment of plaint, when to be allowed.

The fact that the defendant, in a suit to recover money alleged to be due on accounts taken between the parties, sent to the plaintiff a hundi and a cheque which were dishonoured on presentation, cannot attract the application of Art. 78 of the Limitation Act to the suit.

The mere delivery of such a hundi and cheque does not constitute an acknowledgment within the meaning of S. 19 of the Limitation Act.

An application for amendment of a plaint in second appeal was refused by the High Court on the ground that if the amendment were granted, the plaintiff would be able to start afresh on allegations wholly inconsistent with those made in the original plaint. **Padma Lochan Patar v. Girls Chandra Kil**, 45 Ind. Cas. 241 = 27 C.L.J. 392.

MOOKERJEE and BEACHCROFT, JJ.

(68) S. 19. See **ACKNOWLEDGMENT OF DEBT**.

(69) S. 19—Deposition and written statement in another case how far serve as proper acknowledgments under section. See **ACKNOWLEDGMENT OF DEBT**, No. 7, 34 P.R. 1918.

(70) S. 19—Statement contained in application for extension of time for payment of mortgage-money, if acknowledgment. See **ACKNOWLEDGMENT OF DEBT**, No. 4, 35 M.L.J. 552.

(71) Ss. 19 and 20—*Nattukottai Chetties*—Acknowledgment of debt—Vilasam of the firm mentioned in the letter—Signature not made—Acknowledgment, if valid—Sufficient signature among Chetties, what is—Custom—Agent, power of, to make acknowledgment—Part-payment of principal, when valid—Secondary evidence, when can be given. **Muthiah Chettiar v. Kuttayan Chetty**, 6 L.W. 790 = (1918) M.W.N. 42 = 43 Ind. Cas. 20. See Final Part, 1917, Col. 591.

(72) Ss. 19, 20—Entries in debtor's account, if save limitation. See **PARTNERSHIP**, No. 3, 34 M.L.J. 41.

Limitation Act (1908)—(Continued).

(73) Ss. 19, 21—Acknowledgment of debt by receiver in suit for dissolution of Firm if valid. See **ACKNOWLEDGMENT OF DEBT**, No. 5, 35 M.L.J. 571.

(74) Ss. 19, 21 (2)—Acknowledgment by partner if binds co-partner—Direct evidence of specific authority if necessary. See **ACKNOWLEDGMENT OF DEBT**, No. 2, 34 M.L.J. 373.

(75) Ss. 19, 22, Arts. 106, 120—Dissolution of a partnership business—Contract Act (IX, of 1872), Ss. 239, 253—Suit for account—Amendment—Suit that plaintiff was a partner, if may be amended on basis that he was servant remunerated by share of profit—Amendment asked for first time in the Court of appeal—Acknowledgment of part of the claim, effect of. **Kali Das Chaudhuri v. Sm. Drapsaudi Sundari Dassl**, 22 C.W.N. 104 = 27 C.L.J. 403 = 43 Ind. Cas. 893. See Final Part, 1917, Col. 592.

(76) S. 19. See No. 20, *supra*.

(77) S. 20—Interest, payment of—'Interest paid as such.'

In order to bring a case within S. 20, Limitation Act, it is not essential that the debtor should, on the occasion of every payment, state explicitly that the payment is made on account of interest as such; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest (a). **Charu Chandra Bhattacharjee v. Karam Bux Sikdar**, 27 C.L.J. 141 = 43 Ind. Cas. 812.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 9 Bom. L.R. 1329 (1931); 31 A. 285; *Morgan v. Rowlands*, (1872) L.R. 7 Q.B. 493; *Friend v. Young*, (1897) 2 Ch. 421, *Rel. on*; *Nash v. Hodgson*, (1855) 6 De G.M. & G. 474; 3 B. 198; 31 A. 495; 4 A. 512; 6 B. 103; 21 C.W.N. 1055, *Dist.*

(78) S. 20—Mortgage—Part-payment—Payment by mortgagor.

A mortgage was made to A on 8th February, 1891. A brought a suit on this mortgage on 7th November, 1914. He implicated in this suit as defendants—(1) the mortgagors, (2) one set of subsequent mortgages and (3) certain purchasers of a portion of the equity of redemption in the mortgaged property under a sale-deed, dated 24th June, 1913. The third set of defendants only contested the suit on the ground that it was barred by limitation. A alleged that the suit was within time by reason of three payments made by the mortgagors on account of interest as such, the last of the payments being on 25th of November, 1902. This payment was made by the mortgagors by means of a sale by the mortgagors to certain prior mortgagees of some property other than the third that was covered by the mortgage in suit: Held that the payment having been made towards interest as such by the mortgagors, who were liable to pay, took effect against the third set of defendants, purchasers of a part, of

Limitation Act (1908)—(Continued).

the property, add the suit was within time. **Raushan Lal v. Kanhaiya Lal**, 16 A.L.J. 790—47 Ind. Cas. 845.

PIGGOTT and WALSH, JJ.

References:—32 C. 1077; 33 C. 1278; 1 C.L.J. 337; **Bolding v. Lane**, 1 De G.J. & S. 122; **Chinnery v. Evans**, 11 H.L.C. 115; **Lewin v. Wilson**, 11 A.C. 639, R.

(79) S. 20—*Money decrees not bearing interest—Payment—Application for execution—Certificate.* **Harendra Chandra Bhattacharjee v. Gajan Chandra Das**, 35 Ind. Cas. 177—22 C.W.N. 325. See Final Part, 1916, Col. 972.

(80) S. 20—*Payment of interest not as such, if could be taken as payment of principal—Payment in debtor's handwriting.* **Har Chandra Blawas v. Puran Chandra Mookerjee**, 35 Ind. Cas. 638—44 C. 567—22 C.W.N. 190. See Final Part, 1916, Col. 972 and Col. 593 of Final Part, 1917.

(81) S. 20—*Succession by reversioners—Acknowledgment by one—Whether binds others.*

Where a number of reversioners inherit separate and distinct shares in the property, the acknowledgment by one of them as to the liability of a mortgage-debt cannot bind the others. **Sarat Narain Das v. Top Ojha**, 43 Ind. Cas. 351—4 Pat. L.W. 85.

ROE and JWALA PRASAD, JJ.

Reference:—37 C. 461, Dist.

(82) S. 20. See Nos. 20, 71 and 72, *supra*, and No. 234, *infra*.

(83) S. 20 (1)—*Part-payment of principal amount—Endorsement on the back of the bond without signature of the payer—Cannot save limitation.*

Where the endorsement of the fact of part-payment of the principal on the back of the bond was not signed by the person making the payment, nor did it bear his mark, such an endorsement cannot save limitation under the proviso of S. 20 (1), Limitation Act. **Ballram Koch v. Sabha Sheikh**, 41 Ind. Cas. 516.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—28 B. 262, *Appr.*

(84) S. 20, sub-S. 1—*Part-payment of principal—Endorsement not in debtor's hand—Mark.*

If the payer affixes his mark beneath the endorsement written by a third person in the case of an illiterate person, that is a sufficient handwriting to satisfy the proviso to S. 20, sub-S. 1 of the Limitation Act (a). **Ballram Koer v. Sabha Sheikh**, 28 C.L.J. 222.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—(a) 28 B. 262, F.

(85) S. 20 (1)—*Mortgage without possession—Portion of produce agreed to be paid as interest—Sub-mortgage of half of mortgage—Receipt by sub-mortgagees of his share*

Limitation Act (1908)—(Continued).

from original mortgagor—Cause of action if kept alive against principal mortgagee.

In a mortgage without possession a portion of the produce was agreed to be paid as interest. The principal mortgagee sub-mortgaged half his rights. The sub-mortgagee continued to receive from the mortgagors his share of the produce up to within six years of suit. The question was whether limitation was saved as against the principal mortgagee by the payment of produce to the sub-mortgagees by the mortgagors within six years of suit. **Held** that, where a debt is kept alive under S. 20 (1), Limitation Act, by the payment of a person liable to pay it, the effect is to save limitation not only against the person who makes the payment but also to make the debt enforceable against any one liable for it and that in this case the debt was kept alive against the principal mortgagee (a). **Ram Chand v. Mewa Ram**, 3 P.R. 1918—44 Ind. Cas. 213.

SCOTT-SMITH and LESLIE JONES, JJ.

References:—(a) 17 Ind. Cas. 619, R.; 25 M. 220 (F.B.); 28 B. 249, Dist.

(85-a) S. 20—*Appropriation by creditor of payments by debtor without any instructions but with knowledge as to how such payments are usually appropriated if gives fresh starting point of limitation under.* See LIMITATION, No. 5, 26 Ind. Cas. 532.

(85-b) Ss. 20, 21—*Payment by one of several mortgagors—Whether saves limitation against the other—Mortgage providing one of two options—Effect of such option.*

Where one of several mortgagors made payment of interest on the debt, the payment cannot save limitation except as against the person making the payment, unless the other mortgagor or his heirs expressly authorise to make the payment in question.

A contract which gives the mortgagee one of two options, does not bind him to either of them, if he chooses to stick to the other. **Mubarak Ali v. Gopi Nath**, 45 Ind. Cas. 619.

KANHAIYA LAL, A.J.C.

References:—32 C. 1077; 33 C. 1278; 12 M. L.T. 610; 32 Ind. Cas. 551; 13 A.L.J. 486, Dist.; 23 C. 228; 37 A. 400; **Reeves v. Butcher**, (1891) 2 Q.B.D. 509; **Hemp v. Garland**, (1843) 62 E.R. 423; 1 C. 163, R.; 29 A. 43; 40 Ind. Cas. 232; 24 C. 281; 22 M. 20; 39 M. 981, *Appr.*

(85'c) S. 20, Sch. I, Art. 132—*Hindu joint family, Mortgage by father of a—Son, how far a debtor or agent of father—"Debtor" in S. 20. Meaning of—Mortgage-bond, Provision in, for payment by instalments—Default in payment—Suit, Institution of, Limitation for—Article applicable to—Art. 132 of Sch. I.*

A mortgage-deed provided that the principal sum was to be paid up in certain definite instalments. It was also agreed that if the instalments were not paid at the appointed

Limitation Act (1908)—(Continued).

time and if any default were to take place, then the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagee was to be entitled to bring a suit at once and claim interest at a specified rate.

Held, (1) that, on the terms of the bond, a suit for sale should have been brought within 12 years of the date of the first default in payment, under Art. 132 of Sch. I of the Limitation Act;

(2) that no question of waiver could arise for consideration in connection with a mortgage bond the enforcement of which is being sought by a suit for sale of property.

The word "debtor" as used in S. 20 of the Limitation Act means the person who is liable under the contract of debt. In case of a debt contracted by a father of joint Hindu family, presumably as the managing member, his son cannot in the lifetime of the father, be deemed to be a debtor nor an agent of the father for the purpose of paying a debt. **Lachmi Narain v. Daya Shankar**, 47 Ind. Cas. 655.

LINDSAY, J.C.

(86) S. 21 and Art. 182—Payment towards decree by brother of minor while their mother alive—Payment if due by lawful guardian—Payment out of Court not certified if sufficient to keep decree alive. See EXECUTION OF DECREE, No. 2, 45 C. 630.

(87) S. 21. See Nos. 20, 73 and 85-b, *supra*.

(88) S. 21 (2). See No. 74, *supra*.

(69) S. 22. See Nos. 20 and 75, *supra*.

(90) S. 23—Shamilat deh recorded as shamilat taraf—Declaration, suit for—Admission, effect of—Appropriation of compensation money, effect of—Limitation, commencement of—Fresh invasion.

In a suit for a declaration to the effect that the plaintiffs were the owners of a certain share of the village shamilat land, it appeared that the land in suit was entered as shamilat deh in the Settlements of 1856, 1868 and 1891-1892. But in 1893 the entry was changed and the land was shown as shamilat of taraf bedi—one of the three tarafs in the village, the plaintiffs' taraf being known as taraf vedi—in consequence, as was urged on behalf of the bedi defendants, of an admission made by the plaintiffs or their ancestors in that year. It appeared further that portions of the land having been acquired by the Government in 1906 and again in 1911 the compensation money was taken by the Bedis.

Held, (1) that the old entries being all in plaintiffs' favour the admissions of the Vedis meant nothing more than that the Bedis should continue to manage the land taking whatever income might accrue and incurring whatever expense might occur;

(2) that the action of the Bedis in 1911 in taking all the compensation money was a fresh invasion of the plaintiffs' rights and the suit

Limitation Act (1908)—(Continued).

was, therefore, within time. **Harnam Singh v. Makhan Singh**, 21 P.L.R. 1918=43 P.W.R. 1918=44 Ind. Cas. 81.

CHEVIS and SHADI LAL, JJ.

(91) S. 23—Interference with right of irrigation if continuing wrong under section. See REMAND, No. 5, 177 P.W.R. 1918.

(91-a) Ss. 23, 26—Riparian rights—Obstruction, removal of, suit for—Continuing wrong—Limitation—Riparian proprietor, Extent of rights of—Irrigation—Reasonable user—Natural and artificial streams—Grant, validity of.

The obstruction of a stream, whether it has continuous flow or not, is a continuing wrong within the meaning of S. 23 of the Limitation Act, and a suit for its removal is not governed by S. 26 of the Act.

Per **Chapman, J.**—An upper riparian owner can use the water of the stream for irrigation purposes, provided the user is reasonable and no just complaint can be made on the subject by the lower owners. The question in each case would be whether the user is reasonable and the decision of this question would depend among other considerations, upon the use to which the water of rivers is put in the adjoining country.

Where there is not sufficient water for all to use freely, each riparian owner would be permitted only his proportionate share determined by the number of such owners and the area for which the water is applied by each to an equally beneficial use.

Where a riparian owner makes a diversion from the stream for irrigation of his own tenement, there is no reason why the surplus water which would otherwise be wasted over the surface or by absorption in the earth should not be taken in a channel by another riparian owner to irrigate his land. It all depends upon what is reasonable in view of the proper requirements of all the riparian owners and the policy of the law should be to encourage and protect all beneficial use of the water.

Per **Jwala Prasad, J.**—The incidence of a natural stream applies also to an artificial water-course supplied with water from a natural stream and the riparian proprietors of the artificial course have the same rights as if the water-course were a natural stream. **Krishna Dayal v. Bhawanil Koer**, 43 Ind. Cas. 235=3 Pat. L.J. 51=3 Pat. L.W. 5.

CHAPMAN and JWALA PRASAD, JJ.

(92) S. 23, Arts. 115 and 116—Continuing covenant—Breach of—Injured party, if bound to sue at once—Possible means of reparation—Exhaustion of—Limitation, if shall await—Provision in sale-deed against disputes—Vendor guaranteeing to clear all obstruction—Whether amounts to a continuing covenant—Sale of both warans—Tenants settling up occupancy rights—Unsuccessful recourse to Court of Law—Subsequent suit on covenant more than six

Limitation Act (1908)—(Continued).

years from sale—Whether barred—Immediate application to vendor for redress—If necessary.

A provision in a sale-deed, "should disputes of any kind arise at any time touching the said land on the part of anybody we (the vendors) will clear them all with our own funds and allow this sale to continue to you uninterruptedly without any kind of loss to you," is an indemnity clause and should be construed as a continuing covenant (a).

In the case of a continuing covenant, although a cause of action may arise on the date of the covenant or as soon as there is a breach, the injured party is not bound to sue once for all for present and prospective damages for the breach of the covenants, but is entitled to wait until he exhausts all possible means of obtaining reparation before recourse is had to the covenantor. He will then be entitled to sue for consolidated damages caused to him by the act of intervenor and for the expenses he has been put to, in attempting to vindicate his title against that party.

Where the plaintiff purchased in 1906 certain lands from the defendant by a document which purported to convey both warans and which also contained a continuing covenant of indemnity and being unable to obtain possession from tenants who asserted occupancy rights therein sued to eject them and obtained a decree in the Court of the District Munsif in 1909 which however was reversed on appeal in 1910 by the Sub-Judge whose decree was confirmed by the High Court in 1912, and thereupon the plaintiff sued in 1915 for cancellation of the sale or for damages :

Held (1) that the suit was not barred as it was brought within six years of the date when a Court of Law for the first time held that neither the plaintiff nor his vendor had occupancy rights (b).

Art. 115 of the Indian Limitation Act, 1908, and 40 M. 910, referred to.

Where an indemnity clause imposes the duty of getting the title established, the vendee who had carried on the unsuccessful legal proceedings for establishing the title and who is therefore suing for damages must prove that the vendor was first asked to carry out his promise and that he went to Court only on his failure to carry out the covenant, unless the vendee establishes that the understanding was that the vendee should wait until recourse to law was had. *Yenkataramaaya v. Ramabrahman*, 35 M.L.J. 124 = 24 M.L.T. 104 = 8 L.W. 142 = 47 Ind. Cas. 924.

AYLING and SESHAGIRI Aiyar, JJ.

References:—(a) (1900) 2 Ch. 156, *F.* (b) 11 A. 27, *R.*

(93) S. 23, Art. 146 (a)—Erection of wall on Municipal land—Continuation of injuries effect—Extension of time of limitation—Loss of right by Municipality. See *PUBLIC STREET*, No. 1, 28 O.L.J. 494.

(94) S. 23. See No. 20, *supra*.

Limitation Act (1908)—(Continued).

(95) S. 24. See No. 20, *supra*.

(96) S. 25. See No. 20, *supra*.

(97) S. 26—User of watercourse for more than nineteen years and half—Subsequent interruption of such user—Suit to enforce user brought within year of obstruction after twenty years from commencement of user—Prescriptive title to easement, if established.

The plaintiff began to use a watercourse on the 27th April, 1896, and continued to use it until the 15th November, 1915, for a period of nineteen years, six months and nineteen days, when their enjoyment was interfered with by the defendant. Before one year from the date of interference had expired, the plaintiff instituted the present suit for an injunction restraining the defendant's interference. *Held*, there being no plea that the watercourse had been used with defendant's permission, that its enjoyment was *nec vi nec clam nec precario*. *Held*, also, that as the suit was brought after the expiration of twenty years from the date of the commencement of the enjoyment and within one year from the date of obstruction and as the statutory period of twenty years had ended within two years next before the institution of the suit, the plaintiff had established his right to the easement. *Held*, further, that as the obstruction in this case lasted for less than seven months and the period of obstruction being less than one year, the obstruction should be ignored for the purpose of calculating the period of twenty years prescribed by S. 26, Limitation Act, with the result that an easement could be acquired after an enjoyment for nineteen years and a fraction and that the period of twenty years prescribed by S. 26 (1) is overruled by the explanation to that section. *Sawan Singh v. Chatter Singh*, 48 P.R. 1918 = 46 Ind. Cas. 17.

SHADI LAL, J.

References:—*Flight v. Thomas*, (1840) 52 R. R. 468 ; *Battersea v. Commissioners of Sewers*, (1895) 2 Ch. 708, *R.*

(97-a) S. 26—Ancient village pathway used from time immemorial, Applicability to, *Of*. See *PUBLIC NUISANCE*, No. 2, 46 Ind. Cas. 970.

(98) S. 26—Right to supply of water from natural stream, if may be acquired by user. See *WATER*, No. 1, 57 P.R. 1918.

(99) Ss. 26, 27—Sections if apply to Central Provinces. See *FISHERY*, No. 2, 14 N.L.R. 35.

(99 a) S. 26. See No. 91-a, *supra*.

(100) S. 27. See No. 99, *supra*.

(101) S. 28, Art. 144—Right occurring on occasion—Adverse possession—Right to take wood from trees when fallen or cut—Right disputed on two previous occasions—No uninterrupted and continuous possession.

Plaintiffs' ancestor obtained leave in 1867 to plant trees on land belonging to Government

Limitation Act (1908)—(Continued).

He was to do so at his own expense and to tend them; the only right he was entitled to was to get the fallen dry wood from the trees. Certain transfers of the village took place, and on two occasions, viz., once in 1900 and at another time in 1910, the defendant who had purchased the village got the proceeds of the sale of such wood. The plaintiffs on both the occasions asserted their claim to wood or the price thereof but remained unsuccessful. Within six years from the date of the last sale they brought the suit for declaration of their right to get the dry wood under the agreement of 1967. The defendant pleaded adverse possession:—*Held* that the right being one which could only be exercised on occasion that is when the wood might fall or be cut from the trees, and not occurring every year or at stated times, and there having been disputes as to the right between the parties on two previous occasions, there could be no adverse possession.

Quare, whether S. 28 of the Limitation Act applies at all to a case like this? **Debi Parshad v. Badri Parshad**, 16 A.L.J. 345=40 A. 461=44 Ind. Cas. 980.

TUDHALL and RAOOF, JJ.

(103) S. 28. See Nos. 7-c and 28, *supra*.

(103) S. 29. See Nos. 20, 61 and 62, *supra*.

(104) Ss. 29 (1) (b), 15 (2)—*Bengal Tenancy Act* (VIII of 1885), S. 104-H—*Civ. Pro. Code* (Act V of 1908), S. 80—*Period of notice to Secretary of State, if to be deducted in computing the six months within which suit to be brought*.

The effect of S. 29 (1) (b) of the Limitation Act is to make both Parts II and III of the Act inapplicable to a special period of limitation prescribed by a special or local law. In a suit against the Secretary of State under S. 104-H of the Bengal Tenancy Act, computing the period of six months prescribed by cl. (2) of the section, the plaintiff is not entitled to deduct two months in respect of the notice, which he is bound to give to the Secretary of State under S. 90 of the Civ. Pro. Code. **Secretary of State v. Shih Narain Hazra**, 22 C.W.N. 802=47 Ind. Cas. 502.

RICHARDSON and WALMSLEY, JJ.

References:—27 C.L.J. 374, F.; 4 C. 50; 5 C. 110; 5 C. 314, 906; 7 C. 690; 8 C. 910; 10 C. 265; 17 C. 263; 18 C. 231; 18 C. 631; 16 C.W.N. 721; 36 B. 369; 18 C. 368; 30 C. 532; 16 C.W.N. 20; 12 M. 168; 18 M. 99; 34 M. 505; 38 M. 92; 8 B. 529; 20 B. 543; 16 B. 536; 37 M. 186; 31 A. 496; 1 C. 226; 29 C. 818; 10 C.L.J. 517; 18 C.W.N. 31; *Vagliano v. Bank of England*, (1891) A.C. 107, R.

(105) S. 30. See No. 30, *supra*.

(106) Art. 2—*Sale of plaintiff's property in execution of money-decree—Tender of decretal amount by plaintiff—Sale held by Amin in spite of it in collusion with decree-holder—Sale set aside—Suit for damages—Limitation*.

Limitation Act (1908)—(Continued).

In execution of a simple money-decree, certain immoveable property belonging to the plaintiff was advertised for sale. On the date fixed for the sale, the Amin came to sell the property. Before the sale, the plaintiff alleged, he had tendered the decretal amount to the defendant, but, in spite of it, the Amin held the sale in collusion with the decree-holder. The sale was subsequently set aside on plaintiff's application under O. XXI, r. 82 of the Code of Civil Procedure. The plaintiff brought this action for damages against the Amin nineteen months after the date of sale. The defendant *inter alia* pleaded limitation in bar of the suit under Art. 2 of Sch. I to the Limitation Act.

Held that the suit was barred under Art. 2 of Sch. I to the Limitation Act, inasmuch as the whole foundation of the plaintiff's claim was the alleged omission by the defendant to perform a duty imposed by the Code of Civil Procedure.

"The policy of the Law is quite clear, namely, that suits of this nature should be brought and investigated as promptly as possible."

Cases of this nature are distinguishable from cases where a defendant pleads in defence to an alleged illegal act that it was done in pursuance of a legislative enactment which requires notice of the action before the institution of the suit. **Mukat Lal v. Gopal Sarup**, 16 A.L.J. 1017.

RICHARDS, C.J. and BANERJI, J.

Reference:—25 B. 387, Not F.

(107) Arts. 4, 7, 36, 101, 102, 120—*Suit against trustees by hereditary temple servants paid in monthly wages for pay for days of unjust suspension, for value of perquisites from other sources and for damages for mental distress—Suit if of Small Cause nature—Limitation for suit—Appeal against remand order—Provincial Small Cause Courts Act, Art. 13*.

The plaintiff hereditary temple servants (archakas) paid in monthly wages, were suspended from their office in June 1912 by the trustees; the suspension order was intimated to the plaintiffs on the 19th June 1912; and their suspension lasted till the 3rd July 1912. The plaintiffs, questioning the legality and justice of the suspension, brought a suit on the 28th June 1915 against the trustees and the *peshkar* of the temple and also against the persons who discharged their duties during their suspension for pay for the days of suspension, the value of perquisites from other sources during such period and damages for mental distress, loss of dignity, etc., amounting in all to Rs. 79 and odd. An order of remand was passed by the lower appellate Court, which held that the plaintiffs' suit regarding pay and perquisites was not barred by limitation, the Court of first instance, having held that the whole suit was barred and dismissed the suit. In an appeal from the order of remand, the High Court overruled the preliminary objection taken against the appeal on the ground that the suit was of a Small

Limitation Act (1908)—(Continued).

Cause nature, observing that a suit to recover the amount alleged to be due to a hereditary *archaka* as the dues of his office fell under Art. 13 of the schedule to the Provincial Small Cause Courts Act (a). With reference to the contention of the appellants that the whole claim, including that for pay and perquisites was barred, *held* that the plaintiffs' claim did not fall under any of the three Arts. 4, 7 or 101, Limitation Act, but that Art. 102 applied to a suit against the trustees if the pay and perquisites were payable by the temple, that if the perquisites were received from third persons, they were not wages and Art. 102 would not apply and the claim as against the trustees would be in tort, to which Art. 36 might apply; that, as regards the *peskhar*, there was either no cause of action against him or the claim against him fell under Art. 36 and was therefore barred; and that as regards the person who received the plaintiffs' pay and perquisites, if it could be held that he received them for the plaintiffs' use, the claim for them would not be barred (b). **Baradwaja Mudaliar v. Arunachala Gurukkal**, 41 M. 528=23 M.L.T. 288=7 L.W. 524=45 Ind. Cas. 414.

SADASIVA AIYAR and BAKEWELL, JJ.

References:—(a) (1915) M.W.N. 846=31 Ind. Cas. 206, F.; 13 M.L.J. 829, R. (b) 9 M.L.J. 143; 6 W.R. 33; 35 M. 631, R.

(108) Art. 7. See No. 107, *supra*.

(109) Art. 10—*Pre-emption suit—Starting point of limitation.*

Held, following 7 A. 291, that Art. 10 of the Limitation Act was applicable to the suit and the period of limitation commenced from the date of registration of sale-deed and not from the date on which right to redeem the land which included the land in suit was determined in a suit. **Nanku v. Lakshman**, 67 P.L.R. 1918.

SHAH DIN, J.

(110) Art. 10—*Sale of specific plots of land together with share in village shamilat—Share in shamilat not capable of physical possession—Suit for pre-emption regarding such sale—Limitation—Punjab Pre-emption Act, S. 30.*

Though S. 30 of the Punjab Pre-emption Act, 1913, is not applicable to a suit for pre-emption in respect of sale of property consisting of specific plots of land together with a share in the village shamilat, Art. 10, Limitation Act, provides the limitation for such a suit. **Lahra Singh v. Bhagat Singh**, 68 P.R. 1918=108 P.L.R. 1918=158 P.W.R. 1918=47 Ind. Cas. 359.

SCOTT-SMITH, J.

Reference:—65 P.R. 1989, F.

(111) Art. 10—*Sale-deed executed on certain date—Possession in anticipation of sale taken two months prior to sale—Possession for purposes of limitation for pre-emption suit legally takes place only on date of sale-deed.* See **PRE-EMPTION**, No. 21, 80 P.R. 1918.

Limitation Act (1908)—(Continued).

(112) Art. 11—*Civ. Pro. Code, O. XXI, rr. 58, 63—Execution—Claim petition filed after 10 months' delay—Order thereon to notify claim to bidders—If amounts to an order under proviso to O. XXI, r. 58—O. XXI, r. 63—If covers orders refusing to investigate under proviso to O. XXI, r. 58—Art. 11, Limitation Act, if applies to such order.*

Where, in a claim petition under O. XXI, r. 58, the District Munsif first made an order "that, as the petition was filed late, the claim is ordered to be notified to the intending bidders and again in a subsequent petition made an order as follows:—The allegations of the Zamindarini will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last 10 months."

Held, that the latter order amounted in any event to a rejection of the claim on the ground that it was too late and was, therefore, an order made against the Zamindarini within the meaning of O. XXI, r. 63, Civ. Pro. Code.

A claimant, who comes forward too late in the day to entitle him to have his claim investigated, having regard to the proviso in r. 58, none the less raises a question of title with regard to the attached property, and where an order is made against him under the proviso to r. 58, that is to say, an order refusing to investigate such order comes within the mischief of O. XXI, r. 63 and Art. 11 of the Limitation Act. **Machi Raju Venkataratnam v. Kadamanhill Chendrayya**, (1918) M.W.N. 598=24 M.L.T. 197=35 M.L.J. 335=8 L.W. 292=41 M. 985 (F.B.).

WALLIS, C.J., OLDFIELD and SESHAGIRI AIYAR, JJ.

References:—2 L.W. 206; 31 M.L.J. 247, F.

(113) Art. 11—*Rejection, without investigation of claim to attached property—Suit to establish right governed by article.* See CIV. PRO. CODE (1908), No. 327, 45 C. 785.

(114) Art. 11—*Inapplicability of the article to a suit brought on dismissal of objection under O. XXI, r. 62, Civ. Pro. Code, without any investigation.* See CIV. PRO. CODE (1908), No. 332, 44 Ind. Cas. 528.

(115) Arts. 11 and 130—*Civ. Pro. Code (V of 1908), O. XXI, r. 63—Transfer of Property Act (IV of 1882), S. 83—Suit by attaching creditor whose attachment has been raised at the instance of alienees for setting aside alienations as fraudulent—Limitation—Plea that the suit must be representative—If sustainable—Plea, if may be taken for the first time in second appeal.*

A decree-holder whose attachment has been raised at the instance of alienees from the judgment-debtor of the properties attached sued for a declaration that the alienations were not binding on him and that his right to proceed against those properties in execution of his decrees remained unaffected by the alienations.

Limitation Act (1908)—(Continued).

Held that the suit was governed by Art. 11 of the Limitation Act and was in time if it was brought within one year of the order raising the attachment.

The fact that Art. 120 of the Limitation Act is applicable to suits under S. 53 of the Transfer of Property Act for setting aside alienations as fraudulent and that more than six years have elapsed since the date of the alienations sought to be set aside does not bar the suit as Art. 11 is applicable to all cases in which the main relief asked for falls within its scope (a).

Held further that even if Art. 120 applied to the case, the suit was not barred as the cause of action for the creditor arose not on the date of the alienations themselves, but on the date when the creditor knew that he had been defrauded, defeated or delayed.

The objection that the attaching creditor seeking to set aside alienations by his judgment-debtor must bring a representative suit on behalf of all the creditors cannot be allowed for the first time in second appeal.

Quere:—Whether such an objection can be supported at all? *Yenkaeswara Aiyar v. Somasundaram Chettiar*, 7 L.W. 280 = ('918) M.W.N. 244 = 44 Ind. Cas. 551.

AYLING and PHILIPS, JJ.

References:—(a) 4 L.W. 300, *F.*; 38 M. 535, *Cons.*

(116) Art. 12. See No. 29, *supra*.

(116-a) Arts. 12 and 144—Minor, Suit by, after attaining majority, to recover property sold in execution of decree when he was not properly represented. Limitation for—Article applicable. See MINOR, No. 5-b, 113 P.R. 1918.

(117) Art. 30—Suit for compensation for injury to goods in the possession—Railway—Amendment of plaint—Whether allowable on verbal suggestion.

A suit for compensation for injury to goods which was carried by a Railway Company does clearly come under Art. 30 of the Limitation Act.

A plaint would not be allowed to be amended upon a verbal suggestion made only in final reply to the arguments on the issue of limitation, when the amendment would alter the nature of the suit. *Louis Dreyfus and Co. v. The Secretary of State for India*, 45 Ind. Cas. 178.

HAYWARD, A J.C.

References:—12 C. 477, *R.*; 44 O. 16, *R.*

(118) Art. 31—Article if applies to a landing agent. See CONSIGNOR AND CONSIGNEE, No. 1, 34 M.L.J. 563.

(119) Art. 36. See Nos. 54 and 107, *supra*.

(120) Art. 44—Minor—Transfer of property by his guardian—Suit to set aside the alienation.

A minor's mother and natural guardian sold his property. To set aside the sale, the present

Limitation Act (1908)—(Continued).

suit was brought more than three years after the minor attained majority:

Held, that the suit was barred under Art. 44. Limitation Act, 1908. *Laxmava Huchappa Nasipudi v. Rachappa Channasappa Karveershetil*, 20 Bom. L.R. 408 = 42 B. 636 = 46 Ind. Cas. 22.

BEAMAN and HEATON, JJ.

References:—17 Bom. L.R. 1134 and 1187 (Note), *D.*; 34 A. 213 (P.G.); 25 B. 337 (P.G.), *R.*; 14 B. 479, *overruled*.

(121) Arts. 44, 144—Transfer by unauthorised person—Transfer by manager of joint family.

A suit was instituted by the plaintiff less than 3 years after attaining majority, for recovery of possession of his share of the property on the ground that his elder brother, during his (plaintiff's) minority, made away with the property without any legal necessity. The elder brother at the time of the transaction was not a guardian but a manager of a joint Hindu family:

Held, that Art. 44 of the first schedule of the Indian Limitation Act did not apply as it was a transfer by an unauthorised person purporting to deal with property belonging to the plaintiff and that limitation was twelve years. *Aftabuddin v. Prokash Chunder Soot*, 28 C.L.J. 496.

FLETCHER and PANTON, JJ.

(122) Arts. 44 and 144, applicability of, to suit by minor co-parcener after majority to recover possession of property, alienated by manager, describing himself as his guardian. See HINDU LAW (ALIENATION), No. 4, 40 Ind. Cas. 418.

(123) Art. 44. See No. 29, *supra*.

(124) Art. 47—Suit for recovery of land previously declared to be in defendant's possession under S. 145 of the Crim. Pro. Code (Act V of 1898)—Limitation—Order not ultra vires because defective—"Jurisdiction," meaning of.

In a proceeding under S. 145 of the Crim. Pro. Code regularly initiated by a preliminary order under sub-S. 1 the parties filed written statements. The first party to the proceedings, after some witnesses had been examined on his behalf, applied to withdraw from the proceedings stating that he would conduct the case in Civil Court and would not enter upon the land till the matter should have been settled by the Civil Court. The Magistrate reciting the above facts declared the second party to be in possession by an order passed on 24th August 1906. The first party instituted the present suit to recover possession on the 27th January 1912 and contended that the suit was not barred by Art. 47 of the Limitation Act because the order of the Magistrate was without jurisdiction:

Held—That the suit was barred by Art. 47 of the Limitation Act.

Per Richardson, J.—When a Magistrate's order is attacked in a collateral proceeding as

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ultra vires, it should be shown to have been without jurisdiction in the strict sense of the term, and not in the loose sense in which that term is sometimes used in proceedings for the revision of orders under S. 145, Crim. Pro. Code, under the High Court's powers of superintendence under S. 15 of the Charter Act (now S. 107 of the Government of India Act of 1915).

When an enquiry has been properly entered upon, it is not every error which makes the result invalid. Before want of jurisdiction can be established in such a case a vice must be clearly established which infects the whole proceeding. **Far Mahamed Shaha v. Hayat Mahamed Saha**, 22 C.W.N. 342.

N. R. CHATTERJEA and RICHARDSON, JJ.

References:—38 M. 432; 15 I.A. 123; 6 M.I. A. 232; 28 I.A. 257, R.

(125) Art. 47—Proceedings under S. 145, Crim. Pro. Code—Rule of limitation runs from the date of the order of Magistrate. See CRIM. PRO. CODE (1899), No. 2, 43 Ind. Cas. 955.

(126) Arts. 57, 61, 62, 107, 115, 120—*Partnership formed of some members of joint Hindu family—Suit for partition between joint family members—Claim under partnership of moneys lent by it to joint family—Barred debt if can be claimed as an item of joint family.*

The plaintiff, the 1st defendant and the 2nd and 3rd defendants alone carried on a partnership trade for their separate benefit, even during the lifetime of their common ancestor Ponnappa.

Ponnappa died about August 1906 and his funeral expenses were defrayed by partnership out of funds belonging separately to the partnership. When the partnership was dissolved in 1911, the amount alleged on the above account to be due to the partnership by the joint family estate fell to the share of the plaintiff among the partners. In the present suit for partition (brought in 1913), the plaintiff claimed to recover from defendants 1 to 3, two-thirds of this amount of funeral expenses, one-third being due to himself by himself. The Courts below disallowed the plaintiff's claim as having been barred by limitation.

Held, on second appeal, that the claim was barred because the cause of action for the recovery of the moneys of the firm arose, not from the date of the dissolution of the partnership in 1911 but from the date of the loan in 1906 that the partnership could have brought a suit for the amount against their joint family, even if all the members of the partnership were part of such joint family and that the plaintiff was not entitled, in effecting a partition of the joint family properties, to treat the moneys due to him as an item of account to be set off in the partition suit having been

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already barred by limitation (a). **Vallayappa Moothan v. Krishna Moothan**, 34 M.L.J. 32—44 Ind. Cas. 428.

SADASIVA AIYAR and PHILLIPS, JJ.

References:—(a) 25 B. 606; 26 B. 739, Dist.; *Bosaguet v. Wrey*, (1815) 6 Taunton 597—128 E.R. 1167; *Luke v. South Kensington Hotel Co.*, (1879) 11 Ch. D. 121; 20 C. 18; 8 M.L.J. 271; 19 C.W.N. 1183; 5 B. 589; 11 M. 246; 17 B. 271, R.

(127) Art. 60—*Deposit—Maral, meaning of—Deposit in A's name maral B—Effect—Deposit repayable on demand after a certain time.*

Money deposited on the understanding that it was to be paid on demand after a certain period does not cease to be a deposit within the meaning of Art. 60 of the Limitation Act.

Where money is deposited with a firm in the name of a maral B, the maral man B has no right to operate on the amount, nor is he a trustee. The firm remains and liable to A alone. **Chellappa Chetty v. Subramanian Chetty**, 4 L.W. 221—24 M.L.T. 264—(1918) M.W.N. 564—47 Ind. Cas. 948.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

Reference:—37 M. 175 R.

(128) Arts. 60, 111, 115—*Thavanai interest—Money deposited for thavanai interest—Limitation—Succession certificate—Right of grantee of—Payment to certificate-holder.*

Thavanai interest means the customary rate of interest which is fixed by Natukottai Chetties every two months. The money is either payable whenever demanded or it is payable at the expiration of the *thavanai* period current when the demand is made. In the first case Art. 60 would apply and time would begin to run from the date of demand and in the second case limitation would begin to run under Art. 115 on the expiration of the *thavanai* period current when demand was made.

The grant of a succession certificate gives the grantee a title to recover the debt due to the deceased and payment to the holder of the certificate is a good discharge. **Muthiah Chettiar v. Ramanathan Chettiar**, 7 L.W. 330—(1918) M.W.N. 242—43 Ind. Cas. 972.

WALLIS, C.J. and KUMARASWAMI SASTRI, J.

Reference:—29 M.L.J. 372, D.

(129) Art. 60 See No. 42, *supra*.

(130) Art. 61. See No. 126, *supra*.

(131) Arts. 61, 120—*Applicability of, to claims for contribution—Contract Act, 1872, S. 70 See CONTRIBUTION, No. 3, 45 Ind. Cas. 786*

(132) Arts. 62 and 97—*Applicability to a case where vendee sues to recover the purchase-money after deprivation of consideration—Commencement of limitation.*

Limitation Act (1908)—(Continued).

Where a purchaser of land sued to recover the sum which was paid to defendant for the purchase of the land, the possession of which he was deprived of subsequently, *held*, that Art. 97 and not Art. 62 was applicable to the case and the limitation commenced to run from the time when plaintiff was deprived of what he had bargained for, namely, possession of land. **Parasuram Mahajan v. Bhal Chandra Shaha**, 44 Ind. Cas. 719.

GREAVES and SHAMSUL HUDA, JJ.

(132-a) Art. 62. See No. 126, *supra*

(132 & 134) Arts 62, 97—*Contract of sale void ab initio and not merely voidable—Suit by vendee for refund of purchase-money—Limitation.*

Art. 62, not Art. 97, Limitation Act, governs a suit by a vendee against a vendor for the refund of purchase-money paid under a contract of sale, which is not merely voidable, but is void *ab initio*. **Buta Ram v. Gurdas**, 44 P.R. 1918=126 P.L.R. 1918=46 Ind. Cas. 26.

SHAH DIN, C.J.

References:—19 C. 123 (P.C.), *Appl.*; 25 B. 593, *Rel on*; 18 M. 173, *D.*

(135) Arts. 65, 115, 120—*Suit to enforce claim for advances of grain—Article applicable as 65 or 115—Punjab Loans Limitation Act (I of 1904).*

In a suit to enforce a claim in respect of advances of grain, the plaintiff's contention was that, in the absence of any article dealing specifically with grain advances, he would get the benefit of Art. 120, Limitation Act, *held* that he could get no extension of time under the Punjab Loans Limitation Act, as his claim would fall under Art. 65 or Art. 115, Limitation Act (a). **Mengha Ram v. Hassu**, 41 P. R. 1918.

KENSINGTON, C.J.

Reference:—(a) 23 P.R. 1897, *Dist.*

(136) Art. 75—*Forbearance to sue for whole amount under a bona is not waiver.*

A person, by simply forbearing to sue for the whole amount due under the provisions of a bond on failure to pay one or more instalments, does not waive his right under Art. 75, Sch. I, of the Act., **Hara Kumar Saha v. Ram Chandra Pal**, 47 Ind. Cas. 943.

CHITTY and WALMSLEY, JJ.

(136-a) Art. 75—Time begins to run from earliest date at against contract subject to condition as also against instalment bonds. See CONTRACT ACT, No. 17-a, 3 Pat. L.J. 412.

(136-b) Art. 75—Instalment bond—Provision for suing for entire amount on default of payment of any one instalment. See INSTALLMENT BOND, No. 1, 16 A.L.J. 929.

(137) Arts 75 and 132—*Hypothecation bond payable in instalments—Provision for payment of the whole in case of default—Whether the mortgagee has not the option to enforce the default clause—"Whenever you require"—Meaning of—Limitation—*

Limitation Act (1908)—(Continued).

Starting point—Enhanced interest, if can be claimed without previous demand.

Where the document sued on is a mortgage, Art. 132 applies and not Art. 75.

Where a hypothecation bond provided for payment by instalments and also contained a default clause which gave the creditor an option of requiring payment of the whole amount of the mortgage-money at an enhanced rate of interest upon the failure of the debtor to pay any one of the instalments, and the option was not exercised by the creditor, *Held* that the contract for the payment by instalments would subsist.

The words "whenever you require" in the default clause give the mortgagee an option to enforce it.

Where no demand was made until all the instalments become due the mortgagee would not be entitled to enhanced interest. **Lachakammal v. Sakkayya Nalck**, (1918) M.W.N. 586.

BAKEWELL and PHILLIPS, JJ.

(137-a) Art. 78. See No. 67-a, *supra*.

(138) Art. 83—*Suit for recovery of value of goods supplied by commission agent—Wrong decision on question of limitation when ground for revision—Punjab Courts Act (III of 1914), S. 44.*

Held, that a suit for the recovery of money due on account of the value of goods supplied by the plaintiffs as commission agents to defendants, is governed by Art. 83 of Sch. I of the Limitation Act.

Held, also, that a case falls within the purview of S. 44 of the Punjab Courts Act (III of 1914), when it can be shown that a suit has been erroneously held to be either within time or barred by limitation owing to the application to it of an article of the Limitation Act, which cannot apply to the facts. **The Firm of Sarab Dial v. The Shop of Devi Ditta Mal**, 129 P.W.R. 1918=46 Ind. Cas. 541.

RATTIGAN, C.J.

References:—23 P.R. 1915=218 P.W.R. 1914=36 Ind. Cas. 415, *F.*; 39 C. 473=15 Ind. Cas. 547; 20 A. 78=A.W.N. (1897) 168, *Diss.*

(139) Art. 83—*Suit against principal by commission agent—Limitation. See REVISION, No. 26, 59 P.L.R. 1918.*

(140) Art. 89—*Refusal to render accounts—What amounts to.*

Before a failure to render accounts can be accepted as a refusal under Art. 89, Limitation Act, to render accounts, definite evidence should be produced to show that a definite demand was made upon a definite date. It is insufficient to say that demands were made from time to time and plaintiffs were put off by their agents. "Put off" means postponed and postponement is not tantamount to refusal. **Nawab Chowdhury v. Lok Nath Singh**, 48 Ind. Cas. 570.

ROE and IMAM, JJ.

References:—40 C. 108, *F.*; 11 C.L.J. 43, *F.*

Limitation Act (1908)—(Continued).

(141) Arts. 89, 90—*Principal and agent—Money lent by agent to persons to whom, he was not authorised to lend, suit for recovery of—Suit for account—Termination of agency—Question of fact.*

Art. 89 and not 90, Limitation Act, applies to a suit by principals against an agent to recover a specified sum of their money, lent by the agent to persons to whom he was not authorised to lend them, as such a suit is really a suit for a mere money account (a). Termination of agency is a question of fact for purposes of Art. 89, Limitation Act (b). *P. M. A. Muthiah Chetty v. P. R. Alagappa Chetty*, 41 M. 1 = 45 Ind. Cas. 490.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References:—(a) *Great Western Insurance Co. v. Cunliffe*, (1874) 9 Ch. Ap. 525, D. (b) 39 M. 376, R.

(142) Art. 90. See No. 141, *supra*.

(143) Art. 91—*Plaintiff fraudulently made to execute a deed of a different nature from that agreed upon—Suit to recover property affected—Limitation—Void or voidable.*

Where, it is established that the plaintiff by defendants' misrepresentation was got to execute a deed of sale believing the same to have been a deed of a different kind, the transaction is void and not voidable only, and Art. 91 of the Limitation Act has no application to his suit to recover the property. *Sanni Bibi v. Siddik Hussain Munshi*, 23 C.W.N. 93.

NEWBOLD and PANTON, JJ.

References:—33 C. 257 = 9 C.W.N. 636, Dist.; *Thoroughgoods case*, 2 Co. Rep. 9 (1854); *Foster v. Mackinson*, (1869) 4 O.P. 704; 3 B. 242; 28 B. 420; 30 C. 433, R.

(144) Art. 91—*Sale-deed executed by a minor—Suit to recover back possession of the property sold—Limitation.*

Art. 91, Limitation Act, 1908, does not apply to a suit for possession, where the plaintiff alleges and proves that a sale-deed is void, because it was executed by him whilst a minor, but does not claim expressly to have it cancelled or set aside. *Narasagauda v. Chawagauda*, 20 Bom. L.R. 802 = 42 B. 638 = 47 Ind. Cas. 581 (F.B.).

BACHELOR, A.C.J., SHAH and KEMP, JJ.

References:—9 Bom. L.R. 602 = 34 I.A. 87; 10 Bom. L.R. 590 = 35 I.A. 98; 27 C. 156 = 26 I.A. 216; 30 C. 599; 24 B. 260; *Quinn v. Leatham*, (1901) A.C. 495, R.; 15 C. 58, Dist.

(145) Art. 91. See No. 146, *infra*.

(145-a) Art. 91—"Entitled." Meaning of, in—*Specific Relief Act* (1877), S. 39—*Cancellation of document, Suit for, Limitation for, Starting point of.* See CANCELLATION OF DEED, No. 1, 47 Ind. Cas. 505.

(145-b) Art. 91. See No. 146, *infra*.

(145-c) Arts. 98, 95 and 120—*Declaratory suit that Kot Kobala and Solenama decrees not*

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binding on reversioner, article applicable to—*Limitation, Starting point of.* See CIV. PRO. CODE (1908), No. 15-a, 47 Ind. Cas. 2.

(145-d) Art. 95. See No. 145-c, *supra*.

(146) Arts. 95, 91—*Debutter created by testator—Transfer by shebait of shebaiti right—Suit by executor disputing validity of transfer—Limitation.* See WILL, No. 6, 22 C.W.N. 860.

(147) Art. 97. See Nos. 132 and 133, *supra*.

(148) Art. 101. See No. 107, *supra*.

(149) Art. 102—*Claim for pay of temple arohaka and for perquisites.* See PROVINCIAL SMALL CAUSE COURTS ACT, No. 10, 28 M. L.T. 288.

(150) Art. 102. See No. 107, *supra*.

(151) Art. 106. See No. 75, *supra*.

(152) Art. 107. See No. 126, *supra*.

(153) Art. 111. See No. 128, *supra*.

(154) Art. 113—*Agreement for transfer of decree to third party on payment of certain sum by one agreeing party to the other—Third party is entitled to sue for specific performance of contract—Doctrine of certum est quod certum reddi potest.*

A decree-holder and another person B agreed that, on B paying to the former the amount of that decree, he, the decree-holder, would transfer the decree to the plaintiff a third party. In a suit by the latter to compel the decree-holder to execute a duly registered transfer of the decree, held that Art. 113, second para, applied to the case and that the starting point for limitation was from the date when the plaintiff had notice that performance was refused and not from the date of payment by B to the decree-holder (a).

In cases where a right to enforce specific performance rests in a third party to whom the ascertainment of the date need not necessarily be known, the doctrine *certum est quod certum reddi potest*, can have no application (b). *Bathula Venkanna v. Namuduri Venkatakrishnayya*, 41 M. 18.

AYLING and NAPIER, JJ.

References:—(a) 7 M. 1. A. 208; *Merchant Shipping Co. v. Armistage*, (1879) 9 Q.B. 99; *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*, (1893) A.C. 429, D. (b) 6 A. 231; 30 M. 486, R.

(155) Arts. 113, 144—*Chaukidari Chakran lands—Rights of pottidars when such lands are resumed by Government and transferred to Zemindar—Transfer, "subject to contracts"—Village Chaukidari Act, 1870 (Ben. Act. VI of 1870), S. 51.*

The word "contract" primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that it is used in S. 51 of Bengal Act, VI of 1870, and the rights thereby reserved

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to *patnidars* and others on the transfer to the Zemindar of *Chaukidari Chakran* lands, comprehensively included in the word "contracts" are real rights, the enforcement of which is secured, not by a suit for specific performance, but by a suit for possession.

Where, therefore, a *patnidar* sued the Zemindar to recover possession of such lands: *Held* that the Article of Sch. II of the Indian Limitation Act, 1877, applicable was not Art. 118 but Art. 144 and that the period of limitation accordingly was, not three, but twelve years. *Ranjit Singh v. Maharaj Bahadur Singh*, 16 A.L.J. 964=35 M.L.J. 728 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI and SIR WALTER PHILLIMORE.

Reference:—44 I.A. 177, R.

(156) Art. 115. See Nos. 92, 126, 128 and 136, *supra*.

(156-a) Art. 116—Registered, Meaning of, in—General Clauses Act of 1897, S. 3, cl. 4b—Shareholder, Suit by, for dividend a suit for compensation for breach of contract, Limitation for. See COMPANIES ACT (1882), No. 1, 8 L.W. 354.

(157) Art. 116—Covenant in sale-deed to make good loss, if vendee obliged to pay more than agreed price—Suit to recover excess so paid if suit on title—Limitation. See INDEMNITY, No. 1, 16 A.L.J. 706.

(157-a) Art. 116. See No. 92, *supra*.

(159) Arts. 116, 120 and 132—Mortgage for loan of paddy—Applicability of the article.

Where a mortgage bond was executed in respect of a loan of paddy, the suit is governed either by Art. 116 or 120 and not by Art. 132 of the Limitation Act. *Kandarpa Naran Mandal v. Sridhar Roy*, 44 Ind. Cas. 518.

RICHARDSON and WALMSLEY, JJ.

Reference:—24 C.L.J. 348, F.

(159) Arts. 118, 141—Possession, Suit for—Title by adoption, Defence of, in—Limitation applicable to suit. See HINDU LAW (ADOPTION), No. 9, 46 Ind. Cas. 929.

(160) Art. 119—Suit to declare that an adoption did in fact take place—Limitation.

The status of an adopted son was challenged in 1901. The adopted son did nothing till 1913, when he filed a suit for a declaration that a previous decree, which was passed on the basis that there was no adoption, was not binding on him:

Held, that the suit was barred under Art. 119 of the Limitation Act, as it was not brought within six years of 1901. *Bharna v. Balaram*, 20 Bom. L.R. 836=47 Ind. Cas. 689.

BEAMAN and HEATON, JJ.

References:—24 B. 260=1 Bom. L.R. 799; 37 B. 513, F.; 9 Bom. L.R. 722; 14 Bom. L.R. 182, R.

Limitation Act (1908)—(Continued).

(161) Art. 120—Loan on security of moveable property—Suit to enforce payment of the money charged thereon—Personal decree not sought for.

Where a plaintiff, who had lent money on the security of eight black buffaloes, sought by his suit to enforce payment of the money charged upon the buffaloes and did not seek to get a personal decree against the debtor, *held* that the suit was not barred by limitation, it being governed by Art. 120 of the first schedule to the Limitation Act. *Deoki Nandan v. Gupta*, 16 A.L.J. 449=40 A. 512=46 Ind. Cas. 373.

TUDBALL and ABDUL RAOF, JJ.

References:—27 M. 528; 22 C. 21; 17 A. 284, R.

(162) Art. 120—Trespass to land—Pillar driven into another's land—Suit for mandatory injunction to remove the pillar—License.

The defendant built a house on his land, and projected from it a stair-case which overhung the land in dispute and rested on a pillar driven into that land. At that time the land in question was in defendant's possession as a tenant; but subsequently in 1905 it went into plaintiff's possession under a permanent lease. The pillar stood in its position at least some nine years before the suit. The plaintiff having sued to obtain a mandatory injunction directing the defendant to remove the stair-case:

Held, that the suit was barred under Art. 120 of the Indian Limitation Act, even if the stair-case was standing when it had been either by the license of the plaintiff's predecessor-in-title or adversely to him, unless the license were specifically conditioned by some such terms as that the defendant on demand would remove the stair-case. *Harl Ram v. Shivbakas*, 20 Bom. L.R. 327=42 B. 333=45 Ind. Cas. 592.

BEAMAN and HEATON, JJ.

(163) Art. 120—Suit for declaration of proprietary title—Adverse entry in revenue records, effect of—Cause of action—Limitation, Commencement of.

Held, that a declaratory suit brought by the plaintiff, who has all along been in enjoyment of the property, is not barred simply because an entry adverse to his rights was made, or because he came to know of that entry, more than six years prior to the institution of the suit.

Even if the right to demand correction of the revenue entries is lost by limitation, the plaintiff is entitled to declaration of his proprietary title, the period of limitation running from the date when the defendant attempted to oust the plaintiff from the property.

Where, therefore, in a suit for a declaration to the effect that plaintiff was owner of 1/19th share in certain lands and not of a 1/18th share only as recorded in the revenue papers, it appeared that the income derived from the land was spent on the upkeep of certain joint family property in which the plaintiff had a 1/19th,

Limitation Act (1908)—(Continued).

share, which share had been awarded to him: *Held*, that the cause of action arose when the plaintiff asked the Revenue Officer to make an entry in his favour and the defendants denied his title. *Gokal Chand v. Hukam Chand*, 72 P.L.R. 1918=73 P.W.R. 1918=44 Ind. Cas. 912.

SHADI LAL, J. .

References:—140 P.R. 1907=187 P.W.R. 1907; 27 P.R. 1891, *P*.

(164) Art. 120—Limitation governing suits falling within proviso to S. 111-A but outside S. 104-H of Bengal Tenancy Act. See *BEN. ACT VIII OF 1835 (TENANCY)*, No. 46, 45 C. 645.

(164-a) Art. 120—Limitation under, Commencement of—Declaratory suit—Settlement Records, Omission of plaintiffs' name from—Plaintiffs' title, Interference with, Time runs from date of. See *LIMITATION*, No. 6, 46 Ind. Cas. 796.

(164-b) Art. 120—Declaratory suit for plaintiff's right to manage dharmshala, Limitation for—Article applicable to. See *HINDU LAW (SUCCESSION)*, No. 2, 125 P.W.R. 1917.

(164-c) Art. 120. See Nos. 5 75, 107, 115, 126, 130, 135, 145c and 158, *supra*.

(165) Arts. 120, 132, 141 and 144—Immoveable property, Proceeds of, if immoveable property or "any interest therein"—or "if benefits to arise out of land" under S. 3, cl. 25 of General Clauses Act, (X of 1897)—Land Acquisition Act (I of 1894), Acquisition of land under, Sale-proceeds of, Suit for, Limitation for. See *IMMOVEABLE PROPERTY*, No. 2, 3 Pat. L.J. 522.

(166) Art. 123—Woman with children by first husband leaving no children by second husband and having no *thinthi* property—Death of such woman—Marriage of second husband of such deceased woman with another and issue born of such marriage—Death of such second husband of deceased woman—Right of children by first husband of such deceased woman to her property after their step-father's death—Limitation for suit to enforce right. See *BUDDHIST LAW (INHERITANCE)*, No. 2, 9 L.B.R. 176.

(166-a) Art. 124. See No. 43, *supra*.

(167) Art. 125—Mortgage suit, defence of, abandoned by widow after slight contest—Execution of decree—Auction sale if amounts to private alienation by widow—Point to be proved in suit to set aside widow's alienation—Court sale when can be held to be private.

Where the plaintiff as next reversioner brought his suit in 1913 to set aside a Court sale in 1903 of the suit property in execution of the mortgage decree against the widow, it appeared that the widow at first contested the suit on the mortgage but later on abandoned her defence.

Limitation Act (1908)—(Continued).

Held on the facts that the widow's action in withdrawing her defence in 1900 more than 12 years before the suit, cannot be said to amount to an alienation made by the widow and that Art. 125 is therefore inapplicable.

In a suit to set aside an alienation by the widow, it is sufficient for the plaintiff to prove that the widow had done an act which necessarily resulted in the transfer of the property (a).

Held, further, that Art. 120 applied and the suit was barred by Limitation.

Krishnan, J.—Ordinarily a Court sale cannot be treated as a sale by a private individual. To justify us in treating the Court sale as a private sale by the widow, it must be shown that it was the necessary result of some collusive arrangement made by her to use the Court as a medium to transfer or in other words that she intended to transfer the property by means of a Court sale and took steps to bring it about (b). *N. Ranga Row v. Ranganayaki Ammal*, 35 M.L.J. 364=(1918) M.W.N. 739=8 L.W. 455=47 Ind. Cas. 578.

PHILLIPS and KRISHNAN, JJ.

References:—(a) 19 A. 524, *P*. (b) 3 Clark and Finally 479 at p. 511, *Ref to*.

(168) Art. 125—Limitation for suit by presumptive reversioner to question Hindu widow's alienation. See *HINDU LAW (REVERSIONERS)*, No. 2, 35 M.L.J. 57.

(169) Arts. 126, 144, 148—Hindu joint family—Usufructuary mortgage of joint family property by father and son—Subsequent sale by father of entire property—Possession obtained by vendee on payment of money due on mortgage—Sale by son of his share on father's death—Suit by son's vendee for possession of son's half-share on payment of son's share of mortgage debt—Limitation.

A Hindu father and his undivided son mortgaged in 1892 their joint property to A with possession. The father subsequently sold in 1897 the equity of redemption to B, as though the property was his self-acquisition, and in 1898, B, the vendee, discharged the mortgage debt, obtained possession of the property, considering himself to have become absolutely entitled to the property even as regards the son's share. The son, after his father's death, sold his share of the property to the plaintiff, who, on the 26th August, 1912, filed a suit for possession of the son's share on payment of the appropriate portion of the mortgage amount, which B, the father's vendee, had paid on redemption by him in 1898, making the mortgage, the son (the plaintiff's vendor) and the father's vendee as parties defendants. *Held* that the suit was subject to the limitation prescribed in Art. 126, Limitation Act, and having been filed over thirteen years after the possession of B began, was out of time and must be dismissed. Per *Sadasiva Aiyar, J.*—Even assuming that Art. 126 was not applicable, the suit would be

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barred also under Art. 144. *Mania Goundan v. Ramasamy Ghatti*, 34 M.L.J. 528=41 M. 660=8 L.W. 28=24 M.L.T. 22=(1918) M.W.N. 448=45 Ind. Cas. 867.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—26 Ind. Cas. 873, F.; 14 A. 1; 84 A. 296 (P.C.); 23 B. 137; 26 B. 379, 500; 14 Bom. L.R. 314; 4 C.L.J. 79; 20 Ind. Cas. 195; 28 M. 122; 30 M. 426, R.

(170) Art. 130—*Land entered in record-of-rights as liable to assessment—Suit to assess rent—Limitation—Suit if maintainable by a co sharer landlord—Bengal Tenancy Act (VIII of 1885), Ss. 168 and 103-B.*

Defendant's lands having in 1910 been entered in the record-of-rights as liable to be assessed with rent, the recorded landlord brought the present suit for assessment for rent. The District Judge held that the right to have the rent assessed having accrued to the plaintiff more than 12 years before the suit, it was barred by limitation under Art. 130 of the Limitation Act, and dismissed the suit, disagreeing with the Munsif's finding that the suit having been brought within twelve years of the publication of the record-of-rights was within time.

Held, that the Munsif was wrong in taking the entry in the record-of-rights as the starting point for limitation as such an entry confers no title.

That the suit was not one for "resumption or assessment of rent free land" within the meaning of Art. 130, but a suit for the assessment of land presumably liable to be assessed.

That the fact that rent has not in fact been paid more than twelve years before suit is not *per se* sufficient to support a decree for dismissal of such a suit, for the right to have rent assessed must continue so long as the relationship continues of landlord and tenant of land liable to be assessed.

That such a relationship and liability were to be presumed from the record-of-rights, and it was for the defendant to rebut this presumption by evidence.

A suit to assess rent is consistent with and arises out of the general law and the land revenue system of the country, and is not one which the landlord is "required or authorised" to do under the Bengal Tenancy Act within the meaning of S. 188 of that Act. A co-sharer landlord is, therefore, entitled to institute such a suit.

That, had S. 188 of the Bengal Tenancy Act applied, the fact that plaintiff had joined his co-sharers as defendants would not have justified the Court in entertaining the suit "on principles of justice and equity." *Dhananjay Manjhi v. Upendra Nath Deb Sarbadikari*, 22 C.W.N. 685=46 Ind. Cas. 428.

RICHARDSON and BEACHROFT, JJ.

References:—40 C. 173; 2 C.L.J. 569; 16 C. 449; 17 C. 538; 38 I.A. 1; 4 C.W.N. 508 C.W.N. 436; 26 C. 739; 13 C.W.N. 635 C.L.J. 458; 16 C.L.J. 427; 9 C.L.J. 493 W.R. 44, R.

Limitation Act (1908)—(Continued).

(171) Art. 130—Non-payment of rent for certain period—Suit by landlord to recover rent, from his tenant after its assessment, if barred—Limitation. See *LANDLORD AND TENANT*, No. 5, 28 C.L.J. 254.

(172) Art. 132—Mortgage bond—Rice lent—Covenant of repayment—Provision for realisation by mortgagee of money on default by sale of mortgaged property—Suit on mortgage bond, if suit for recovery of money charged on mortgaged property. See *MORTGAGE (SALE)*, No. 4, 22 C.W.N. 790.

(173) Art. 132. See Nos. 5, 85 c, 137, 158 and 165, *supra*.

(174) Art. 134—*Transferee of mortgaged property—Burden of proof—Res judicata—Issue found against a party but suit dismissed as against him—Procedure.*

Art. 134, Limitation Act, is only a branch of the law of prescription and the question to be determined in each case is as to what the transferee intended to purchase and what the transferor intended to transfer. The transferee claiming the benefit of the article must adduce evidence as to what he intended to and did purchase (a).

Per Bakewell, J.—Evidence as to the documents of title produced by the vendor and the steps taken by the purchaser to ascertain the former's title to the property will be important as showing the interest intended to be transferred.

Per Sadasiva Aiyar, J.—The fact that the purchaser knew that his vendor had only a mortgage right would not be conclusive of the question.

In a suit for partition by a member of a family, the mortgagee of certain family properties was made a party and the plaintiff claimed the right to redeem his share on payment of his share of the mortgage amount. The mortgagee contended that the alienation in his favour was an absolute sale and not a mortgage. It was found that the alienation was a mortgage and not a sale but the suit was dismissed against the mortgagee on the ground that there could be no suit for redemption of a share in the mortgaged property. Subsequently, a suit for redemption was brought and the alienee again contended that the alienation was a sale and not a mortgage.

Held that the question whether the transaction was a sale or mortgage was *res judicata* by reason of the decision in the previous partition suit.

The rule of *res judicata* is not affected by the fact that the party against whom the decision was given had no right of appeal (b).

Where the decision upon the issue is necessary for the disposal of the suit the issue will be *res judicata* in a subsequent suit even though the party against whom the issue was decided had no right of appeal by reason of the final decree being in his favour.

The proper procedure in such a case is for the party affected to ask the Court which has given an adverse decision on a material issue to

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embody the same in the decree so that he may have a right of appeal against such a decision. *Muthaya Shetti v. Kanthappa Shetti*, 7 L.W. 482=84 M.L.J. 481=23 M.L.T. 291=(1918) M.W.N. 334=45 Ind. Cas. 975.

SESHAGIRI Aiyas and BAKEWELL, JJ.

References:—(a) 14 M.I.A. 1; 19 B. 140; (1917) M.W.N. 5; 32 M.L.J. 85; 1 L.W. 687; 32 M.L.J. 24, R. (b) 30 M. 447; 25 M.L.J. 379; 9 O.W.N. 584; 17 M.L.T. 85; 37 M. 25; 20 O.W.N. 1354; 4 M. 134; 7 M. 145; 13 C. 17; 18 C. 647; 17 A. 174; 26 M. 102; 40 B. 662; 24 C. 900; 7 A. 606, R.

(175) Art. 134—Transfer by mortgagee as full own—No possession given at date of transfer—Article applicable—When time begins to run. *Mulla Yitil Seeti Kutti v. K.M.K. Kunhi Pathumma*, (1917) M.W.N. 609=33 M.L.J. 320=22 M.L.T. 236=6 L.W. 464=40 M. 1040=43 Ind. Cas. 31 (F.B.). See Final Part, 1917, Col. 608.

• (175-a) Art. 134—Occupancy tenant mortgaging his holding to landlord—Landlord selling the mortgaged land to third person—Tenant suing to redeem mortgage—Limitation. See MORTGAGE (GENERAL), No. 6-b, 45 Ind. Cas. 549.

(176) Art. 134—Trust property—Alienation by trustee—Suit to contest alienation—Period of limitation. See TRUST, No. 2, 45 Ind. Cas. 292.

(177) Art. 134. See Nos. 43 and 44, *supra*.

(178) Arts. 135, 144—Bai-bil-wafa mortgage—When possession of mortgagor determines and cause of action for possession as owner arises—Proceedings for foreclosure notice simply ministerial—Regulation XVII of 1806, S. 8.

Held that:

(1) In cases of bai-bil-wafa mortgages, the right to possession of the mortgagor determines on the date of default, when, under the terms of the mortgage-deed, the mortgagee becomes entitled to get possession of the mortgaged property without first taking out foreclosure proceedings, but, where under the terms of the mortgage-deed, the mortgagee, as such, has no right to possession, the right to possession of the mortgagor does not determine and his possession does not become adverse to the mortgagee until the foreclosure proceedings have been perfected and the year of grace has expired.

Consequently a suit brought by *quondam* mortgagee for possession as owner of the mortgaged land which is brought, and in which notice of foreclosure has been issued, twelve years after expiry of the term of the mortgage, is neither barred under Art. 135 or 144 of the Indian Limitation Act, IX of 1908, when the mortgage-deed provides that:—

(i) The mortgage money shall be paid after three years; (ii) in default, the mortgagee shall be at liberty to secure possession by the issue of a foreclosure notice, and (iii) if he

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elects not to do so, the mortgagee will continue to pay interest until the mortgage is redeemed.

In this case the mortgage-deed was dated 28th June, 1899, the mortgage money was payable after three years, i. e., on 28th of June, 1901.

On 17th of June, 1913, the mortgagee got notice of foreclosure issued, which was served on 7th September, 1913, so the year of grace expired on 7th September, 1914, and the suit was instituted on 9th of February, 1915 (a).

Held, also, that the proceedings under the bai-bil-wafa Regulation which are purely ministerial devised to give warning to the mortgagor of the impending disappearance of his right to redeem, cannot confer any new period of limitation to a claim which otherwise would be barred by time. *Ratan Das v. Mussamat Gurau*, 25 P.L.R. 1918=52 P.W. R. 1918=45 Ind. Cas. 563=79 P.R. 1918.

• SCOTT-SMITH and LE-ROSSIGNOL, JJ.

References:—(a) 90 P.R. 1895 (F.B.); 35 P.R. 1889; 65 P.R. 1906=96 P.W.R. 1906=72 P. L.R. 1907; 57 P.R. 1908=115 P.W.R. 1908; 94 P.R. 1912=178 P.W.R. 1912=237 P.L.R. 1912; 11 A. 144; 12 C. 614; L.R. 7 App. Cas. 235; 22 W.R. 90; 6 W.R. 270, *Ref. to & D.*

(179) Art. 135. See No. 30, *supra*.

(180) Arts. 137, 138, 142—Suit for recovery of possession—Auction-purchaser—Burden of proof. *Dokari Joddar v. Nilmani Kundo*, 26 C.L.J. 399=22 C.W.N. 319. See Final Part, 1917, Col. 609.

(181) Arts. 137, 138, 142—Symbolical possession of bare site—Disturbance of possession—Suit for possession—Limitation governed by Art. 142—Adverse possession. See POSSESSION, No. 7, 76 P.R. 1918.

(182) Art. 138. See Nos. 180 and 181, *supra*.

(182-a) Arts. 188 and 180—Civ. Pro. Code, S. 47—Suit for recovery of possession by auction-purchaser.

An auction sale having been confirmed, the limitation for a suit for recovering possession of property by purchaser is 12 years after the sale confirmation, under Art. 138, Sch. I of the Limitation Act, and not under Art. 180, such a suit not being one barred under S. 47 of Civ. Pro. Code. *Jagesur Singh Mahapatra v. Sridhar Sardar*, 47 Ind. Cas. 844.

IMAM, J.

(183) Art. 141—Suit for possession by reversioner after death of widow of alienor—Death of alienor after enactment of Punjab Limitation Act (I of 1900)—Suit governed by Limitation Act.

Art. 141 of the Limitation Act, and not the Punjab Limitation Act, 1900, applied to a suit for possession by a reversioner, filed after the death of the widow of the alienor, even though

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the latter died only after the Punjab Limitation Act came into force. *Ganesh Ram v. Panju Singh*, 95 P.R. 1918=128 P.L.R. 1918=174 P.W.R. 1919=47 Ind. Cas. 977.

BROADWAY, J.

References:—90 P.R. 1904; 91 P.L.R. 1906; 145 P.R. 1907; 64 P.R. 1909; 62 P.R. 1910; 38 P.R. 1911; 29 P.R. 1914, *Rel. on*.

(184) Art. 141—Suit to recover estate vesting in heir of last male owner on determination of woman's estate—Suit to recover estate of which woman is in possession as full owner—Applicability of article to suits. See OUDH ACT I OF 1869 (ESTATES), No. 1, 21 O.C. 1.

(185) Arts. 141, 144—*Alienation by a Hindu widow—Suit by an heir of the reversioner—Limitation.*

Of two Hindu co-widows, one, who had two daughters, alienated her husband's property on the 10th March, 1897, and died on the 11th July, 1902. The other widow died on 17th January, 1903. One of the daughters gave birth to a son (plaintiff) in 1905 and died in 1907. The other daughter died in 1911. The plaintiff having filed the suit on 13th January, 1915, to set aside the alienation:

Held, that the suit was not governed by Art. 141 of the Indian Limitation Act, 1908, inasmuch as the plaintiff claimed as the heir of her mother and the suit was not one brought by a Hindu entitled to the possession of immovable property on the death of a Hindu female.

Held, however, that the suit was in time under Art. 144, for the vendee's possession, however adverse against the widows, could not be regarded as adverse against the plaintiff. *Malkarjun v. Amrita*, 20 Bom. L.R. 762=42 B. 714=47 Ind. Cas. 163.

BATCHELOR, A.C.J. and KEMP, J.

References:—12 C. 594; 10 A. 343; 4 C. 327; 27 B. 43, *R.*

(185-a) Art. 141. See Nos. 159-a and 164-c, *supra*.

(185-b) Art. 142—*Dispossessed true owner regaining possession by force—Trespasser evicting true owner under Specific Relief Act—Suit by true owner to eject trespasser—Limitation.*

A true owner was dispossessed from his land and he succeeded in ousting the trespasser and regaining his possession. Thereupon, the trespasser brought a suit under S. 9 of the Specific Relief Act to recover possession of the land in question and succeeded. Subsequently, the true owner brought a suit to eject the trespasser therefrom. *Held* that the possession of the true owner, however obtained, counts in his favour for the purpose of Art. 142 of the Limitation Act, and the time begins to run from the time he was evicted by Court under the decree in the suit under the Specific Relief Act. *Hari Das v. Debendro Ram Banerjee*, 45 Ind. Cas. 548.

RICHARDSON and BEACHEOFT, JJ.

Limitation Act (1908)—(Continued).

(185-c) Sch. I, Art. 142—*Chaukidari Chakran lands—Possession of, by patnidar, through services rendered—Resumption of land—Discontinuance of possession—Possession, Suit by patnidar for, Limitation for.* See LIMITATION, No. 8, 46 Ind. Cas. 895, .

(186) Arts. 142, 144—*Suit for possession—Burden of proof—Laches and acquiescence, difference between.*

If a plaintiff claims on the ground that he and his predecessors have been in possession but have been dispossessed or have discontinued possession, the period for which the limitation runs is the date of dispossession or discontinuance, and the burden is on the plaintiff to show that he or his predecessors-in-title have been in possession within 12 years of the date of the suit and the article applicable is Art. 142 of the Limitation Act.

Where there is a statute of limitation applicable to the case, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief, that it would not be objected to and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce. *Appan Charan v. Kyaase Ma*, 41 Ind. Cas. 723.

MAUNG KIN, J.

(187) Arts. 142 and 144—*Suit for possession by patnidar—Amendment of plaint by addition of new lands—Limitation applicable.* See CHOWKIDARI CHAKRAN LANDS, No. 4, 41 Ind. Cas. 738.

(188) Arts. 142, 144—*Distinction between articles pointed out.* See HINDU LAW (INHERITANCE), No. 5, 14 N.L.R. 82.

(189) Art. 142. See Nos. 180 and 181, *supra*.

(190) Art. 144—*Possession, Suit for—Burden of proof—Limitation.* See ADVERSE POSSESSION, No. 2, 40 Ind. Cas. 420.

(191) Art. 144—*Independent trespassers whether can tack on their periods of possession.* See ADVERSE POSSESSION, No. 7, 163 P.W.R. 1918.

(192) Art. 144—*Parjot, charai and charnai, dues if immovable property.* See IMMOVABLE PROPERTY, No. 1, 21 O.C. 119.

(193) Art. 144. See Nos. 28, 43, 101, 116-a, 121, 122, 155, 164-c, 169, 178, 185, 186, 187 and 188, *supra*.

(194) Art. 145. See No. 42, *supra*.

(195) Art. 146 (a). See No. 93, *supra*.

(196) Art. 146—*Persons owning a portion of the equity of redemption paying off the whole mortgage—Suit by remaining co-shares to redeem—Limitation—Mortgage and charge—Transfer of Property Act (IV of 1882).*

Limitation Act (1908)—(Continued).

Ss. 95, 100—Person taking exclusive possession under a Court-sale of the whole, though interest of certain co-sharer's only sold—Possession whether as co-sharer or exclusive.

Where, on 7th May, 1890, in execution of a decree against two out of three brothers who had mortgaged their property, one, A, purported to purchase the whole property, which he redeemed on 6th April, 1892, by paying off the mortgage, and A, or persons claiming through A, remained in sole possession of the property for 19 years from 19th April, 1892, when A obtained possession through Court until the present suit by an assignee of the share of the remaining brother K was brought for redemption of K's one-third share of the property in the hands of A's successor in interest:

***Held**—That, under S. 95 of the Transfer of Property Act, A obtained a charge on the one-third share of K, which not being a mortgage, Art. 148 of the Limitation Act did not apply to the suit. That suit, having been brought more than twelve years from the date when the charge came into existence and more than twelve years from the date when A obtained exclusive possession, was barred by limitation.

That, in the circumstances, the possession of A under a sale of the whole property was not that of a co-sharer of K and was exclusive of him. *Purna Chandra Pal v. Baroda Prsanna Bhattacharjya*; 22 C.W.N. 637=45 Ind. Cas. 783.

RICHARDSON and WALMSLEY, JJ.

References:—26 B. 500, F.; 14 A. 1; 38 A. 540, R.

(197) **Art. 148—Usufructuary mortgage—Redemption—Purchaser of equity of redemption in part of mortgaged property, Suit by.**

A purchaser of the equity of redemption in part of the mortgaged property is entitled to redeem his own portion of the property within sixty years of the date of the mortgage from another person who having purchased another portion of the mortgaged property has redeemed the entire mortgage and is in possession of the entire property. The limitation applicable to a suit of this description is that provided by Art. 148 of Sch. I to the Limitation Act. All persons who have stepped into the shoes of the mortgagor are "co-mortgagors" for all purposes and the rule of limitation provided by Art. 148 is applicable to a suit by a purchaser of the equity of redemption in a part of the mortgaged property. *Wazir Ali v. Ali Islam*, 16 A.L.J. 740=40 A. 683=47 Ind. Cas. 833.

BANERJI and RYVES, JJ.

References:—14 A. 1 (F.B.), F.; 14 A.L.J. 41, Dist.

(198) **Art. 148.** See No. 169, *supra*.

(199) **Art. 158—Applicability of article to proceedings under S. 12 or S. 14 of Civ. Pro. Code, second schedule.** See *AWARD*, No. 8, 24 M.L.T. 102.

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(200) **Art. 164—"Duly served," meaning of—Civ. Pro. Code (Act V of 1908), O. V, r. 6, O. IX, r. 13 and O. V, r. 19.**

In O. V, r. 19, Civ. Pro. Code, the phrase 'duly served' means that the summons has been served upon the defendant in such a way that the defendant has knowledge of the suit or that the Court may presume that he has such knowledge. That phrase 'duly served' occurring in Art. 164 of the Limitation Act must also be construed as meaning served in such a way as to give the defendant information of the proceedings, i.e., 'duly served' as used in O. V, r. 19, Civ. Pro. Code. *Kesarchand Keshowji v. Lakhamai Ramlal*, 42 Ind. Cas. 611.

PRATT, J.C. and HAYWARD, A.J.C.

(201) **Arts. 165, 181—Application by judgment-debtors alleging that land more than that awarded by decree was made over to decree-holders—Interpretation of technical language of statutes like that of limitation.**

An application by judgment-debtors alleging that the land made over under the order of the Court to the decree-holder was very much in excess of the land affected by the decree is governed by Art. 181, and not by Art. 165 of the Limitation Act, 1908.

Where the interpretation sought to be put upon the technical words of a statute like the Limitation Act is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalising operation, unless it is driven to do so by the irresistible force of language. *Maung Tha v. Ma Pyu*, U.B.R. (1918), 1st Qr., 79=46 Ind. Cas. 323.

SAUNDERS, J.C.

References:—38 A. 339, Appr.; 35 A. 343; 21 M. 494, Not F.

(202) **Arts. 166, 181—Application to set aside sale—Limitation.** See *SETTING ASIDE SALE*, No. 2, 20 Bom. L.R. 925.

(203) **Art. 169—Notice of appeal not served—Limitation for application for its rehearing dates from time of applicant's knowledge of decree.** See *APPEAL (GENERAL)*, No. 33, 96 P.R. 1918.

(204) **Art. 180—Application for delivery of possession more than three years after confirmation of sale—Prior applications dismissed for purchaser's default—General order "deliver" made on a prior application preferred in time—Subsequent dismissal of the same owing to purchaser's failure to take delivery—Present application, if can be treated as one for further execution of the prior general order—Application under O. XXI, r. 95, Civ. Pro. Code—If can result in a more general order for delivery—Execution applications—Dismissal of—Effect on subsistence of attachment.**

The sale to a decree-holder auction-purchaser was confirmed on 16th January 1911. On the 9th November 1912 and 4th December 1912, he made applications for delivery of possession, but

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they were both dismissed by an order, dated 4th December 1912 on the ground that he was unable to identify the land. A third application made on 4th July 1913 resulted in an order "Deliver" passed on the 7th July 1913 but on 30th July 1913, the Court ordered on the same petition "No one to take delivery. Petition dismissed." Finally on 16th April 1915, the purchaser again applied for delivery of possession but was met with the plea of limitation under Art. 180 of Act IX of 1908. The first Court overruled the plea. On appeal:

Held per Abdur Rahim, J. (Oldfield, J., contra).—(i) That there being no evidence to show that the order of dismissal on 30th July, 1913, was made after hearing the purchaser, it must be deemed a dismissal only for statistical purposes; and

(ii) that the application of 1915 might be treated as one for the execution of the general order for delivery made on 4th July 1913 and being in that view merely a continuation of the prior proceedings was not barred by Art. 180.

Held per Oldfield, J.—(i) That there was no reason why the Court should not act on the presumption that official acts were properly done and the Court passed the order of 30th July 1913 on an adjourned date or after notice;

(ii) that there was nothing to show that there was any obstacle of granting relief beyond the respondent's control;

(iii) that the prior applications had to be dismissed only on account of the purchaser's default;

(iv) that the prior proceedings cannot therefore be held to have continued after the orders terminating them; and

(v) that the application of 1915 cannot therefore be regarded as a continuation of or subsidiary or incidental to any of the previous applications (a).

Also per *Oldfield, J.*—An order for delivery made on an application under O. XXI, r. 95, Civ. Pro. Code, cannot be treated as a mere general order to be worked out in subsequent execution proceedings and an application for delivery under O. XXI, r. 95, Civ. Pro. Code, can in no sense be deemed an application for the further execution of a general order for delivery made in prior execution proceedings.

Per *Abdur Rahim, J.*—Whether the dismissal or striking off of an execution proceeding has or has not the effect of putting an end to the attachment is one of intention to be determined upon the circumstances of each case.

Per *Oldfield, J.*—The mere fact that an order on an execution application is worded "dismissal" is not decisive and the order will be treated as merely suspensory, if the circumstances of the case justify the presumption that such was the Court's real intention. *Nandur Subbaya v. Sri Raja Venkatramayya Appa Rao Bahadur*, 7 L.W. 16—(1918) M.W.N. 214—43 Ind. Cas. 155.

ABDUR RAHIM and OLDFIELD; JJ.

References:—(a) 29 A. 13; 4 L.W. 112, F.; 37 A. 884, Dist.; 36 M. 558; 21 A. 155, F.

Limitation Act (1908)—(Continued).

(204-a) Art. 180. See No. 182-a, *supra*.

(205) Art. 181—*Suit on mortgage—Preliminary decree—Six months fixed for payment of mortgage-money—Application for decree absolute—Dismissal of application for default—Second application more than three years after accrual of right to apply.*

Under Civ. Pro. Code, a 'final decree' in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. A second application cannot be regarded as a revival of a previous application which was disposed of. A preliminary decree under O. XXXIV, r. 4 of the Civ. Pro. Code, was passed on August 27, 1909, and six months were allowed to the defendant to pay the mortgage-money. No payment having been made, the mortgagee applied for a decree absolute on August 26, 1911. It was dismissed for default on April 9, 1912. On September 10, 1912, a second application was made:—*Held* that the application was time-barred, inasmuch as the right to apply under Art. 181 of the first schedule to the Limitation Act, accrued within three years after the expiration of the time allowed by the decree for the payment of the mortgage-money. *Ahmad Khan v. Gaura*, 16 A.L.J. 143=40 A. 235=43 Ind. Cas. 518.

RICHARDS, C.J. and BANERJI, J.

(206) Art. 181—Revival of antecedent application for execution, kept in suspense by some lawful cause—Limitation. See **EXECUTION OF DECREE**, No. 26, 3 Pat. L.J. 103.

(207) Art. 181—Application for final decree under Civ. Pro. Code, O. XXXIV, r. 5—Computation of time to be made from date of final appellate preliminary decree. See **FINAL DECREE**, No. 1, 21 O.C. 176.

(208) Art. 181—Application to continue suit—Application to continue abated suit—Article applicable. See **HINDU LAW (REVERSIONERS)**, No. 6, (1918) M.W.N. 889.

(208-a) Sch. I, Art. 181—Suit for pre-emption dismissed on loss of title to property qualifying for pre-emption—Application for revival, Limitation for—Commencement of. See **PRE-EMPTION**, No. 14-a, 47 Ind. Cas. 137.

(209) Art. 181—Article if controls period for which mesne profits claimable. See **RESTITUTION**, No. 5, 3 Pat. L.J. 367.

(210) Arts. 181 and 182—*Mortgage suit—Preliminary decree for sale passed after the new Civ. Pro. Code—Application for final decree—Limitation—Article applicable, what is—Civ. Pro. Code (V of 1908), O. XXXIV, r. 5.*

The preliminary decree in a suit for money due on a mortgage was passed on 27th September 1910 after the new Civ. Pro. Code came into force and the money was made payable on or before 27th March 1911. Two applications for final decrees were made on 17th September 1913 and 17th November 1914 which were dismissed for non-payment of *batta*. The

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present application for final decree was made on 6th February, 1915.

Held that Art. 181 and not Art. 182 of the Indian Limitation Act was applicable to such applications for final decrees in mortgage suits after the new Civ. Pro. Code came into force and that the present application was therefore barred by limitation (*cf.* *Pattabirama Naidu v. Subramania Chettai*, 7 L.W. 438=45 Ind. Cas. 76).

OLDFIELD and KRISHNAN, JJ.

References:—(a) 32 M.L.J. 455, F.; 39 M. 544, D.; 98 B. 32; 38 A. 31; 19 C.W.N. 473, R.

(211) Arts. 181, 182—Execution of decree—Application of decree absolute for sale—Accrual of right to apply. See CIV. PRO. CODE (1908), No. 92, 20 Bom. L.R. 481.

(212) Arts. 181, 182—Preliminary decree for sale under Tr. P. Act—Expiration of time fixed for payment after Civ. Pro. Code came into force—Application for final decree or for execution of decree proper procedure—Limitation. See MORTGAGE (SALE), No. 7, 35 M.L.J. 194.

(213) Arts. 181, 182—Application for restitution if application for execution. See RESTITUTION, No. 6, 15 P.L.R. 1918.

(214) Art. 181. See Nos. 31, 66, 201, 202. *supra* and 232-a, *infra*.

(215) Art. 182—In accordance with law—Application complying with Civ. Pro. Code (Act V of 1908), O. XXI, r. 11—Subsequent order for filing decree—Non-compliance with.

An application for execution of a decree was made on 1st March, 1916, but copy of the decree was not filed along with it. It, however, fulfilled all the requirements of O. XXI, r. 11 of the Civ. Pro. Code. Time was given by the Court for filing the copy of the decree, but it was not filed, whereupon the application was struck off. Another application was filed within three years of the application of 1916 but beyond three years of the previous application. *Held* that the application when filed having complied with all the requirements of O. XXI, r. 11, was an application in accordance with law and saved limitation. *Raghumandan Lal v. Badan Singh*, 16 A.L.J. 87=40 A. 209=43 Ind. Cas. 914.

RICHARDS, C.J. and BANERJI, J.

(216) Art. 182—Step-in-aid of execution—Application to transfer the decree to the Court of a Native State for execution.

An application made to a British Indian Court to transfer its decree for execution to the Court of a Native State between whom and the British Government there exists an agreement to execute each other's decrees, is a step-in-aid of execution within the meaning of

Limitation Act (1908)—(Continued).

Art. 182, Limitation Act, 1908, *Janardan Govind Kargupplkar v. Narala Krishnaji Kargupplkar*, 20 Bom. L.R. 421=42 B. 420=46 Ind. Cas. 56.

BEAMAN and HEATON, JJ.

References:—40 M. 1069 (F.B.); 107 P. R. 1881, R.

(217) Art. 182—Mortgage decree—Execution application—Failure to describe guardian as such—Whether such application proper according to law.

Where notice of execution application under a mortgage decree was issued to all persons mentioned in the application including the guardian of a minor, although he was not described as guardian, *held* that the application was an application "in accordance with law" within the meaning of Art. 182, Limitation Act. *Ram Lakhan Das v. Shankar Singh*, 43 Ind. Cas. 519 (F.B.).

RICHARDS, C.J. and BANERJI, J.

(218) Art. 182—Step-in-aid of execution—Execution application seeking relief not granted by decree, whether 'in accordance with law.'

Under the Limitation Act, the execution application must be one to execute the decree; but, if the application contained a prayer that properties not included in the decree should be sold, the application cannot be considered as in accordance with law. *Thirumalai Kandam Kundala Nagayya Ramakrishna Kadivelu sami Nalcker v. Valuthayammal*, 43 Ind. Cas. 537.

SESHAGIRI AYYAR and BAKEWELL, JJ.

References:—4 C.L.J. 141=33 C. 867; 13 B 237, F.

(219) Art. 182—Civ. Pro. Code, 1909, O. XXXIV, r. 5 (2)—Application for final decree for sale—Computation of time, whether to be made from date of confirmation of preliminary decree by appellate Court or from such decree as passed by original Court.

Art. 181 of the Limitation Act governs an application for a final decree under O. XXXIV, r. 5 (2), Civ. Pro. Code, and the right to so apply arises on the expiration of the period of six months from the date of the original preliminary decree and where an appeal has been preferred from the preliminary decree, the right to apply must be taken to accrue from the date of the appellate decree, even though the latter decree simply confirmed the decree of the first Court. *Subbarayulu Naidu v. Sundararaju Naidu*, 35 M.L.J. 507.

ABDUR RAHIM and OLDFIELD, JJ.

References:—32 M.L.J. 445; 15 A.L.J. 734, F.; 16 Ind. Cas. 799; 31 M. 28; 15 M. 170, Dist.

(220) Art. 182—Decree against talukdar—Application to execute decree in absence of certificate—Exclusion of time from date of decree to date of application for certificate—

Limitation Act (1908)—(Continued).

Application in accordance with law. See EXECUTION OF DECREE, No. 8, 20 Bom. L. R. 872.

(221) Sch. I, Art. 182—Execution application, not in accordance with law required by r. 11, O. XXI—Whether such defective application saves limitation. See EXECUTION OF DECREE, No. 17, 44 Ind. Cas. 220.

(222) Art. 182—Application for execution—Objection by judgment-debtor—Filing of list of witnesses. See STEP-IN-AID OF EXECUTION, No. 2, 22 C.W.N. 1027.

(223) Art. 182. See Nos. 86, 210, 211, 212 and 213, *supra*.

(224) Art. 182, cl. 2—Decree modified by High Court in revision if gives new start to limitation.

A decree was passed on consent by the High Court directing that the plaintiffs do pay to the defendant the price to be ascertained by the first Court of a certain property within one month from the date of the valuation being made and that upon such payment the defendant do convey the property to the plaintiff. The first Court made the valuation and embodied it in a supplementary decree. An appeal from this decree was rejected by the High Court but in revision the said Court on 14th June 1909 held that no supplementary decree should have been passed, and that the decree of the High Court became capable of execution one month after the making of the valuation, viz., on 12th January 1905. The defendant applied for execution of the decree on 23rd August 1911.

Held, that under cl. 2 of Art. 182 of the Limitation Act, limitation ran from the order in revision passed by the High Court on 14th June 1909, which modified the decree of the first Court and the application was within time. *Gurupada Halder v. Tarit Bhushan Ray Choudhury*, 22 C.W.N. 158=44 Ind. Cas. 141.

D. CHATTERJEE and CHAPMAN, JJ.

References :—9 C. 100 ; 16 C. 250 ; 18 C. W. N. 740, R.

(225) Art. 182 (2) and (3)—“Where there has been an appeal,” construction of term in Art. 181 (2)—Suit dismissed for default—Application to set aside dismissal and for re-hearing—Dismissal of application—Order so dismissing if “review of judgment” as meant by Art. 181 (3).

The expression, “where there has been an appeal” in the last column of Art. 182 of the first schedule to the Limitation Act means where there has been an appeal against a decree in the suit, and cannot be held to include an appeal against an order made on an application to set aside that decree (a). An order dismissing an application for the re-hearing or review of a suit dismissed for default is not a review of judgment (b). *Raj Brijraj v. Nauratan Lal*, 3 Pat. L. J. 119=44 Ind. Cas. 575.

CHAMBER, C.J. and SHARFUDDIN, J.

References :—(a) 8 C. 248, Not F. ; 16 B. 128 ; 21 C. 387, F. (b) 10 M. 67, R.

Limitation Act (1908)—(Continued).

(226) Sch. I, Art. 182 (5)—Execution of decree, Limitation for—Decree amount, Payment of portion of, by judgment-debtor, if fresh starting point. See LIMITATION, No. 4, 45 Ind. Cas. 903.

(227) Art. 182 (5)—Application to executing Court to dismiss objections to execution. See STEP-IN-AID OF EXECUTION, No. 1, 16 A.L.J. 704.

(228) Art. 182, cl. 5—Application for payment out of money deposited in Court as security—Order for payment—Application if a step-in-aid of execution. See STEP-IN-AID OF EXECUTION, No. 3, 35 M.L.J. 575.

(229) Art. 182, cls. (5) and (6)—Suit for arrears of rent in respect of separate tenancies—Passing of single decree—Execution application in respect of one tenancy—Saving of limitation. *Dhirendra Nath Sarkar v. Nischintapore Co.*, 36 Ind. Cas. 395=26 C.L.J. 118=22 C.W.N. 192. See Final Part, 1916, Col. 1017 and Col. 621 of Final Part, 1917.

(230) Art. 182, cl. 6—Decree—Execution—Step-in-aid—Time runs from the actual issue of notice and not from the date of the order issuing the same.

Under Art. 182, cl. 6, Limitation Act, in the case of an application for the execution of a decree, time runs from the date on which the notice was issued, and not from the date on which the order issuing the notice was passed. *Nilkanth Laxman Joshi v. Ragho Mahadu Pavale*, 20 Bom. L. R. 351=42 B. 553=45 Ind. Cas. 559.

BEAMAN and HEATON, JJ.

(231) Art. 182 (6)—Execution of decree—Limitation, starting point for.

The expression “the date of the issue of the notice” occurring in cl. (6), Art. 182, Limitation Act, means the date on which the notice actually issued from the office of the Court, that is to say, the date on which it is signed by the Sheristadar in the name of the Court. *Shalkh Khoda Bukhsh v. Bahadur Ali*, 3 Pat. L.J. 285.

ROE and IMAM, JJ.

Reference :—1 C.W.N. 1917 (Patna) 52, F.

(232) Sch. I, Art. 182 (6)—“Date of issue of notice,” meaning of—Patna High Court, whether bound by view of Calcutta High Court.

The ‘date of issue of notice’ means the date on which the notice actually issued from the office of the Court, that is to say, the date on which it is signed by the Sheristadar in the name of the Court.

The view of the High Court of Calcutta is binding on the Patna High Court, in the matter of calculating limitation, as the pleaders have been so calculating in making application for execution. *Khoda Bukhsh v. Bahadur Ali*, 45 Ind. Cas. 209.

ROE and IMAM, JJ.

Reference :—36 Ind. Cas. 999, R.

Limitation Act (1908)—(Concluded).

(232-a) *Arts. 182 and 181—Applicability of—Decree satisfied by attachment and execution of another decree in judgment-debtor's favour pending appeal—Said decree set aside in appeal—Fresh application for execution.*

A obtained a decree against B for costs and he applied for execution and attached a decree which B obtained against a third person. Then A proceeded to execute the attached decree and got his decree satisfied with the proceeds thereof subsequently the attached decree was set aside in appeal which was pending at the time and A had to refund the money. Thereupon A applied to execute his decree against B.

Held, that the application was in form and substance an application for the execution of the decree and Art. 182 of the Limitation Act applies to the case and not Art. 181. *Sundar Lal v. Banarsi Das*, 45 Ind. Cas. 531.

TUDBALL, J.

(233) Art. 182 (6). See No. 35, *supra*.

(234) *Art. 182 and S. 20—Oral application for step-in-aid, what amounts to—Civ. Pro. Code, O. XXI, r. 2, cls. 1 and 2—Part-payment. Maslamany Mudallar v. Sethuswami Aiyar*, 22 M.L.T. 115=33 M.L.J. 219=(1917) M.W.N. 502=41 M. 261. See *Final Part*, 1917, Col. 622.

(235) *Art. 182, Expt. I—Joint decree against several persons—Appeal by two out of such—Appeal dismissed with costs—Execution of decree for appellate costs against them—No further application within three years—Limitation.*

S obtained a decree for possession and costs against K, D and certain other persons jointly. Out of these defendants K and D appealed to the High Court and their appeal was dismissed with costs. D held a decree against S and in execution thereof he attached the decree in favour of S against himself and his co-judgment-debtors. D executed the decree from time to time and realised various sums, and eventually it was held that the first Court's decree had been satisfied. S had applied for execution of his decree for costs obtained in the High Court in 1907. In this interval S had been adjudicated an insolvent and the Official Assignee transferred the decree in favour of S to M. M applied for execution on foot of the High Court's decree:—*Held* that the application was time-barred having been made more than three years from 1907. *Ghulam Muhiddin Khan v. Dambar Singh*, 16 A.L.J. 109=40 A. 206.

RICHARDS, C.J. and BANERJI, J.

Liquidation.

(1) *Company—Appeal from order of liquidating Judge dismissed as barred by limitation—Review of order by liquidating Judge if valid—Leave to file regular suit in respect of matter decided by liquidating Judge, if can be given.*

Liquidation—(Concluded).

After an appeal from the order of a liquidating Judge refusing to give preference to a particular debt was dismissed by the Chief Court as barred by limitation, the unsuccessful creditors applied to the liquidating Judge for leave to bring a regular suit to get a decree declaring their claim to be entitled to priority over other claims. *Held* that, after the dismissal of the appeal from his order, the liquidating Judge could not review it and that the question having been settled by him could not be re-opened by a regular suit. *Kishan Das v. Official Liquidator*, 40 P.R. 1918=60 P.W.R. 1918=45 Ind. Cas. 84.

CHEVIS and SHADI LAL, JJ.

(2) *Company put into liquidation after institution of suit—Leave to continue suit when will be granted. See COMPANIES ACT (1913), No. 2, 93 P.R. 1918.*

(3) *Company in liquidation—Pro-note taken by liquidator for money due towards shares—Suit on pro-note, Dismissal of, on merits—Liquidator's right to fall back on original cause of action—Incompetency of Liquidation Court to re-consider question—Merger of original contract into pro-note and novation of contract. See RES JUDICATA, No. 42, 87 P.W.R. 1918.*

Lis Pendens.

(1) *Civ. Pro. Code (Act V of 1908), Ss. 47, 151, O. XXI, r. 2—Payment out of Court to decree-holders—Uncertified payment—Executing Court or a Court hearing suit prevented from recognising payment—Plea of fraud not raised by judgment-debtor cannot be allowed to be raised by his assignee after many years—Inherent powers of Court to reopen transactions on the ground of fraud—Transfers pendente lite—Transfer of Property Act (IV of 1882), S. 52.*

The plaintiff held an unregistered mortgage for Rs. 30 executed by M in 1884, on which he obtained a decree in 1899 and, in execution, purchased the mortgaged property himself at a Court-sale in 1901. He also obtained formal possession but not actual possession, which was with defendant No. 1, who was subsequent mortgages with possession. M had mortgaged the property to defendant No. 1 by five registered mortgages in 1892, 1897, 1898, 1899 and 1900 and had placed him in possession of the property. In 1903 M sold her right in the property to defendant No. 1. Defendant No. 2 was a purchaser from defendant No. 1. The plaintiff sued in 1912 to recover possession of the property, or, in the alternative, to redeem the subsequent mortgages executed by M. The defendant resisted the suit on the ground that the mortgage debt of 1884 having been satisfied in 1900 by M, the decree and the sale in the suit of 1901 were fraudulent. The plaintiff contended in reply that the question of fraud in the execution of the decree could not be investigated upon a vague plea of fraud in the written statement in a redemption suit and that the plea of satisfaction of the mortgage decree prior to the Court-sale could not be entertained.

Lis Pendens—(Continued).

since the adjustment had not been certified, in view of the provisions of O. XXI, r. 2:

Held, (1) that, under the provisions of S. 47 of the Civ. Pro. Code, a question relating to the satisfaction of a decree was a question arising in execution, which must be tried by the executing Court under that section, or, at the discretion of that Court, by suit, in either of which cases the Court would be a Court precluded from recognising the adjustment;

(2) that it was very undesirable that the defendant should by the plea of fraud be permitted after the lapse of many years to call in question a title acquired at a Court-sale, which was never challenged by the judgment-debtor, though she was alive at the time of the trial of the suit;

(3) that, though the Court had inherent powers to allow, in a proper case, the investigation of a question of fraud in order to prevent injustice, there was no question of injustice here, for any investigation of title prior to defendant No. 1's purchase in 1903 would have disclosed the decree and Court sale in the mortgage suit of 1899;

(4) that the mortgages of 1899 and 1900 effected during the prosecution of proceedings in the suit of 1899 were ineffectual as against the plaintiff;

(5) that the plaintiff was entitled to redeem the first three mortgages in favour of defendant No. 1, as the purchaser of right, title and interest of M, who was entitled to redeem them at the date of the Court-sale. *Mora v. Hasan*, 20 Bom. L.R. 949.

SCOTT, C.J. and SHAH, J.

References:—19 C. 683 (P.C.); 22 B. 939; (1898) Bom. P.J. 386, R.

(2) *Award during pendency of attachment—Purchase in execution sale under attachment—Award, if private transfer—Purchase in execution sale, if subject to decree on award—Civ. Pro. Code, 1908, S. 64.*

S. 64, Civ. Pro. Code, 1908, avoids only private transfers, and not an award, which is made after an attachment but long before the execution sale under the attachment; such an award cannot be treated as a private transfer, as it only recognises a prior existing title; an attachment creating no title, a purchase made in an execution sale under such attachment, must be taken to be subject to the rights created by the decree passed upon the award. *Karl Ylananathan Chettiar v. Ramasawmy Athitha Nadar*, 35 M.L.J. 441=8 L.W. 582=24 M.L.T. 477.

SPENCER and KRISHNAN, JJ.

(3) *Transfer of Property Act, S. 52—Mortgage suit, Pendency of—Agricultural lease during pendency of such suit—Validity of lease—Burden of proof.*

During the pendency of a mortgage suit, the mortgagor executed a patta in favour of the defendant, recognising him as an occupancy tenant. *Held* that the burden of showing that the rights of the foreclosing mortgagee were not

Lis Pendens—(Concluded).

affected by the lease, within the meaning of S. 52, Transfer of Property Act, lay on the defendant whether a fresh lease of fields that had recently been surrendered is or is not an act of ordinary management affecting the rights of lessor's successor must be decided by the circumstances of the case. *Shri Ganesh v. Pandurang*, 14 N.L.R. 433=46 Ind. Cas. 762.

BATTEN, A.J.C.

References:—15 C.P.L.R. 6; 6 N.L.R. 140; 7 M. 96, R.

(4) *Doctrine of, if applicable to lease by ijaradar after expiry of ijara and during pendency of ejectment suit—Transfer of Property Act (1882), S. 52. See LANDLORD AND TENANT, No. 52-f, 47 Ind. Cas. 365.*

(5) *Decree for execution of lease in suit for specific performance of agreement to lease—Transfer of suit property thirteen days after decree—Execution of lease—Transfer whether affected by rule of lis pendens. See RELINQUISHMENT OF PORTION OF CLAIM, No. 2, 14 N.L.R. 176.*

(6) *Applicability of the doctrine—Alienation of property pendente lite—Compromise entered into between parties—Whether decree can be passed in terms of compromise so as to affect the interests of alienee pendente lite. See TRANSFER OF PROPERTY ACT, No. 18, 43 Ind. Cas. 502.*

(7) *Nature of, explained. See TRANSFER OF PROPERTY ACT, No. 20, 7 L.W. 104.*

Loan.

Advance of money to finance litigation—Agreement to share in property on success—Transaction if a loan—Default to pay full amount—Refund of amount actually advanced, Lender if entitled to—Loan charged on property—Default by lender—Lien in respect of money advanced. See CONTRACT, No. 8, 47 Ind. Cas. 563.

Loans Limitation.

See PUN. ACT I OF 1904.

Local Authority.

Jurisdiction of Civil Courts to determine legality of imposition of tax by. See PUN. ACT III OF 1911 (MUNICIPAL), No. 2, 74 P.L.R. 1918.

Local Boards.

See MAD. ACT V OF 1884.

Local Investigation.

Local investigation, unsatisfactory—Appellate Court not bound to order fresh investigation—Decision of appellate Court—Powers of High Court. See POSSESSION, No. 4, 45 Ind. Cas. 408.

Lost Grant.

Presumption of, Principles governing. See EASEMENTS ACT, No. 1, 20 Bom. L.R. 398.

Lunacy Act.

See ACT IV OF 1912.

Madras City Municipality.

See MAD. ACT III OF 1904.

Madras Civil Courts.

See MAD. ACT III OF 1873.

Madras Court of Wards.

See MAD. ACT I OF 1902.

Madras Hereditary Village Offices.

See MAD. ACT III OF 1895.

Madras Irrigation Cess.

See MAD. ACT VII OF 1883.

Madras Land Encroachment.

See MAD. ACT III OF 1905.

Madras Land Estates.

See MAD. ACT I OF 1909.

Madras Land Improvements Loans.

See MAD. ACT XIX OF 1883.

Madras Local Boards.

See MAD. ACT V OF 1884.

Madras Proprietary Estates Village Services.

See MAD. ACT II OF 1894.

Mahar Yatan.

Suit by villagers for injunction restraining mahars from taking away skins of dead animals—Right so to take claimed by mahars as vatan—Suit if cognisable by Civil Court. See JURISDICTION (OF CIVIL COURTS), No. 1, 20 Bom. L.R. 993.

Mahomedan Law.

- 1.—GENERAL.
- 2.—ACKNOWLEDGMENT.
- 3.—ALIENATION.
- 4.—DIVORCE.
- 5.—DOWER.
- 6.—GIFT.
- 7.—GUARDIANSHIP.
- 8.—HUSBAND AND WIFE.
- 9.—INHERITANCE.
- 10.—LEGITIMACY.
- 11.—MAINTENANCE.
- 12.—MARRIAGE.
- 12-a.—MINORITY.
- 13.—PRE-EMPTION.
- 14.—SUCCESSION.
- 15.—WAKF.

—1.—General.

- (1) *Kasi, Office of, not hereditary—Kasi, Grant to, Construction of—Presumption—Grant not heritable and divisible.*

The office of Kasi is a public office of high repute, but it is not hereditary, though its devolution often follows a line of inheritance.

Mahomedan Law—(Continued).**—1.—General—(Concluded).**

In case of a grant to a person as Kazi of a place, it is safe to presume that the primary purpose of the grant was to furnish emoluments for the office of the Kazi, and though the words "for maintenance" were added, they were never intended to divert the grant from its main purpose so as to make it heritable and divisible. *Mohammad Jafar Ali v. Mohammad Turab Ali*, 46 Ind. Cas. 853.

STANYON, A.J.C.

(2) Mopla in Burma, if governed by, or Marumakkathayam law—His self-acquisition, Devolution of. See MARUMAKKATHAYAM LAW, 46 Ind. Cas. 792.

—2.—Acknowledgment.**Mahomedan Law—Marriage and legitimacy**

—Acknowledgment with intent to confer legitimacy—Such acknowledgment is effective when illegitimacy established—

- * What is necessary to establish legitimacy—Marriage and semblance of marriage, if to be disproved—Concubinage if semblance of marriage—Acknowledgment for collateral object, if sufficient—Onus of proof—Repudiation of acknowledgment, if possible.

Under Mahomedan Law, acknowledgment cannot establish the legitimacy of a child proved to be illegitimate. It is only when it is uncertain whether there was marriage or not or legitimacy or not that acknowledgments are effectual to establish legitimacy (a).

In a suit by H for recovery of the estate of a deceased Mahomedan A as the latter's son and sole heir, H's legitimacy being challenged :

Held, on the evidence, (per *Sanderson, C.J.*, and *Chitty, J.*), that the alleged marriage between H's mother and A had been disproved and H proved to have been the illegitimate son of A, and no acknowledgment by A of H's legitimacy could, in such circumstances, confer legitimacy on H.

Per *Woodroffe, J.*—Disproof of both a marriage and a semblance of marriage is necessary to invalidate an acknowledgment valid in other respects.

That though the plaintiff had failed to prove marriage, the defendants had not disproved both the reality and semblance of marriage so as to establish that the plaintiff was the issue of Zina.

Per *Chitty, J.*—Concubinage is not "a semblance of marriage" in the contemplation of Mahomedan Law.

Woodroffe, J.—If mere concubinage is established, there is ex-hypothesi neither marriage nor semblance of marriage which a proved concubinage excludes (b).

The evidence showing that A had acknowledged H as his "son" for the purpose of getting him admitted into certain educational institutions and had made similar acknowledgments to others for the purpose of procuring H's marriage with a ward of the Court of Wards.

Mahomedan Law—(Continued).**—2.—Acknowledgment—(Concluded).**

Held (per curiam).—That these were acknowledgments with the intention of conferring legitimacy.

Per Woodroffe and Chitty, JJ.—An acknowledgment, once made and proved, cannot be rebutted. It cannot even be repudiated by the man who made it.

Woodroffe, J.—The plaintiff had not established an acknowledgment in the sense of a clear intention to confer legitimacy on the plaintiff. If he had, it might have been held that the defendant had not disproved marriage or semblance of marriage to rebut such valid acknowledgment. **Habibur Rahman Chaudhuri v. Altaf Ali Chaudhuri**, 23 C.W.N. 1 (F.B.).

SANDERSON, C.J., WOODROFFE and CHITTY, JJ.

References:—(a) 11 M.I.A. 94 (113); 8 M.I.A. 136 (139); 9 I.A. 8=8 C. 422; 10 A. 289; 27 C. 801; 9 C.W.N. 352; 43 I.A. 219=21 C.W.N. 130, Cons. (b) 10 A. 269, R.

—3.—Alienation.

Mars-ul-maut, doctrine of—Applicability.

Where a transaction purports to be a sale, the doctrine of *mars-ul-maut* does not apply to it; while if it is a *waqf* created when the *waqif* was suffering from death illness, it is valid to the extent of a third; and that if it is a gift, it cannot take effect at all. **Fazal Ahmad v. Rahim Bibi**, 16 A.L.J. 158=40 A. 238.

RICHARDS, C.J. and BANERJI, J.

—4.—Divorce.

(1) *Post-nuptial agreement by husband not to take another wife and delegation to wife of power of divorce on breach—Validity—Breach of agreement, followed by husband's suit for restitution of conjugal rights—Divorce given after suit by wife, if valid.*

A post-nuptial delegation of the power of divorce is valid under Mahomedan Law.

Where by a *kabinnamah* executed after the marriage, the husband undertook not to take a second wife without the wife's permission and delegated to her the power of "giving three taluqs" in case of violation of the said amongst other conditions "whenever she choose" and afterwards having taken a second wife without the first wife's permission sued the latter for restitution of conjugal rights, whereupon she gave herself the three divorces according to Mahomedan Law:

Held, that the authority to divorce was validly given and exercised and the suit must fail. **Sainuddin v. Sm. Latiffennesa Bibi**, 22 C.W.N. 924.

FLETCHER and SHAMSUL HUDA, JJ.

(2) *Kabinnamah—Failure by husband to comply with terms—Right of wife to divorce.* See **MAHOMEDAN LAW (DOWER)**, No. 1, 48 Ind. Cas. 17.

Mahomedan Law—(Continued).**—5.—Dower.**

(1) *Kabinnamah—Failure by husband to comply with terms—Right of wife to divorce—Right to dower.*

Where a husband failed to comply with terms of *kabinnamah*, wife is entitled to divorce her husband and claim dower. **Sultan Ahmed v. Safra Khatun**, 43 Ind. Cas. 17.

CHATTERJEA and RICHARDSON, JJ.

(2) *Dower debt, Release obtained by husband in consideration after handing over certain properties to wife—Gift—Sufficiency of consideration.*

Where a Muhammadan husband obtained a release from the payment of the dower money by handing over certain properties to the wife, then there was sufficient consideration for the deed. Inadequacy of consideration does not invalidate such a transaction. **Abdul Majid v. Khalil Rahman**, 46 Ind. Cas. 355.

FLETCHER and SHAMSUL HUDA, JJ.

(3) *Relinquishment of right to dower by a Mahomedan lady of 15 years of age—Age of majority according to Mahomedan Law—Indian Majority Act (IX of 1875), S. 2.*

Where a Mahomedan lady of 15 years of age relinquished her right to dower when her husband was dying and subsequently sued to recover it, *held* that she was not acting 'in the matter of dower' when she said that she gave up her rights to it, that the ordinary law of the land regarding age of majority applies to renunciation of dower, that the exception mentioned in S. 2 of the Indian Majority Act does not bind her (a). **Abidhunnisa Bibi Ammal v. Muhammad Fathi Udini Sahib**, 23 M.L.T. 78=35 M.L.J. 468=(1918) M.W.N. 246=41 M. 1026=44 Ind. Cas. 293.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 11 W. R. 212; 2 N. W. P. 327, R.; 22 B. 430, Diss.

(4) *Wife's right to prompt dower is not subject to condition.*

The prompt dower may be realized by the wife at any time before or after consummation (a). **Musammam Nawab Bibi v. Muhammad Din**, 28 P.L.R. 1918=100 P. W. R. 1918=45 Ind. Cas. 893.

SCOTT-SMITH, J.

Reference:—30 B. 122, R.

—6.—Gift.

(1) *Hiba—Musha—Custom—Authoritative statement—Custom not pleaded in litigation—Relevant evidence—Documentary evidence conflicting—Court of appeal in matter of conflict of evidence—Burden of proof—Benami transaction—Surrounding circumstances—Witness, reliability of, how judged—Purdanashin lady—Deed, execution of—Family settlement.*

Sanderson, C.J.—Where the documentary evidence is conflicting, great weight should be

Mahomedan Law—(Continued).**—8.—Gift—(Continued).**

given to the opinion of the learned Judge who has seen and heard the witnesses.

The Court of appeal would be more unwilling to set aside a judgment of the lower Court, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit (a).

Mookerjee, J.—The burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record (b).

Woodroffe and Mookerjee, JJ.—Whether a witness is reliable or not may be judged, not merely from demeanour but also from the mode and manner in which the answers are given.

Reference may legitimately be made to the work of Mr. Crookes on Castes and Tribes of the North-Western Provinces and Oudh as an authoritative statement of customs prevalent among the Eraki sect of Mahomedans.

The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded, is relevant evidence, and the question of its relevancy is not affected by the circumstance that some of these suits were still pending in Courts at the time of the trial.

Mookerjee, J.—In a case of gift by a Mahomedan, when it is alleged that the transaction was fictitious, the Court has to rely upon the surrounding circumstances contemporaneous with the gift and the subsequent conduct of the parties concerned.

Mookerjee, J. (Sanderson, C.J., dissenting).—A gift of a house by a Mahomedan donor to two of his sons, one of whom is adult and the other is a minor and the adult son takes possession of it, is absolutely void.

Mookerjee, J. (Woodroffe, J., expressing no opinion).—Under the Mahomedan Law as administered by British Indian Courts where the subject of the gift is incorporeal property not susceptible of physical possession, a gift thereof may be completed by such transfer of control as may be appropriate and possible in the circumstances (c).

The doctrine relating to the invalidity of gifts of *musha* though not favoured, cannot altogether be ignored or repudiated (d).

Sanderson, C.J.—A gift to two donees, one of whom is an adult and the other a minor, but not in the guardianship of the donor at the time of the gift, is valid. Where the adult son accepts the gift for himself and his minor brother at one and the same time and thereby places himself in the position of trustee or guardian for his brother, and consequently the donor will not take seisin of the property for his minor son, no 'confusion' will arise.

Mahomedan Law—(Continued).**—8.—Gift—(Continued).**

According to Mahomedan Law, seisin or actual possession is not necessary to complete the heba and the donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee by placing the latter in a position to enjoy it beneficially, or to make use of it consistently with its purpose, and in considering this question, the relationship of the parties must be kept in view. In other words to be in a position to take possession is tantamount to taking possession; and to place the donee in a position to take possession, is equivalent to delivery of possession—similarly investing with authority for that purpose is equally sufficient.

Per curiam.—A custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly (e).

Sanderson, C.J.—There is no absolute rule of law that a *purdanashin* lady must have independent advice. The possession of independent advice or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld, but if on a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor as well as the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand (f).

Mookerjee, J.—Where the person who seeks hold a *purdanashin* lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence, the Court will act with great caution and will presume confidence put and influence exerted. Where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arms length, the Court will require the confidence and influence to be proved intrinsically.

A Court will not be inclined to set aside a deed by a *purdanashin* lady, where the lady is proved to have been of business habits, to have been literate and to have possessed capacity to judge for herself.

A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or repudiate. This principle is not applicable to a case where the party does not assert that there was a compromise to put an end to dispute and to terminate or avoid litigation, and that the consideration for the compromise was, not the sacrifice of a right, but the abandonment of a claim. **Mariam Bibee v. Shaikh Muhammad Ibrahim**, 26 O.L.J. 306 (F.B.).

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

Mahomedan Law—(Continued).**—8.—Gift—(Continued).**

References:—(a) *Colonial Security v. Massey*, (1896) 1 Q. B. 38, R. (b) 23 C. L. J. 190 (204) = 43 C. 833, R. (c) 2 I. A. 287 = 15 B. L. R. 67, R. (d) 30 M. 519; 35 C. 1 = 34 I. A. 67 = 6 C. L. J. 695, R. (e) 3 I. A. 259 (285), R. (f) 36 A. 81 (91) = 41 I. A. 23 = 19 C. L. J. 172, F.

(3) Heba-bil-ewas—Transfer of Property Act (IV of 1882), S. 11.

The ordinary rules applicable to gifts apply to the Mahomedan Law like any other system of law and a gift under a *heba-bil-ewas* is not invalidated by an invalid condition being attached to it. *Niamatunnissa Bibi v. Hossenuddin Nazir*, 22 C. W. N. 512 = 27 C. L. J. 512 = 45 Ind. Cas. 601.

FLETCHER and SHAMSUL HUDA, JJ.

Reference:—17 C. L. J. 173, *Expl.*

(2-a) Marz-ul-maut—Gift to heirs during marz-ul-maut — Hiba-bil-ewas, whether effected by marz-ul-maut—Transfer in lieu of dower debt, nature of.

Under the Muhammadan Law the tests of *marz-ul-maut* are:—(1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death? (2) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death? (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocation or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death? (4) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady?

Where a lady who was suffering from dropsy and other complicated diseases, was unable to rise and say her prayers and used to say that she would not live and subsequently died of the disease:

Held, that the disease from which she died was what is technically known in the Muhammadan Law as *marz-ul-maut* (a).

A disposition made at a time when the disposer is suffering from a disease which is technically called *marz-ul-maut* or death illness stands so far as its legal effect is concerned, on the same footing as a testamentary disposition (b).

A deed executed in consideration of a valuable ring and a volume of the Holy Quran is a *hiba-bil-ewas*.

In a *hiba-bil-ewas* the delivery of possession is not necessary for its validity nor need there be adequacy of consideration, but there must be an actual payment of consideration by the donee and a *bona fide* intention on the part of the donor to divest himself *in presenti* of the property and confer it on the donee (c).

A *hiba-bil-ewas* is not a sale but a kind of gift. Muhammadan Law divides gifts into three classes—(1) a gift pure and simple; (2) a *hiba-bil-ewas* or a gift for consideration or

Mahomedan Law—(Continued).**—8.—Gift—(Continued).**

return; (3) a *hiba-ba-shari-ul-ewas*, that is, a gift conditioned upon a consideration to be paid in future in return for the gift. In *hiba-bil-ewas*, the consideration need not be adequate whereas in a sale the consideration must be sufficient and adequate.

Marz-ul-maut as affecting the validity of a *hiba* applies both to a *hiba* pure and simple and to a *hiba-bil-ewas* (d).

It is essential for a valid gift under the Muhammadan Law that the donor should be subject to no undue influence, coercion or duress in the execution of the deed of gift.

A document which does not give effect to the intention of the executant is not valid under the Muhammadan Law, which says that the legal effect of every transfer depends upon the transferor and the intention is an essential element in considering the legal effect of a voluntary transfer.

Obiter dictum.—A transfer to a wife in lieu of an existing dower debt amount to a sale and not to a *hiba-bil-ewas* inasmuch as a dower debt is a debt already incurred which the husband is bound to pay, which has priority over other debts and legacies and if put into possession of her husband's estate the wife is entitled to retain such possession until the dower debt is satisfied. 43 Ind. Cas. 196 = 3 Pat. L. W. 232.

CHAMBER, C.J., and JWALA PRASAD, J.

References:—(a) 3 C.W.N. 57; 30 B. 537 = 8 Bom. L. R. 35; 31 B. 264 = 9 Bom. L. R. 252; 23 Ind. Cas. 253 = 12 A.L.J. 41 = 36 A. 289; 22 Ind. Cas. 807 = 12 A. L. J. 132; 35 C. 1 = 9 Bom. L.R. 872 = 4 A.L.J. 572 = 11 C.W.N. 973 = 6 C. L. J. 595 = 17 M. L. J. 408 = 34 I. A. 167 = 2 M. L. T. 479 = 4 L. B. R. 154, F. (b) 30 C. 683; 3 I.A. 291 = 2 C. 184 = 26 W.R. 36 = 1 Ind. Dec. (N.S.) 412, F. (c) 3 I.A. 291 = 2 C. 184 = 26 W.R. 36 = 1 Ind. Dec. (N.S.) 412; 11 M.I.A. 517 = 10 W.R. (P.C.) 25 = 2 Suth. P.C.J. 98 = 2 Sar. P.C.J. 315 = 20 E.R. 195, F. (d) 23 Ind. Cas. 253 = 12 A.L.J. 417 = 36 A. 289, F.; 2 A. 854 = 1 Ind. Dec. (N.S.) 1134; 28 Ind. Cas. 692 = 42 C. 361 = 9 C.W.N. 325; 10 Ind. Cas. 727 = 8 A.L.J. 206 = 39 A. 421; 12 Ind. Cas. 457 = 21 M.L.J. 958 = (1911) 2 M.W.N. 412; 4 Ind. Cas. 466 = 18 C.W.N. 160, *Ref. to and Dist.*

(3) Principle underlying the law of gift—Point of law requiring investigation of facts cannot be raised in second appeal—Estoppel, its requirements—Failure to mention by appellate Court about a document—Effect.

The principle underlying the Muhammadan Law in respect of a gift is the same as that which underlies gifts in other systems. If the donor or transferor has done all that he could have possibly done under the circumstances, then the transaction is complete and gives the donee or transferee a complete title to recover possession.

Mahomedan Law—(Continued).**—8.—Gift—(Continued).**

Where a point of law requires investigation into facts that point of law cannot be allowed to be taken for the first time in second appeal.

It is necessary, in order to establish estoppel, the defendant must show that a representation was made by the plaintiff and that the defendant acting upon that representation has changed his position.

The mere fact that an appellate Court has not made special mention of certain document is not sufficient to show that it has not considered it at all. *Basirul Haq v Mahomed Ajimuddin*, 43 Ind Cas. 857=3 Pat L W. 213.

• MULLICK, J

References —11 C 121, 15 C 684, 21 A. 165, *Appr.*

(4) *Hanafi Law—Essentials of gift—Gift of corpus with retention of usufruct for life—Valid—Person disclaiming cannot set up claim.*

Where a donor transfers the corpus of the property retaining a usufruct for life physical possession must necessarily remain with the donor. There is nothing in the Hanafi Law to prohibit a gift of the corpus combined with the retention of the usufruct.

A person who has disclaimed a title cannot be allowed to set it up afterwards to the prejudice of third parties, who have purchased the property from the ostensible owner in good faith and for value. *Fakhr Jahan Begam v Muhammad Abdul Ghani Khan*, 45 Ind. Cas 307.

STUART and KANHAIYA LAL, A J Cs

References —12 O C 188, 40 Ind Cas 469; 20 O C. 360 R, 15 C 644; 11 M.L.A. 517, 25 A. 286, 9 O C. 196, 26 B 497, *Appr.*

(5) *Gift by grandfather to minor grandson—Transfer of possession of necessary—Gift to minor ward by the guardian—Declaration of—Whether raises any presumption of an intention to complete the transfer—Acceptance of gifts under Mahomedan Law—Principles as to, discussed*

Where a grandfather father and minor son in a Muhammadan family all live together and the grandfather makes a gift of certain immoveable properties and there is no evidence of any acceptance of the gift by the father on the minor's behalf, the gift will nevertheless be valid provided it is shown that the properties were after the gift held by the grandfather for the benefit and on behalf of the minor (a).

Per *Spencer, J.*—Although delivery of seisin is necessary in the case of gifts by Muhammadans in order to complete the gift, yet where a father or grandfather is living with his minor son or grandson and makes a declaration of the gift before any dispute arises, such a declaration would be sufficient to raise a presumption in favour of the latter that the former intended to complete the transfer.

Mahomedan Law—(Continued).**—8.—Gift—(Concluded).**

In order to rebut that presumption or on the other side to strengthen it other indicia of the transfer of possession may be looked to, such as, the attornment of the tenants to the donee, the mutation of names in the Collector's registers and the application of the profits of such property.

Per *Krishnan, J*—The ordinary rule of the Mahomedan Law is that a gift is not valid till it is completed by the delivery of the property given so far as it is capable of such delivery (b).

(a) Where, however, the donee is a minor in the lawful custody of the donor such as father, grandfather, etc no transfer of possession is necessary and the declaration of the gift itself is sufficient to change the possession of the donor, on his own account into one on behalf of the minor.

(b) In such a case the presumption is that the guardian donor holds the properties and collects the income on the minor's behalf and the burden of proof is on the person who seeks to invalidate the gift to show that the donor continued to deal with the property as if it was his own. *Subramania Ayyar v Mulla Yeettli Assan Koya*, 36 M L J 541=24 M.L.T. 351=8 L W 559=(1918) M W N 742.

SPENCER and KRISHNAN, JJ

References:—(a) 29 M L J 733, F (1915) M W N 430, *Dist* (b) 28 A 499, 30 M. 519; 23 B. 682, R.

(6) Release obtained by husband in lieu of payment of dower—Handing over certain properties in consideration of—Validity of gift—Sufficiency of consideration See MAHOMEDAN LAW (DOWER), No 2, 46 Ind. Cas. 355

(7) Gift by pardanashin lady—Burden of proof as to its bona fides and validity. See MORTGAGE (GENERAL), No. 7, 45 Ind Cas 691

—7.—Guardianship

(1) *Minors—Mother's rights under Mahomedan Law in respect of minor son—Power of de facto guardian—Immoveables—Alienation—Validity—Legitimacy—Acknowledgment—Presumption of marriage—Documentary evidence—Civ. Pro. Code, O. XIII, r. 1*

Under the Mahomedan Law a person who has charge of the personal property of a minor without being his legal guardian and who may, therefore, be conveniently called *de facto* guardian has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as trespasser.

A mother is entitled only to the custody of the person of her minor child, but is not the natural guardian and has no larger powers to deal with her minor child's property than any

Mahomedan Law—(Continued).**—7.—Guardianship—(Concluded).**

outsider or non-relative who happens to have charge for the time being of the infant.

A father alone, or if he is dead, his executor (under the Sunni Law) is the legal guardian of his minor child. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather, and should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian devolves upon the Judge as representing the Sovereign. But the powers of even the *de jure* guardians to intermeddle with the property of a minor are confined within legal limits. If the mother is the father's executrix or is appointed by the Judge as the guardian of the minors, she has all the powers of a *de jure* guardian. If there is no legal guardian, the person in charge of a minor (e.g., the mother) has power as *de facto* guardian to incur debts, or to pledge the minor's goods and chattels for the minor's imperative necessities (such as food, clothing or nursing), but has no power to deal with the immoveable property.

The Mahomedan Law makes a sharp distinction between "goods and chattels" and immoveable property with regard to the powers of dealing by guardians (a).

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother (b).

Documentary evidence which has not been produced at the first hearing of a suit in accordance with O. XIII, r. 1 of the Code of Civil Procedure, 1908, may be admitted at any subsequent stage at the discretion of the Court. *Imambandi v. Sheikh Haji Mutsaddi*, 35 M. L.J. 422 = 24 M. L. T. 280 = 28 C. L. J. 409 = 16 A. L. J. 800 = 20 Bom. L. R. 1022 = 47 Ind. Cas. 513 = 23 C. W. N. 50 = 45 C. 878 (P. C.).

LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

References:—(a) 37 M. 514, *Disappr.* (b) 10 O. L. R. 293, *Appr. and Appl.*

(2) Married girl who has not attained puberty—Whether husband proper guardian, guardian of person, guardian of property. See GUARDIANS AND WARDS ACT (VIII OF 1890), No. 1-a, 43 Ind. Cas. 849.

(3) Mother, Acts of, as *de facto* guardian, When can bind her minor son.

The acts of a mother in dealing with her minor son's estate as *de facto* guardian must be upheld, if they are to the manifest advantage of the minor or if they are for urgent or imperative necessity. *Kapura v. Shankar Das Mal Chand*, 108 P. R. 1918.

LE-ROSSIGNOL and WILBERFORCE, JJ.

References:—15 Ind. Cas. 576; 34 C. 36; 34 C. 65; 26 A. 22, B.; 29 C. 278, *Disappr.*

Mahomedan Law—(Continued).**—8.—Husband and Wife.**

(1) Restitution of conjugal rights, Suit for—Legal cruelty:

In a suit for restitution of conjugal rights by the husband, the Court found that the husband and the wife (both Muhammadans) were on the worst possible terms, that the husband, though not actually ill-treating her physically yet ill-treated her in other ways, that is to say, mentally, and that, by her return to his custody, her health and safety would be endangered; held that the wife could not be delivered over to the husband (a). *Hamid Hussain v. Kubra Begam*, 16 A. L. J. 132 = 40 A. 332 = 44 Ind. Cas. 728.

PIGGOTT and WALSH, JJ.

References:—(a) 1 A. L. J. 218, F.; 11 M. I. A. 551 (610); 29 A. 222; 12 A. L. J. 1065, R.

(2) Post-nuptial agreement by husband not to take another wife and delegation to wife of power of divorce on breach, Validity of. See MAHOMEDAN LAW (DIVORCE), No. 1, 22 C. W. N. 924.

(3) Declaration about marriage 20 years after divorce—Maintainability. See SPECIFIC RELIEF ACT, No. 21, 23 C. W. N. 171.

—9.—Inheritance.

(1) Halai Memons, law of succession and inheritance applicable to—Hindu Law—Mahomedan Law—Custom—Halai Memons are governed by Mahomedan Law in matter of inheritance and succession.

A Halai Memon, domiciled in Porebunder, in Kathiawar, died intestate in Bombay leaving moveable and immoveable properties in Bombay and Porebunder. The plaintiff, his daughter, having brought a suit for a share in his estate according to Mahomedan Law:

Held, that the plaintiff was entitled to a share in her father's estate as he was governed by Mahomedan Law in matters of succession and inheritance and not by Hindu Law. *Khatubal v. Mahomed Haji Abu*, 20 Bom. L. R. 289 = 45 Ind. Cas. 619.

MARTEN, J.

References:—3 M. H. C. 75; 4 Bom. L. R. 365; 18 Bom. L. R. 695; 13 B. 534; 33 I. A. 1; 2 Bom. L. R. 831, R.

(2) Right of inheritance, alienation of, before vesting—Validity—Transfer of Property Act (IV of 1882), S. 6.

A transfer or renunciation by a Muhammadan of his right of inheritance before that right vests in him is prohibited by the Muhammadan Law. The rules of Muhammadan Law are not affected by the Transfer of Property Act (a).

Quare:—Whether such a transfer is not invalid under S. 6 of the Transfer of Property

Mahomedan Law—(Continued).**—9.—Inheritance—(Concluded).**

Act also? *Agha Beevi v. S. K. M. Karuppan Chetty*, 7 L.W. 215=34 M.L.J. 460=45 Ind. Cas. 35=41 M. 365 (F.B.).

WALLIS, C.J., BAKERWELL and KUMARA-SWAMI SASTRI, JJ.

References:—(a) 17 W.R. 108 (P.C.); 24 M. L.J. 268; 31 B. 165, F.; 19 M. 176, Diss.; 13 A.L.J. 710, Diss.

—10.—Legitimacy.

(1) *Paternity and legitimacy—Acknowledgment of parentage—Necessary legal conditions—Fasid, Batil, Zina, explained—Presumption of marriage between a Mahomedan and a woman installed in a house as wife—How to rebut such presumption—Evidence Act, S. 112—Its applicability to Mahomedan law.*

In all cases in which marriage may be presumed from cohabitation, it may also be presumed for the purpose of establishing paternity and legitimacy.

Paternity is established in the person said to be the father by proof or legal presumption that the child was begotten by him on a woman who was at the time of conception his lawful wife or was in good faith or reasonably believed by him to be such. The offspring of such union is legitimate. Paternity and legitimacy may also be presumed from acknowledgment by the putative father in every case where it is humanly and legally possible that he might have been the father in fact, and there might have been a valid marriage between him and the mother of the acknowledged child.

A marriage by a Muhammadan with a non-moslem woman unconverted to Islam, who is not at the time the lawful wife of another man, is merely irregular (*fosisid*) and the child born of such a union is legitimate.

Where a child has been acknowledged by a Muhammadan father, the burden of disproving the paternity and legitimacy of such child lies heavily on the person who denies them. Neither paternity nor legitimacy can be obtained by adoption, and the child begotten by *Zina* cannot be made legitimate by the subsequent marriage of its parents before its birth, S. 112 of the Indian Evidence Act being inapplicable to Mahomedans.

Where a Muhammadan father installed mother and child in his house as his wife and son, and thereafter gave them all the domestic status due to a wedded wife and lawful son, the presumption of marriage will be all but conclusive, and, though marriage can be disproved, the evidence must be extremely cogent to displace the presumption, which is not an ordinary presumption of evidence but a strong rule of the Muhammadan law. The mere oral testimony of partisan witnesses would be quite insufficient. *Zakir Ali v. Lograbli*, 43 Ind. Cas. 888.

STANTON, A.J.C.

References:—7 W.R. (P.C.) 1; 8 M.L.A. 395; 29 C. 184 (P.C.); 8 C. 492; 10 C. 663; 21 C.

Mahomedan Law—(Continued).**—10.—Legitimacy—(Concluded).**

666; 23 C. 190; 5 W.R. 132; 3 W.R. 187; 10 W.R. 45; 18 W.R. 250; 20 W.R. 164; 4 B.L.R. A.C. 55; 25 W.R. 444; 3 W.R. (P.C.) 37; 8 A. 234; 15 A. 396; 27 C. 801; 9 C.W.N. 352; 34 B. 111; 32 C. 871, R.

(2) Acknowledgment with intent to confer legitimacy—Such acknowledgment if effective when illegitimacy established. See MAHOMEDAN LAW (ACKNOWLEDGMENT), No. 1, 23 C.W.N. 1.

—11.—Maintenance.

(1) *Decree for, in terms of award—Charge on immoveable property created by award—Decree if capable of execution personally.*

Where an award created a charge upon immoveable property for the payment of maintenance and a decree was passed by the Court in terms of such award and where the decree was sought to be executed personally, without bringing the immoveable property charged to sale:

Held that, as it was not sought to bring the property to sale and as the charge was not created before the decree was obtained, the decree could be executed personally. *Mahamaya Prasad Sinha v. Sukhdal Koer*, 46 Ind. Cas. 169.

MULLICK and THORNHILL, JJ.

(2) *Arrears of maintenance due to wife from husband—When can be recovered—Maintenance, if in the nature of a gratuity or debt—Hanafi Law, if different.* *Kozhi Koti Khader Palliveethi Mahamed Haji v. Moldeen Yeethil Kallmatil*, 6 L.W. 288=41 M. 211. See Final Part, 1917, Col. 632.

—12.—Marriage.

(1) *Treatment, evidence of.*

A Mahomedan lady brought a suit for dower as the widow of a deceased Mahomedan nobleman against his heirs. The lady was the daughter of a woman of questionable antecedents and she herself led a disreputable life before she was admitted by the said nobleman into his harem. The nobleman himself had illicit connection with her. The lady alleged that she had been married to the Raja. The evidence in support of the marriage consisted of the depositions of two witnesses who were disbelieved and of long-continued and exclusive cohabitation:—*Held* that the connexion between the parties being in its inception an illegitimate one, it is difficult to infer a subsequent marriage from evidence of long-continued and exclusive cohabitation. *Shabban Bihl v. Khalil Shah*, 16 A.L.J. 754.

PIGGOTT and TUDBALL, JJ.

(2) *Mother certificated guardian of minor Mahomedan girl—Uncle effected marriage*

Mahomedan Law—(Continued).**—12.—Marriage—(Concluded).**

of minor girl—Whether mother entitled to sue under S. 42, Specific Relief Act, to declare marriage invalid.

Where an uncle of a minor Mahomedan girl effected a marriage of the girl without the consent of her mother, who was also her certificated guardian, and where the mother brought a declaratory suit to declare the marriage invalid, held that it would not be a proper exercise of judicial discretion to make any declaration under S. 42 of the Specific Relief Act, inasmuch as under S. 43 the decree would not be binding on the daughter. *Somulla Sarkar v. Tula Bibi*, 45 Ind. Cas. 203.

RICHARDSON and BEACHCROFT, JJ.

(3) Husband and wife, Relationship of, Existence of—Presumption of—Marriage, Facts necessary to establish—Long cohabitation and birth of child, Not merely, but acknowledgment of marriage and legitimacy of child. See HUSBAND AND WIFE, No. 2, 46 Ind. Cas. 913.

(4) Presumption of marriage between a Muhammadan and a woman installed in house as wife—How to rebut such presumption. See MAHOMEDAN LAW (LEGITIMACY), No. 1, 43 Ind. Cas. 883.

—12-a.—Minority.

Mortgage by minor's father and after his death by minor's mother as de facto guardian—Act II of 1913, S. 12—Redemption of first mortgage by order of Collector—Possession received by minor—Suit by mortgagees under S. 12—Equity.

A Muhammadan mortgaged his land to K for Rs. 193-8-0. After his death, his widow as *de facto* guardian of his minor son S created an additional mortgage of Rs. 160 on the land in K's favour.

The Collector on an application by S under Act II of 1913 ordered redemption on payment of Rs. 193-8-0 only and S on depositing that money was duly placed in possession.

On a declaratory suit by K under S. 12 of Act II of 1913 in respect of the additional charge created by S's mother as *de facto* guardian of S:

Held, that the settled principle of law applicable to alienations by *de facto* guardians of a Muhammadan minor is that the alienee cannot enforce the alienations against the minor but that on the equitable ground, that he who seeks equity must do equity, the minor if he himself comes into Court to challenge the alienation, must before re-entry restore to the alienee all the benefits he has personally derived from the alienation. This principle equally applies to the suit, brought by the mortgagees, under S. 12 of Act II of 1913, for writing the order incorrectly issued by the Collector, as the minor is still to be considered as real plaintiff, who originally moved the executive machinery (a).

Held, also, that a declaratory suit lies, although the mortgagee has been ousted of the

Mahomedan Law—(Continued).**—12-a.—Minority—(Concluded).**

possession of the land; and in case of his success possession is to be restored to him and he is entitled to hold the property till his claim is fully satisfied. *Sajdara v. Kaura Ram*, 152 P.L.R. 1917=36 P.R. 1918=7 P.W.R. 1916=44 Ind. Cas. 219.

LE-ROSSIGNOL, J.

Reference:—(a) 33 P.R. 1912=295 P.W.R. 1912, R.

—13.—Pre-emption.

(1) *Talabs—Custom arising on sale—Transaction in the form of a lease—Issues to be decided.*

Where a custom of pre-emption prevails upon sale, the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same principle applies to the Mahomedan Law.

Where, therefore, a small piece of land was transferred, the transfer being in the form of a perpetual lease the premium being Rs. 250 and the annual rent being two annas, and pre-emption was claimed in respect of the land, under the Mahomedan Law, on the ground that the transaction was really a sale in the garb of a lease made to defeat pre-emption: Held that on the issue as to the nature of the transaction being raised by the plaintiff, the Court was bound to determine its real nature, and if after considering all the circumstances, namely, sum which was paid down, the smallness of the rent, and the value of the property, it came to the conclusion that it was a sale, it must hold that the right of pre-emption arose and determine whether the demands were performed or not. *Muhammad Niaz Khan v. Muhammad Idrees Khan*, 16 A.L.J. 233=40 A. 322=44 Ind. Cas. 227.

RICHARDS, C.J. and TUDBALL, J.

(2) Vendor and vendee if can defeat pre-emption by dressing up transaction as lease. See MAHOMEDAN LAW (PRE-EMPTION), No. 1, 16 A.L.J. 233.

(3) Sale by Shiah—More than two co-sharers in property—No pre-emption. See PRE-EMPTION, No. 4, 16 A.L.J. 507.

—14.—Succession.

(1) *Succession of distant kindred—Essentials to establish claim—Trespasser—Person in possession.*

Before the contention, that plaintiffs are heirs as members of the class known as distant kindred, could prevail, it would be necessary for the plaintiffs to establish by evidence that all persons having a prior or better title than they had been exhausted or did not exist.

A against a trespasser, possession is a good and sufficient title to enable the persons in possession to resist the claim of the trespasser. *Shah Mirza v. Shaik Abdul Gani*, 43 Ind. Cas. 398=4 Pat. L.W. 130.

MULLICK and ATKINSON, JJ.

Mahomedan Law—(Continued).**—15.—Wakf.**

- (1) *Woman, if entitled to religious office of Head Mujavar of Astana—Grant, Construction of—Practice and usage under grant, Value of—Devolution—Musjid, Mujavar, Astana, Sajjadanashin, Gadnashin, Meanings of.*

In a suit by a woman, a descendant of the original grantee, to recover, from the defendant, also descendants of the original grantee, certain lands attached to what was described in the plaint as *Astana Bara Imam*, on the ground that the plaintiff was entitled to the office of *Head Mujavar* of the *Astana* in succession to her mother, it appeared, from the interpretation put upon a grant and from the practice and usage that had grown under it, that the grant had been treated by the parties concerned as creating a public religious trust for the performance of *Fatiha* and certain other ceremonies during the *Moharam*. *Held* that the course of devolution, the way in which the parties had been enjoying and their pleadings clearly showed that the plaintiff was not, by reason of her being a woman, incompetent to perform the duties of *Head Mujavar*—*ship* of this particular *Astana*.

Per Abdur Rahim, J.—A religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy, and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion and in the absence of anything in the rules by the founder, the usage of the institution governs the case (a). It is a perfectly reasonable proposition that females are not competent, for certain obvious reasons, to assume the office of superior in an endowment, so long as it is understood that the prohibition or the disability arises from certain local usages and customs and not by an absolute injunction of Mahomedan religion or law.

The word "*Mujavar*" literally means a sweeper or the person who cleans the place, but it is conventionally used to denote a person who is looking after a shrine or tomb of a holy person generally called "*Astana*." In this presidency, the word "*Mujavar*" is not seldom used in the sense of *Mutwalli* of an ordinary religious trust. "*Astana*" is a word which is often used to denote a place inspiring respect and reverence, not necessarily indicating, as in popular use, a tomb or shrine of a holy person. The term "*Sajjadanashin*" or "*Gadnashin*" is conventionally used to denote the person in charge of a *khankah* or an institution where religious enthusiasts and fakirs congregate and where the superior or the head of the institution has certain doctrines of sufism to teach.

Per Seshagiri Aiyar, J.—Wherever there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions based on the

Mahomedan Law—(Continued).**—15.—Wakf—(Continued).**

ground of sex or sect, that women are competent to inherit those offices and to perform the duties pertaining to them (b). *Munnavaru Begum Sahibu v. Mir Mahapalli Sahib*, 41 M. 1033.

ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

References:—(a) 34 C. 118 (P.C.); 5 L.W. 226, *Rel. on*; 7 Ind. Dec. O.S. 684; 4 M.H.C. 23, R. (b) 32 A. 461; 1 Bom. L.R. 743, R.

- (2) *Deed providing for support of grantor's family and descendants—Nominal dedication for charitable purposes—Waqf illusory—Muslimans Waqf Validating Act (VI of 1913), Ss. 3, 4, whether retrospective.*

Neither S. 3 nor S. 4 of the Muslimans Waqf Validating Act is retrospective in its operation; consequently, if a *Waqf* created before the passing of that Act was illusory, and therefore, invalid in the eye of the Mahomedan Law, it would not be validated by reason of any retrospective operation of that Act.

A Mahomedan executed three documents purporting to make a *waqf*. By the first of these he made no substantial and effective dedication of the property nor did he specify the objects of the endowment; there was no effective alienation of the rights of ownership; by the second of these instruments he provided that on his death the defendant, a minor, who was a son of a son of his, would be the *mutwalli* under the guardianship of the plaintiff; it referred to his will as laying down the manner in which the income of the property was to be spent or invested. The third document was the "will" and under it provision was made for religious and charitable purposes; but reading it as a whole the manifest intention of the testator was to dedicate the income of the property estimated at Rs. 20,000 per annum to the advancement of the members of his family, to tie up the property against the possibility of waste, to make such investments after defraying all expenses that the estate would go on augmenting steadily; while the provision in regard to the charitable and religious purposes was ten per cent. on the total income:

Held that, having regard to the course of rulings of the Privy Council and of the High Courts prior to the passing of Act No. VI of 1913, no valid *waqf* was created (b). *Naimul Haq v. Mohamud Subhan-ul-lah*, 36 A.L.J. 841.

PIGGOTT and WALSH, JJ.

References:—(a) 40 M. 1164; 19 C.W.N. 76; 43 C. 158; 16 Bom. L.R. 977, R. (b) 17 C. 498; 19 C. 399; 22 C. 619; 8 A.L.J. 162, R.

- (3) *Shias—Waqf created by trust-deed—Ownership in property not divested from date of execution of deed—Validity of Waqf.*

Where a Mahomedan and his wife, *Shias* by persuasion, purported to create a *waqf* by means of a trust-deed, but the deed did not divest the ownership of the executants from the

Mahomedan Law—(Continued).**—15.—Wakf—(Continued).**

date of execution. *held* that the *waqf* was invalid. **Syed Ali Raza v Sanwal Das**, 16 A. L.J. 876.

PIGGOTT and WALSH, JJ.

References:—13 A. 261; 24 A. 257; 25 A. 236, R.

- (4) *Unlawful alienation of endowed property by mutwalli of mosque—Ahli masjid, a daily worshipper, if may sue for declaration that alienation void, without special damage—Representative suit if lies, under Civ. Pro. Code (Act V of 1908), O. I, r. 8—S. 92 of the Code or S. 14 of Act XX of 1863, if bars suit.*

A suit brought by two worshippers of a mosque for themselves and is representing other worshippers in the locality for a declaration that a permanent lease granted by the *mutwalli* is void and inoperative is maintainable, the requirements of O. I, r. 8, having been complied with by the plaintiffs.

No special damage need be alleged or proved for the maintainability of such a suit, since worshippers living in the vicinity of a mosque have rights as daily worshippers to it over and above those possessed by the Mahomedan public and have a more direct interest in its maintenance and in the proper administration of the properties endowed for its benefit.

S. 14 of Act XX of 1863 contemplates a suit instituted primarily against the Trustee, Manager or Superintendent of a mosque, temple or religious establishment or the members of any committee appointed under that Act, and the only relief that can be asked for in such a suit is a decree directing the specific performance of any act by such Trustee, Manager, etc., a decree for damages and costs against them and a decree directing their removal.

A suit under S. 92 of the Civ. Pro. Code is primarily a suit against a Trustee and can only be instituted either on the ground that there has been a breach of trust or that direction of the Court is necessary for the administration of the trust. In the present case the mere fact that the Trustee was a defendant in the suit did not attract the application of S. 92 of the Civ. Pro. Code, since no relief was claimed against him, nor was the Court asked to give any direction for the administration of the trust. **Ashraf Ali v. Mohammad Nurojjoma**, 23 C.W.N. 115.

N. R. CHATTERJEA and SHAMSUL HUDA, JJ.

Reference:—33 A. 660, *Appr.*

- (5) *Application to be appointed Mutwalli rejected by the District Judge—District Judge whether has powers of a Kazi—Petitioner whether to proceed by application or by suit—Civ. Pro. Code (Act V of 1908), S. 92.*

An application was made by a person to the District Judge to be appointed *Mutwalli* of a *wakf* property, but the District Judge refused

Mahomedan Law—(Continued).**—15.—Wakf—(Continued).**

to deal with the matter on application on the ground that the petitioner's only course was to proceed by suit under S. 92 of the Civ. Pro. Code.

Held, that it may be conceded that the District Judge has the powers of a *kazi*, but it does not necessarily follow that the petitioner is entitled to proceed by application or that the District Judge has no power to relegate her to a suit. **Jamila Khatun v Abdul Jalil Meah**, 23 C.W.N. 138.

RICHARDSON and WALMSLEY, JJ.

References:—20 C.W.N. 113; 43 I.A. 127—43 C. 1085—20 C.W.N. 1118; 37 C. 870, R.

- (6) *Test of—Settlement of property partly for religious purposes and mainly for private purposes—Charge—Annuity under waqf-nama, interest on.*

The true test as to whether a deed is a valid deed of endowment as a *waqf* is whether, having regard to all the circumstances existing at the date of the execution of the deed, the dominating purpose and intention of the grantor was to provide for charities or religion (a).

Where the main object of the settlor in executing a deed of *waqf* is to provide for his own daughter and her successors, but a portion of the property is given for religious and charitable objects, though the settlement may not be wholly valid as a *waqf*, the religious and charitable trusts created by the document would form a valid charge on the property.

Interest ought to be awarded on an annuity claimed under the terms of a document in the nature of a *waqf*. **Srimati Karimunnessa Chowdhurani v. Srimati Ekiwa**, 37 Ind. Cas. 904—22 C.W.N. 568.

FLETCHER and RICHARDSON, JJ.

References:—(a) 17 C.W.N. 1018, R.; (b) 17 C. 498 (P.C.); 4 U.L.J. 442, F.

- (7) *Mutwalli—His right to appoint successor by tauliatnama—Muhammadian Endowments Committee at Chittagong, a statutory body—Regulation XIX of 1910.*

If a *Mutwalli* had a right or power to appoint a successor under the Muhammadan Law or under any general law applicable to this topic and if he freely executed a *tauliatnama* as a testamentary document, while he was of sound disposing mind, its validity cannot be questioned.

The Muhammadan Endowments Committee at Chittagong, to which Reg. XIX of 1910 (before it was repealed by Act XX of 1863) applied, is a statutory body, and its recognition of a person as a rightful *mutwalli* is authoritative. **Sultan Ahamad v. Abdul Ghani**, 45 Ind. Cas. 581.

RICHARDSON and WALMSLEY, JJ.

References:—8 C. 732; 37 C. 263, *Dist.*; 22 C. 324, 19 B. 555, *Appr.*

Mahomedan Law—(Concluded).**—15.—Wakf—(Concluded).**

(8) *Rents of dedicated houses to be spent in good work at executor's discretion—Dedication whether private wakf.*

Held, that the trust created in the following terms of dedication to God is too vague to be enforced by Courts and also cannot be described as a private wakf.

"I, with my free consent dedicate my three houses to God. After my death the executors shall be entitled to take possession of these like me as *mutwallis* and realise the rept of all the houses and spend it on good work as they think best" (a). *Muhammad Wazir v. Ali Hussain*, 26 P.W.R. 1918=43 Ind. Cas. 749.

SCOTT-SMITH and LESLIE-JONES, JJ.

* *References* :—(a) 50 P.R. 1882, F.; 75 P.R. 1907=189 P.W.R. 1907, F.

Maintenance.

(1) Right to maintenance in impartible estates if claimable by custom on Hindu Law. See HINDU LAW (MAINTENANCE), No. 4, 35 M.L.J. 392 (P.C.).

(2) Transfer of impartible property—Brother of transferor to recover share of transferred property for maintenance. See IMPARTIBLE PROPERTY, No. 1, 3 Pat. L.J. 648.

(3) Marriage of female member of Malabar tarwad under Malabar Marriage Act—Right of such woman and her children to claim maintenance from tarwad if lost by marriage. See MALABAR LAW, No. 8, 35 M.L.J. 509.

(4) Female member of Malabar tarwad leaving tarwad to live with her husband—Such leaving if good reason for absence from tarwad—Right of such woman to maintenance from tarwad. See MALABAR LAW, No. 9, 35 M.L.J. 565.

Maintenance Grant.

Construction—Sanad granting 'taluka' with the lands in lieu of pension as jagir—Whether grant of land or mere revenue—Grant for maintenance to a person and after his death for his heirs—If estate free from attachment in the hands of the heir—S. 60 (g), Civ. Pro. Code

Where, in a sanad granted to the appellant's ancestor, one Karim Khan, it appeared from the recitals that the premises granted were intended to be in lieu of Rs. 10,000, which Karim was entitled to receive by way of pension and the operative part witnessed that the Government had granted the "taluka together with lands" as a revenue free jagir to Karim by way of maintenance, and, after the death of Karim, the said *ilaka* shall continue to stand in the names of his children as a permanent *saminadari*: *Held*, on the construction of the sanad, that the grant was one of land rather than of revenue charged on land (a).

Held, also, that, though the grant in favour of Karim Khan was expressed to be for maintenance, it was not one in the hands of his

Maintenance Grant—(Concluded).

descendants within S. 60 (g), Civ. Pro. Code, and was therefore not free from attachment. *Musammatt Sakina Bai v. Kaniz Fatima Begum*, (1918) M.W.N. 384=22 C.W.N. 577=47 Ind. Cas. 632.

LORD PARKER, LORD WRENBURY, SIR JOHN EDGE, MR. AMER ALI and SIR LAWRENCE JENKINS.

Reference :—(a) 31 A. 382, Appr.

Malabar Compensation for Tenants' Improvements.

See MAD. ACT I OF 1900.

Malabar Law.

(1) *Anubhavan tenure. nature of—Kanom—Construction of documents, whether an irredeemable tenure or rent charge on land.*

Anubhavan may be used with reference to tenure of land, and it will then import an irredeemable tenure, or it may be used with reference to a specified money or grain rent charged on the land and, in that case, it will not imply any tenure. The question should be determined by the construction of each particular deed of grant. The construction of documents discussed. *Pothur Tarwad Karnavay and Manager Kunhan v. Muthiyallur Kumaran Rarichan*, 43 Ind. Cas. 379.

OLDFIELD and SPENCER, JJ.

References :—30 M. 203=29 M. 501, F.; 27 M. 202; 17 Ind. Cas. 424; 32 Ind. Cas. 982, R.

(1-a) *Power of agent of a Devaswom to grant meloharath—Whether Melkanomdar bound to scrutinise as to the application of funds.*

The grant of *Melcharths* is an ordinary incident of the management by the agent of a *Devaswom*; the *Melkanomdar* is not bound to enquire into the propriety of the transaction, nor is he under any obligation to scrutinise the same. *Vythianthier v. Padmanabha Pattar*, 45 Ind. Cas. 659.

OLDFIELD and SADASIVA AYYAR, JJ.

(2) *Kuzikanom lessee holding over—Nature of possession—Trespasser or tenant—Lessee holding over, if entitled to notice to quit—Nature of suit for possession against Kuzikanom lessee—Malabar Compensation for Tenants' Improvements Act (I of 1900), S. 5—Applicability to South Canara. Theman v. Kunhi Pathumma*, 6 L.W. 570=(1917) M.W.N. 784=34 M.L.J. 128=41 M. 118=48 Ind. Cas. 757. See Final Part, 1917, Col. 643.

(3) *'Kanom—Demise in perpetuity by way of kanom with a covenant for renewal every twelve years—Effect of the deed—Right of redemption, clog on—Transfer of Property Act (IV of 1882), S. 98—Anomalous mortgage.*

A demise of land recited that a sum of Rs. 600 was due under two previous deeds, a *Kanom* and a *Pattam chit*, and demised the lands in perpetuity and contained a covenant for renewal every twelve years. The document also set out

Malabar Law—(Continued).

the number of trees and tanks on the property. It also contained a forfeiture clause.

Held per Bakewell, J.—The intention of the parties was to create a mortgage and the deed should be read as if it contained a proviso for redemption. The provision for renewal every twelve years, amounts to a covenant by the lessor (mortgagor), that the mortgage shall not be redeemable for a period of twelve years, and, if he fails to redeem the mortgage at the expiration of any such period, the lessee shall, upon payment of a certain sum, be entitled to retain possession for a further period of twelve years. The lease being in perpetuity, there is no need of a fresh grant every twelve years (a).

Per Phillips, J.—The transaction is an anomalous mortgage coming under S. 99 of the Transfer of Property Act, and it is a mortgage with a covenant for renewal by the mortgagor every twelve years. The covenant for perpetual renewal is binding and is not bad as a restriction of the right of redemption (b).

The possibility of a redemption is contemplated in case of forfeiture. The mortgagor would on a forfeiture be entitled to redeem the mortgage on payment of the mortgage money.

Per curiam:—Where a minor was represented by a guardian in the lower Court and a decree was passed, any plea based on his minority cannot be raised by the minor in an appeal against the decree. The decree is binding until set aside in proper proceedings. *Kuttikatt v. Kunhikayamma*, 7 L.W. 119=23 M.L.T. 67=(1918) M.W.N. 235=43 Ind. Cas. 989.

BAKEWELL and PHILLIPS, JJ.

References:—(a) 30 M. 61, *Rel on.* (b) 30 M. 300; 6 M.H.C. 258; 2 L.W. 941, R.

(4) *Its nature and incidents—Suit by stanomdar to recover possession of trust properties—Limitation Act (IX of 1908), S. 2, cl. (8), Arts. 124, 144. Yalla Raja of Palghat v. Tharuvayurpada Nair*, 33 M.L.J. 26=(1917) M.W.N. 552=6 L.W. 195=41 M. 4. See Final Part, 1917, Col. 652.

(5) *Karnavan appointed by family Karar to which he is party—Renunciation of his rights as karnavan—Suit if lies to remove karnavan appointed by karar.*

Held, by the Full Bench, that a suit will lie to remove a Karnavan recognised as such by a family karar.

All the members in Council of a tarwad executed a karar whereby its karnavan for the time being was removed from the general management and the next senior, anandravan was constituted the karnavan, the superseded karnavan being, however, allowed to manage a family temple and to utilise the surplus income for his maintenance. In a subsequent suit to remove the karnavan appointed, *held* that the fact that the tarwad (including the new karnavan) gave the management of a temple and its income to the removed karnavan did not affect

Malabar Law—(Continued).

the other results of the karar, namely, the determination of the tenure of the removed person's office as karnavan and the appointment of the senior anandravan to the said office that the supersession of the removed karnavan's rights by the family karar could not be affected by any subsequent unilateral act or expression of intention on his part, and that the newly appointed karnavan, who became not only the *de facto* but also the *de jure* karnavan under the karar could be removed by suit for gross misconduct (a). *Chindan Nambiar v. Kunhi Ramon Nambiar*, 34 M.L.J. 400=7 L.W. 543=(1918) M.W.N. 283=41 M. 577=29 M.L.T. 316=45 Ind. Cas. 26.

WALLIS, C.J., SADASIVA AIYAR and SPENCER, JJ.

Reference:—(a) 32 M.L.J. 323, *Dist.*

(6) *Malabar Law—Decree against karnavan—When binding on the tarwad—Compromise decree—Burden of proof on party impugning same—Registration Act of 1866, S. 49—Compromise decree affecting immovable property, if invalid for non-registration—Indian Limitation Act (IX of 1908), S. 5—If applies to delay on account of error of law.*

A decree against the karnavan of a Malabar tarwad will be binding on the tarwad if the karnavan was in substance conducting the litigation in his representative capacity (a).

Under the Registration Act, 1866, a compromise decree affecting immovable property is not invalid for non-registration and is receivable in evidence without registration. It is for the party who impeaches a compromise to prove that it is illegal or void (b).

Delay due on account of error of law is not outside the scope of S. 5 of the Limitation Act (c). *Rayarappa Nambiar v. Yeetil Karaman*, 35 M.L.J. 51=8 L.W. 154=24 M.L.T. 28=45 Ind. Cas. 489.

AYLING and SESHAGIRI AIYAR, JJ.

References:—(a) 20 M. 129, *Cons.* (b) 31 M. 474, *F.*; 7 L.W. 94, *Dist.* (c) 6 L.W. 592, *F.*

(7) *Karnavan—Management, Delegation of, to another—Right of Karnavan to resume such management—Lease by Karnavan, Validity of—Melcharath granted by Karnavan before expiry of previous term.*

A karnavan, although he may have allowed another to discharge the duties of karnavan, may resume the management at any time, where a karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the tarwad, this will be a good ground for removing him from his *karnavasthanam* but a particular lease by him cannot be declared to be invalid as against the lessee, merely because it is not proved to be beneficial to the tarwad. A *melcharath* granted by a karnavan before the expiry of the previous term will not bind his successor but such

Malabar Law—(Continued).

melcharath is not necessarily invalid ab initio. *Abdulla Koya v. Eacheran Nair*, 35 M.L.J. 405—47 Ind. Cas. 945.

OLDFIELD and PHILLIPS, JJ.

References:—27 M.L.J. 175, 690 and 691, Dist.

- (8) *Suit by female member of tarwad against it for maintenance of herself and children—Marriage of such female member under Malabar Marriage Act (IV of 1896), if bars claim against tarwad—Right of member of tarwad to allowance, Nature of.*

In a suit by a female member of a tarwad and her children for maintenance against the tarwad, the defence was that as the woman's marriage had been registered under Act IV of 1896, she and her children should entirely look to her husband and not to the tarwad for maintenance. On second appeal, the High Court held that the right of a member of a tarwad for an allowance, being an incident of co-proprietorship in the property of the tarwad, and not one founded upon moral or quasi-legal obligations or on inability to maintain himself or herself, could not be denied unless circumstances were proved that the tarwad is not in a position to give a separate allowance. *Manikkath Ammal v. Padmanabha Menon*, 35 M.L.J. 509—24 M.L.T. 493—41 M. 1075.

SESHAGIRI AIYAR and BAKWELL, JJ.

References:—4 M. 171; 5 M. 71; 13 M.L.J. 499; 36 M. 203; 39 M. 79; 39 M. 317, Rel. on.

- (9) *Maintenance—Female member leaving her tarwad house and living with her husband—Husband able to support her—Right of such woman to claim maintenance from tarwad.*

A female member of a Malabar tarwad who leaves her tarwad house for the purpose of living with her husband is entitled to claim maintenance for herself and her children from the tarwad property even if her husband could maintain them.

The right of maintenance of a junior member is based on his right to a share of the tarwad property (a).

A member if he alleges good reasons for leaving the tarwad house, is entitled to maintenance from the tarwad under Marumakkathayam or Alyasanthan Law.

The category of good reasons is not exhaustive as considered in decided cases. *Kunhi Krishna Menon v. Kunhikayamma*, 35 M.L.J. 565—(1918) M.W.N. 751—24 M.L.T. 449.

AYLING and SADASIYA AIYAR, JJ.

References:—36 M. 597; S.A. No. 2065 of 1915, F.

- (10) *Kanom—Arrears of rent—Melcharthdar liable to collect and pay jenmi former arrears of rent—Melcharth, assignment of, to kanomdar—Jenmi, suit by, for arrears—Money had and received—Contract, suit on, by third person. Mannath Veettil Ithi Padku Menon v. Thasheth Meladam Dharman Achan Avergal*, 22 M.L.T. 543—34 M.L.J. 193—(1918) M.W.N. 98—41 M. 488—8 L.W. 118—43 Ind. Cas. 625. See Final Part, 1917, Col. 644.

Malabar Law—(Concluded).

- (11) *Kanom—Mortgagor and mortgagee—Acknowledgment of title—Estoppel.*

An assignee of a *kanom*, who acknowledges the title of the mortgagor (*Jenmi*) by accepting a fresh *kanom* deed, is estopped from denying the latter's title, although he was not let into possession by the mortgagor. *Govinda Menon v. Kuppan Nambudripad*, 24 M.L.T. 472.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—40 M. 561, F.; 36 B. 185, R.

- (12) *One member dissenting—Will—Conditional ratification of partition—If valid.*

When a partition was effected in a Malabar Tarwad, one member alone dissented and refused to join. The partition was however effected and the share of the dissenting member was kept separate. The dissenting member never brought a suit to set aside the partition but left a will in favour of his wife and children saying that if he did not set aside the partition by legal proceedings before death, the legatees would take the share allotted to him. The wife and children brought the suit for fresh partition on the ground that the original partition was void as all members were not parties.

Held the will was a conditional ratification of the partition which became effective when the testator died and the ratification completed the partition (a). *Kalliani Ammal v. P. Narayana Menon*, (1918) M.W.N. 38—45 Ind. Cas. 758.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

Reference:—(a) 29 M. 62, F.

- (13) *Karnavan—If entitled to revive a barred claim against the tarwad—Execution of mortgage by Karnavan in payment of a decree debt barred by limitation, if valid.*

The powers of a Karnavan of a Malabar Tarwad are more like those of a manager of a Hindu family than those of a Hindu father and the Karnavan has no power to revive a barred debt against the Tarwad.

A mortgage executed by a Karnavan in payment of a decree debt which was barred by limitation at the date of the mortgage is not binding on the junior members of the Tarwad (a). *Mankoothal Chathukutti Nair v. P. P. M. Kommappan Nair*, (1918) M.W.N. 144—35 M.L.J. 390—44 Ind. Cas. 572.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 5 M. 169 (F.B.), F.; 35 A. 207, disaffirmed; 15 M.L.J. 201; (1912) M.W.N. 396, Rel. on; *In re Rowson Field v. White*, 29 Chanc. 558, R.

- (14) *Suit to remove karnavan—Injunction restraining him from raising loans—Loan raised for necessary purposes in spite of such order—Loan if binds tarwad. See INJUNCTION*, No. 3, 35 M.L.J. 96.

- (15) *Otti mortgage—Right of ottidar to enforce pre-emption against auction-purchaser. See PRE-EMPTION*, No. 15, 34 M.L.J. 412.

Malabar Marriage.

See **MAD. ACT IV OF 1896.**

Malicious Prosecution.

- (1) *Suit for damages—Complaint false to the knowledge of complainant—Process issued to accused—Acquittal of accused after evidence taken—Malice.*

Where a person was dragged into the Criminal Court by reason of a complaint which to the knowledge of the complainant was false from beginning to end, but after evidence taken the accused was acquitted of all the charges made against him, *held* that the cause of action for a malicious prosecution was complete and the facts afforded sufficient evidence of malice. **Puttu Lal v. Ram Sarup**, 16 A.L.J. 468=46 Ind. Cas. 190.

TUDBALL and ABDUL RAOOF, JJ.

References:—38 C. 880; 24 M. 59; 5 Bom. L.R. 940, *Dist.*

- (2) *Prosecutor's mental state the pivot of all actions for damages for—Points to be proved by plaintiff in actions for—Plaintiff is bound to prove his innocence.*

In actions for malicious prosecution, the plaintiff must prove four things:—(1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause and (4) that the defendant was actuated by malice. Under the second and third heads, questions as to the plaintiff's innocence generally arise, but they must be regarded only as incidental to the questions whether the prosecution ended in the plaintiff's discharge or acquittal, and whether the defendant acted without reasonable or probable cause. Failure to prove more than this may be relevant to the question of damages (a).

The pivot upon which all such actions turn is the state of mind of the prosecutor at the time that he institutes or authorises the prosecution (b). **Gopala Krishna Kudna v. Narayana Kamthy**, 34 M.L.J. 517=23 M.L.T. 341=7 L.W. 604=(1918) M.W.N. 454=45 Ind. Cas. 803.

WALLIS, C.J. and SPENCER, J.

References:—(2) 25 B. 331; *Cox v. English, Scottish and Australian Bank, Ltd.*, L.R. (1905) A.C. 168; 28 C. 591, *Rel. on*; 24 M. 59, *Comm. on*; *Abrath v. N.E. Ry. Co.*, (1883) 11 Q.B. D. 440, *Expt.* (b) *Corea v. Peiris*, L.R. (1909) A.C. 549, *Hicks v. Faulkner*, (1878) L.R. 8 Q.B.D. 167, *R.*

- (3) *Damages for suit for—Essential conditions for sustaining suit—Discharge—Acquittal—Malice, when can be inferred.*

A suit for damages for malicious prosecution will lie even though the plaintiff had been merely discharged and not acquitted. The discharge of an accused person is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution (a). No general distinction between a discharge and an acquittal can be drawn and a person cannot be debarred from obtaining a

Malicious Prosecution—(Concluded).

remedy for malicious prosecution, because the facts alleged have possibly been so obviously false that a charge could not be sustained against the plaintiff.

Held that, before an action for damages for malicious prosecution could be sustained, something more than inference from the general circumstances of the criminal case is necessary and it must be definitely proved either that there was malice, or that there was such a wilfully false statement to the Police as would justify an inference of malice (b). **Maung Po Lun v. Ma Nyela Bon**, U.B.R. (1918) 1st Qr., p. 67=46 Ind. Cas. 337.

SAUNDERS, J.C.

References:—(a) 6 B. 376, *R.* (b) S.A. No. 28 of 1916 (U.B. Unrep.), *R.*

Malikana.

(1) *Patni lease—Sum recoverable by plaintiff described as malikana—Provision for recovery of such sum by summary procedure mentioned in Patni Regulation—Such sum is rent—Suit for recovery of arrears governed by what law.* See **BEN. ACT VII OF 1876 (LAND REGISTRATION)**, No. 5, 27 C.L.J. 474.

(2) *Suit to declare defendant's *ala* right only to 25 per cent. of land revenue without possession of land—Declaration of plaintiffs being *adma* owners—Entry in settlement records in favour of defendants—Onus on plaintiffs.* See **BURDEN OF PROOF**, No. 9, 63 P.W.R. 1918.

Malite Mabuza Rights.

Lease of mortgaged land on condition of holding so long as rent paid—Remission of rent for fixed term in consideration of receipt of certain amount in advance—Lessee only permanent sub-tenant not entitled to any proprietary interest in land—Lessee's right to redeem. See **MORTGAGE (REDEMPTION)**, No. 18, 14 N.L.R. 117.

Mandatory Injunction.

Suit for, to remove pillar driven into one's land by neighbour—License, plea of. See **LIMITATION ACT (1908)**, No. 162, 20 Bom. L.R. 327.

Market.

Custom of establishing—Presumption. See **CUSTOM**, No. 3, 43 Ind. Cas. 451.

Marriage.

(1) *Burmese youth under age of eighteen, if can make valid promise of marriage—Liability of such youth for damages for breach of such promise.* See **BUDDHIST LAW (MARRIAGE)**, No. 3, U.B.R. (1918), 1st Qr., 75.

(2) *Husband's petition for dissolution of marriage—No co-respondent mentioned—Leave to proceed without co-respondent, to be obtained before hearing of petition.* See **DIVORCE ACT (1869)**, No. 2, 45 C. 525.

Marriage—(Concluded).

(3) Presumption as to—Long cohabitation and treatment as husband and wife. See EVIDENCE, No. 4-b, 146 P.L.R. 1917.

(4) Marriage of female member of Malabar tarwad under Malabar Marriage Act—Right of such woman and her children to claim maintenance from tarwad if lost by marriage. See **MAJABAR LAW**, No. 8, 85 M.L.J. 609.

Marriage and Divorce Act (Part).

See ACT XV OF 1865.

Marriage Brocage Contract.

- 1) *Contract Act, Ss. 23, 65—Money paid by one party to marriage brocage contract to another—Breach of contract—Suit to recover money so paid—Conditions for claiming refund.*

In a suit to recover money paid by one of the parties to a marriage brocage contract to the other, held that the money could be recovered before any portion or any substantial portion of the unlawful purpose has been carried out.

The test to find out whether there is such a right to recover is not whether the transfer of an advantage under the agreement was merely ostensible or was intended to be real.

There is no warrant in the English decisions or in S. 23, Contract Act, for the distinction drawn in 43 C. 115 between agreements contrary to law or public policy and others which would merely have an unlawful object.

The words "discovered to be void" in S. 65, Contract Act, are more apt to describe an agreement which was void *ab initio*, but not then known by the parties to be so than an agreement of which the illegality must be taken to have been always known to them and hence the section is not applicable to such a case as the present (a).

If the plaintiff suing to recover money paid under such a contract does not plead that it is unlawful, the defendants can rely on it only if they further allege and prove that the unlawful agreement or a substantial part of it has been performed. But if the agreement is still entirely executory and no material part of the illegal purpose has been accomplished the defendants cannot plead that they hold the money for that purpose (b).

Per Bakewell, J.—In India marriage is not generally a matter of contract between the parties thereto but a status or condition imposed upon them by persons who are under a social duty to do so. Persons who undertake this duty must have regard solely to the interests of their wards and must not stipulate for a profit for themselves. **P. R. Srinivasa Aiyar v. A. Sesha Aiyar**, 84 M.L.J. 292.

OLDFIELD and BAKEWELL, JJ.

References:—(a) 9 B. 358; 89 B. 411; 43 C. 115, B. (b) *Barclay v. Pearson*, (1899) 2 Ch. 151; 85 C. 551, R.

Marriage Brocage Contract—(Concluded).

(2) Agreement to bring about marriage between plaintiff and defendant's relative—Agreement if legal consideration—Suit for recovery of price of mare—Such agreement if may be pleaded in avoidance of claim for money. See **CONTRACT ACT** (1872), No. 13, U.B.R. 1918, 4th Cr., 119.

Marumakkathayam Law.

Mopla in Burma—If governed by, or Mahomedan Law—Self-acquired property of such Mopla. Devolution of.

The mere fact that a Mopla, an undivided member of a Tarwad governed by Marumakkathayam Law, has lived for 2 or 3 years in Rangoon will make no difference in his personal law. His estate cannot be dealt with otherwise than it would have been dealt with as if he had lived continuously in his native country.

The self-acquired property of a member of a Tarwad governed by the Marumakkathayam Law devolves upon the Tarwad on his death. **Salika Umma v. Moopanatagath Amu**, 46 Ind. Cas. 794.

TWOMEY, C.J. and ORMOND, J.

Marupat.

Nature of—Stamp required where charge created on improvements for arrears of rent. See **LEASE**, No. 1, 41 M. 469.

Marz-ul-maut.

Doctrine of, applicability of transactions of Mahomedans. See **MAHOMEDAN LAW (ALIE-NATION)**, 16 A L.J. 158.

Master and Servant.

(1) *Schoolmaster, contract of service as—Service terminated by notice—Notice for what period required—Reasonable notice—What is reasonable notice in case of schoolmaster—Custom as to notice in such cases—Proof of custom.* **Wittenbaker v J. C. Galstaun**, 44 C. 917—43 Ind. Cas. 11. See Final Part, 1917, Col. 655.

(2) *Master, Liability of, for servant's wrong.*

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit though no express command or privity of the master be proved (a).

The owner of a vessel is not liable *qua* owner for damage caused by the negligence of the crew. He is liable only as employer of the wrong-doer. **David M. Bruce v. Mg. Kyaw Zin**, 45 Ind. Cas. 822.

TWOMEY, C.J. and MAUNG KIN, J.

Reference:—(a) (1867) 2 Ex. 259 at p. 265—16 L.J. Ex. 147=16 L.T. 461=15 W.R. 877.

(3) *Servant, Dismissal of, Gross insolence or insubordination, is a ground for—Wrongful dismissal—Damages, Suit for, and measure of.*

Where the plaintiff, an accountant in the defendant Company's service preferred certain

Master and Servant—(Concluded).

charges of a criminal nature against the local manager of the Company, who, in preparing an answer to those charges, wanted to remove one of the Company's registers, from the office to show it to his Counsel. And the plaintiff stopped him and told him that he could not, under the Articles of Association of the Company, show the Company's registers to outsiders.

Held, that the plaintiff's conduct did not amount to gross insolence or insubordination and that his dismissal by the Company was not justified.

A servant who has been improperly dismissed need not wait till the expiration of the term for which he was engaged to serve before bringing his action for damages.

Though it is the duty of the servant who is discharged to seek employment, the onus rests with the person who denies his right to receive his wages in full to show that he could have obtained employment. *Moulmein Rubber Plantation Co., Ltd. v. C. W. Mitchell*, 46 Ind. Cas. 615.

MAUNG KIN and RIGG, JJ.

(4) Communication by servant to his co-employees of suspicion of being poisoned at the instigation of master—Communication made in self-interest but *bona fide* and without malice—Such imputation of crime, if actionable. See *SLANDER*, No. 1, 35 M.L.J. 673.

(5) Liability of a Railway Company for wrongful assaults committed by its servants—Company not liable for acts of its employees which the Company itself is not empowered to do—Indian Railways Act (IX of 1890), ss. 108, 121, 128, 132. See *TORT*, No. 2, 20 Bom. L.R. 126.

Maxims.

(1) *In pari delicto, potior est conditio possidentis*. Maxim, Applicability of. See *AGREEMENT*, 46 Ind. Cas. 424.

(2) *Omnia presumuntur rite esse acta*. Applicability of, when question of attestation arises after admission of execution. See *ATTESTATION*, 47 Ind. Cas. 9.

(3) *Quod fieri non debet factum valet*—Doctrine of—Applicability of—Service of summons, to. See *SERVICE OF SUMMONS*, 46 Ind. Cas. 277.

Meaning.

Word, of a—Question of fact.

The meaning of a word is a question of fact, not of law. *Madho Rao v. Govindbhat*, 46 Ind. Cas. 794.

DRAKE-BROCKMAN, J.C.

Melcharath.

Melcharath granted by karnavan before expiry of prior lease, if void *ab initio*—Delegation by karnavan of management to another—Right to resume management so delegated. See *MALABAR LAW*, No. 7, 35 M.L.J. 405.

Melwaram.

Grant of inam—Presumption as to grant of melwaram only if proper. See *INAM*, No. 1, (1918) M.W.N. 859 (P.C.).

Memorandum of Appeal.

Filing of, with deficit Court-fee—Court, Duty of, not to accept under S. 4, Court Fees Act, 1870—Filing such a memo. of appeal, by Vakil not in good faith under Limitation Act, 1908, S. 2 (7)—Negligence of Vakil not sufficient cause under S. 5. See *COURT FEES ACT*, No. 2-b, 3 Pat. L.J. 484.

Memorandum of Objections.

(1) Cross-objections against co-respondent when may be filed. See *CIV. PRO. CODE* (1903), No. 493, 16 A.L.J. 587.

(2) Respondent content with decree appealed from—Right to resist appeal without filing memorandum of cross-objections. See *INTEREST*, No. 6, 48 P.W.R. 1918.

Merger.

Court of Equity—Question of merger—Mokarrari and patni, merger.

In a Court of Equity the question whether there is merger or no. was considered to depend upon the express or implied intention of parties.

Where plaintiffs contend that the *mokarrari* merged in the *patni*, when both became vested in the same person, the Court ought to have considered the question whether the evidence showed an intention to keep the two interests apart, or it was to the interest of the *mokarraridar* to keep them apart. *Dulhni Lachanbati Koeri v. Bodhuath Tewari*, 43 Ind. Cas. 449.

CHAMIER, C.J. and SHARFUDDIN, J.

Reference:—23 Ind. Cas. 612, F.

Messe Profits.

(1) *Right to—Alienee from co-parcener—Hindu Law—Alienation.*

Where the members of a co-parcenary have become divided in status, an alienee from a co-parcener, who has not been in enjoyment of his share, is entitled to his share of profits from the date of his purchase.

The rule that profits cannot be claimed till after decree applies only to the case of a joint family where the members have not become divided before suit (a). *Yanjapuri Goundan v. Pachamuthu Goundan*, 7 L.W. 225.

SPENCER and KRISHNAN, JJ.

References:—(a) 39 M. 265; 4 L.W. 99; 14 C. 493; 16 C. 397, D.

(2) *Civ. Pro. Code*, 1908, O. XX, r. 12—*Appeal to Privy Council—Period for which profits should be awarded, Calculation of.*

On the 7th March, 1918, the Privy Council dismissed an appeal from a decree of the

Mesne Profits—(Continued).

Calcutta High Court which was itself a decree dismissing an appeal from a decree dated the 28th November, 1905, of the Subordinate Judge awarding the plaintiffs mesne profits "from the date of decree to the date of recovery of possession." The plaintiffs obtained delivery of possession, some on the 29th May, 1914, and others on the 14th January, 1916. In an application for assessment of mesne profits from the 28th November, 1905, till delivery of possession, *held* that mesne profits must be assessed as prayed for, because, for purposes of O. XX, r. 12, decree in this case must be taken to mean the Privy Council decree which in effect awarded profits from the 28th November, 1905, to date of possession and that such a construction would be in accordance with O. XX, r. 12, Civ. Pro. Code. *Nand Kumar Singh v. Bilasram Marwari*, 3 Pat. L.J. 116 = 4 Pat. L.W. 100.

CHAPMAN and JWALA PRASAD, JJ.

Reference :—23 A. 151, R.

(3) Calculation of value of appeal to Privy Council—Mesne profits of property if may be added to its value to make up appealable value. See APPEAL (TO PRIVY COUNCIL), No. 12, 3 Pat. L.J. 377.

(4) Due to mortgagor between the date of payment under preliminary decree and date when he is put in possession of his property—Mortgagor, if bound to have such profits included in final decree. See CIV. PRO. CODE (1908), No. 33, 7 L.W. 269.

(5) Trespasser dispossessing actual cultivator—Compensation—Principle of calculation of mesne profits. See COMPENSATION, No. 1, 48 Ind. Cas. 53.

(6) Usufructuary mortgage—Mortgagee refusing to deliver possession after satisfaction of mortgage—Ejectment, Suit for, if mortgagor entitled to maintain—Mesne profits accruing from date of ejectment suit, Suit for, if lies. See EJECTMENT, No. 4-a, 46 Ind. Cas. 743.

(7) Nature of, and right to. See HINDU LAW (ALIENATION), No. 12, 23 M.L.T. 245.

(8) Specific Relief Act, S. 9—Possessory suit under, Subsequent suit for, if maintainable—Possessory suit and suit for mesne profits, cause of action for, if different. See JURISDICTION (OF CIVIL COURTS), No. 7, 46 Ind. Cas. 885.

(9) Suit for mesne profits for period during which plaintiff, though entitled to land was not in possession of it, Maintainability of, in Revenue Court. See JURISDICTION (OF REVENUE COURTS), No. 7, 53 P.R. 1918.

(10) Non-transferable occupancy holding, Purchaser of, Liability of, for—Assessment of, Basis of—Civ. Pro. Code (1903), S. 2 (12). See LANDLORD AND TENANT, No. 52 b, 46 Ind. Cas. 624.

(11) Suit for—Ptni sale—Possession given to purchaser—Sale set aside—Reversal of decree—Claim for. See LIMITATION, No. 1, 27 C.L.J. 357.

Mesne Profits—(Concluded).

(12) Suit for redemption—Mesne profits directed to be ascertained in execution—Time runs from date of such ascertainment. See MORTGAGE (REDEMPTION), No. 1, 16 A.L.J. 88.

(13) Suit for, for wrongful dispossession from a grove—Jurisdiction of Small Cause Court. See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), No. 14, 16 A.L.J. 55.

(14) Suit for possession and—Decree silent regarding future—Fresh suit for such profits not barred. See RES JUDICATA, No. 1, 16 A.L.J. 182.

(15) Plaintiff in possession under decree for possession—Reversal of such decree by High Court—Application for possession by defendant without claiming mesne profits from plaintiff for period during which plaintiff was in possession—Award of possession to defendant—Subsequent application by defendant for mesne profits if barred. See RESTITUTION, No. 5, 3 Pat. L.J. 367.

(16) Specific legacy—Legatee's right to, arises from what date. See WILL, No. 9, 7 L.W. 511.

(17) Cancellation of Hindu father's deed of transfer on condition of son paying certain amount to vendee—Vendee if in unlawful possession—Vendee if liable to pay mesne profits. See WITNESSES, No. 2, 21 O.C. 228.

Ministerial Act.

See ADMINISTRATIVE ORDER.

Minor.

(1) Contract Act (IX of 1872), S. 65—Infant—Contract—Money lent—Fraudulent misrepresentation as to age—Equitable relief—Costs—Discretion—Interference by appellate Court.

A minor cannot be made to repay money, which he has spent, merely because he received it under a contract induced by his fraud (a).

The plaintiff brought a suit for sale on two mortgage-bonds. The defendant pleaded that, at the time of execution of the bonds, he was a minor. There was no allegation nor proof that the defendant had made any fraudulent misrepresentation as to his age whereby he had induced the plaintiff to advance money :—*Held* that the plaintiff was not entitled to recover.

The Court below had deprived the successful defendant of his costs, because in its opinion he was responsible for the litigation. There was also no proof of any wrongful conduct on the part of the defendant :—*Held* that there being no evidence of this fact, the successful defendant ought to have been awarded costs.

Where the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order

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which the Court below ought to have made. **Radhey Shyam v. Bihari Lal**, 16 A.L.J. 592—40 A. 558.

PIGGOTT and WALSH, JJ.

References:—(a) *R. Leslie, Limited v. Sheill*, (1914) 3 K.B. 607, F.; *Mahomed Syed v. Ariffin*, (1916) 2 A.O. 575; 31 A. 21, R.

- (2) *Liability of, when ancestral trade carried on on his behalf—Contract Act (IX of 1872), S. 247—Interest, not contracted for and not recoverable under the Interest Act (XXXII of 1839) allowed as damages.*

A minor, on whose behalf an ancestral trade is carried on, is not personally liable for debts incurred in such business.

The liability of such a minor is not greater than that of a minor admitted to a partnership as laid down by S. 247 of the Contract Act.

The amount due having been ascertained and a *moblogbandi* signed by the defendants:

Held, that, though no contract to pay interest was proved and the case was not covered by the Interest Act, some interest should be allowed by way of damages for the detention of the money. **Khetra Mohan Toddar v. Nishi Kumar Saha**, 22 C.W.N. 488—45 Ind. Cas. 667.

N. R. CHATTERJEA and SMITHER, JJ.

References:—15 C.L.J. 684 (687); 26 C. 955; 31 B. 354; 20 B. 767; 30 C. 539; 3 C. 738, R.; 20 M. 181, Diss.

- (3) *Family arrangement to settle a dispute—Its binding character, whether minor affected by it may repudiate it—Grounds on which family arrangement may be challenged on behalf of a minor.*

In the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or any similar ground, a partition or family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or reside from. If the parties have settled a dispute, such settlement will not be set aside on the ground that it gave to one of them more than what he ought possibly to have recovered if he had taken the judgment of the Court upon the matters in difference between them. The Courts will not be disposed to scan with much nicety the quantum of consideration.

There is nothing in this doctrine of family arrangements opposed to the general principle that when it is sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage had been taken of the minor's position, a family arrangement can be set aside on the ground of undue influence or inequality of position or one of the other grounds which would vitiate such an arrangement in the case of adults. But when there is no defect of this nature, the settlement of a doubtful claim is of as much

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advantage to a minor as to an adult, and where a genuine dispute has been fairly settled the dispute cannot be reopened solely on the ground that one of the parties to the family arrangement was a minor. **Keramatulla Meah v. Keramatulla Meah**, 23 C.W.N. 118.

N. R. CHATTERJEA and NEWBOULD, JJ.

References:—20 C.W.N. 210; 31 C. 111; 34 C. 70; *Stapilton v. Stapilton*, 1 W. & T. L.O. 7th Ed. 223, R.

- (4) *Sale by, during minority—Suit to set aside on attaining age—Right of—False representation by minor as to age—Whether deprives the minor's right to relief—Mere silence or not disputing that he was of age—Whether amounts to a misrepresentation by the minor as to age—Array of minor in the suit on one side or the other—Whether affects his right to relief—Equities on cancellation—Minor, if bound to compensate purchaser—Specific Relief Act (I of 1877), S. 41—Statutory right to impose condition—Compensation apart from statute—If Court has power to award—Right to direct restitution, statutory and equitable—Difference between.*

Per curiam.—A minor is entitled to have a sale executed by him during his minority set aside in the absence of proof that he deliberately misled the purchaser into buying by a false representation that he was of age (a).

Quere:—Whether even such false representation would disentitle the minor from claiming the relief?

Per Seshagiri Aiyar, J.—It is not open to the Court to conclude that the minor is guilty of a misrepresentation as to age from his mere silence or conduct in not disputing that he was a major; to deprive the minor of the advantage secured to him by the law, an assertion of the untrue fact must have been made by him.

Also per Seshagiri Aiyar, J.—The grant of the relief to which the minor is entitled does not depend upon and is not affected by the fact that the minor is the plaintiff and not the defendant in the suit.

Under S. 41 of the Specific Relief Act, 1877, a Court in this country is entitled to call upon the minor to refund the consideration he has received before his prayer for the cancellation of the sale is granted but apart from the discretion which the statute confers, there is no general rule of equity under which a minor can be compelled to pay compensation to the transferee on avoidance of the transfer.

Where a minor on attaining majority sued to have a sale deed executed by him during his minority along with his elder brother for a sum of Rs. 300 set aside and it was found that no false representation was made by the minor at the time of the alienation that he was of age.

Held that he was entitled to have the deed cancelled to the extent of his own share only on payment to the purchaser of Rs. 150, his share.

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of the consideration for the sale. *Mallacheru v. Raghavayya v. Mallacheru Subbayya* 7 L.W. 124—42 Ind. Cas., 908.

COURT TROTTER and SESHAGIRI AIYAR, JJ.

References:—(a) 41 B. 480, *Diss.*; R. *Leslie, Ltd. v. Sheill*, (1914) L.R. 3 K.B.D. 607, F.; 80 C. 539 (P.C.), R.

(5) *Mortgage in favour of minor, validity of, Bhagabhor Moudal v. Mohini Mohan Banerjee*, 33 Ind. Cas. 994—22 O.W.N. 130. See Final Part, 1916, Col. 1056.

(5-a) *Power of attorney relating to management of jagir of, Construction of—Person is authorised also to defend minor's title to jagir—Admission by such person, how far binding on minor.*

A power of attorney has to be construed strictly.

A power of attorney relating to matters connected with only the management of a minor's jagir cannot, in the absence of express provisions, authorise the person in whose favour it has been executed, to defend the minor's title to the jagir. Statements and admissions by such an unauthorised agent cannot bind the minor. *Nazar Ali v. Ashraf Ali*, 47 Ind. Cas. 528.

PRIDEAUX, A.J.C.

(5-b) *Decree against a, Validity of, when not properly represented—Execution-sale, jurisdiction of Court to order—Minor, Power of, to recover property sold in execution of such decree—Suit for recovery, Limitation for—Limitation Act (1908), Arts. 12 and 14—Minor, if can be compelled to reimburse purchase-money.*

A decree against a minor, when he is not properly represented in the suit is a nullity (a); and a Court has no jurisdiction to sell the minor's property in execution of such a decree and in case of such a sale taking place, the minor can recover the property even from a stranger purchaser, as the purchaser is not protected by the fact of his not being a party to the suit (b). A suit by him after attaining majority for recovery of the property is governed by Art. 144 and not Art. 12 of the Limitation Act, (c) and he cannot be compelled to reimburse the auction-purchaser. *Hira Singh v. Gulam Qadir*, 113 P.R. 1918.

CHEVIS, J.

References:—(a) 13 Ind. Cas. 414; 17 Ind. Cas. 263; 20 O.L.J. 469, *Ref. to*. (b) 20 C.L.J. 469; 10 A. 166 (P.C.); 14 C. 18; *Dist.* (c) 307 P.W.R. 1912, *Ref. to*.

(6) *Member of a firm—Can act as an agent—His purchasing shares of a Limited Co.—His and the Firm's liability thereon—Contract Act (IX of 1872), Ss. 184 and 248.*

Held, that as under S. 184 of the Indian Contract Act, IX of 1872, a minor can act as an agent, the allotment of the shares of a Limited Company to a firm on the application of its active minor member who does most of the firm's work is valid and binding on the

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firm; and that under S. 248 of the said Act the minor himself becomes equally liable unless on attaining the age of majority he gives public notice within a reasonable time of his repudiation of the partnership. *Firm of Gopimal, Durga Das v. The Jain Bank of India*, 17 P.L.R. 1918—38 P.W.R. 1919—45 Ind. Cas. 17.

SCOTT-SMITH and SHADI LAL, JJ.

(7) *Assignee of Muhammadan minor—Limitation—Point of limitation can be taken at any time even suo motu by Court—Defendant bound to pay Court-fee on entire claim, when pleading limitation in appeal—Limitation Act, 1908, S. 6.*

Held that an assignee of a Muhammadan minor cannot avail himself of the benefit conferred upon the minor by S. 6 of Act IX of 1908.

Held, also, that abandonment of a point of limitation in the lower Court does not relieve the appellate Court of the duty of taking notice of the Statute of Limitation (a).

But, where the plea of limitation involves total dismissal of the suit and the appellant fails to pay Court-fee on the entire claim within the period prescribed for an appeal, the appellate Court cannot give him the advantage of limitation, as the law is that, where a suit ought to be dismissed *in toto* as time-barred, the defendant must appeal on the whole and not on any particular portion of it (b). *Hukam Singh v. Shahab Din*, 14 P.W.R. 1918—44 Ind. Cas. 890.

LESLIE-JONES, J.

References:—(a) 10 C.L.J. 297 (P.C.); 24 O. 1 (P.C.), R. (b) 28 M. 67; 27 M.L.J. 677, F.

(8) *Withdrawal of suit on behalf of minor, when permissible—Minor, Benefit of—Court, Duty of, to protect interests of minor—Civ. Pro. Code (Act V of 1908), O. XXIII, r. 1.*

Held, that the Court should be very jealous of the interests of minors and should not allow a suit or part of a suit, instituted on a minor's behalf, to be withdrawn without being satisfied that it is for his benefit.

In a suit for a declaration that the sale of certain land will not affect the plaintiffs' reversionary rights, it appeared that the plaintiffs had, in their minority, sued, along with certain others, for the same relief, asking, in the alternative, for pre-emption of the land sold, and that, subsequently, there had been an amendment of the plaint, by which the other plaintiffs alone claimed pre-emption, it being stated that the minor plaintiffs had no money with which to pre-empt. Later on, an application was presented by all the plaintiffs for permission to withdraw the prayer for declaration. The Court did not give its permission, nor did it consider whether the withdrawal was for the benefit of the minors. The case proceeded and eventually a decree for pre-emption was passed in favour of the adult plaintiffs, but by mistake the names of all were entered in the decree.

Minor—(Continued).

Held, that, inasmuch as no reason was given by the next friend for withdrawing the suit on behalf of the minors, nor was the Court asked to allow the plaintiffs to withdraw from part of the suit with liberty to institute a fresh suit in respect of the subject-matter of such part, nor was the interest of the minors considered, the minors were entitled to bring a separate suit for the relief, which was abandoned in the previous suit. *Rajada v. Ghulla*, 164 P.W. R. 1918=47 Ind. Cas. 508.

SCOTT-SMITH and MARTINEAU, JJ.

References:—27 M. 377; 29 C. 735; *Gregory v. Molesworth*, (1747) 3 Atk. 628=26 E.R. 1160, F.

(9) Assignee of, it acquires minor's rights under S. 6, Limitation Act. See APPEAL (GENERAL), No. 15, 24 C.W.N. 931.

(10) Award made while minor not represented, Validity of. See CIV. PRO. CODE (1909), No. 548, 23 M.L.T. 99.

(11) Compromise of claim obtained from guardian by alleging false will—Claim not *bona fide*—Compromise not binding on minor. See COMPROMISE, No. 1, 22 C.W.N. 463.

(12) Contract by, Validity of—Ratification of, on attaining majority—Mortgage by, on attaining majority—Consideration, Fresh advances and old minority debts—Validity of mortgage. See CONTRACT, No. 6, 46 Ind. Cas. 765.

(13) Whether necessary parties to suit regarding debt contracted by the *karta* of a Mitakshara joint family for family purposes. See HINDU LAW (DEBT), No. 3, 45 Ind. Cas. 76.

(14) Joint Hindu family, A member—Property of—If guardian can be appointed in respect of. See HINDU LAW (JOINT FAMILY), No. 6, 46 Ind. Cas. 815.

(15) Joint Hindu trading family—Liability of minor member assisting in trade to be declared insolvent—Personal liability. See INSOLVENCY, No. 4, 24 M.L.T. 216.

(16) Lease to a, With condition to pay rent, if null and void.—Person in possession of property under such a lease, Ejectment of.—Chota Nagpur Tenancy Act (VI of 1908), S. 41. See LEASE, No. 11-b, 3 Pat. L.J. 518.

(17) Transfer of minor's property by minor's mother and guardian—Sue by minor to set aside alienation. See LIMITATION ACT (1908), No. 120, 20 Bom. L.R. 408.

(18) Sale deed executed by minor—Suit to recover back possession of property sold. See LIMITATION ACT (1908), No. 144, 40 Bom. L. R. 802.

(19) Suit to set aside sale—Limitation for. See LIMITATION ACT (1908), No. 29, 40 P.L.R. 1918.

Minor—(Concluded).

(20) Gift by grandfather to minor grandson—Transfer of possession if necessary—Gift to minor ward by the guardian—Declaration of—Whether raises any presumption of an intention to complete the transfer—Acceptance of gifts under Mahomedan Law—Principles as to, discussed. See MAHOMEDAN LAW (GIFT), No. 5, 35 M.L.J. 541.

(21) Muhammadan Law—Mother, Acts of, as *de facto* guardian how far binding on. See MAHOMEDAN LAW (GUARDIANSHIP), No. 3 103 P.R. 1918.

(22) Letters of administration granted to minor sisters and their married sister and her husband—Letters granted to minors invalid—Sale by brother-in-law of minors as Administrator, Rights of minor sister's-in-law to treat as void—Limitation—Sale by sisters of their share to another an act of avoidance. See POSSESSION, SUIT FOR, No. 2, 9 L.B.R. 186.

(23) Suit by minor without next friend—Allegation by minor of having attained majority, during pendency of suit and application to proceed as major with suit—Plaint ordered to be struck off—Legality. See REVISION, No. 7, 16 A.L.J. 737.

Minority.

Burmese youth under age of 19—Promise of marriage if can be made by such youth—Liability of such youth for damages for breach of promise of marriage. See BUDDHIST LAW (MARRIAGE), No. 3, U.B.R. (1918), 1st Qr., 75.

Misfeasance.

If statutory authority servant or agent of Crown—If such body exempt from liability for misfeasance as exercising sovereign functions—General responsibility of such bodies. See TORT, No. 1, 41 M. 538.

Misjoinder of Causes of Action.

(1) Civ. Pro. Code, O. II, rr. 6 and 7—Misjoinder of causes of action—Possession or joint possession of particular plot, Suit for—Maintainability.

Plaintiff brought a suit in the alternative to recover certain particular specified land on the footing that a legal partition had been made between the parties and, if the partition was not legal, he asked to be put in joint possession with defendants. The defendants did not apply to the Court to exclude one of the causes of action for the present trial as they might have done under O. II, r. 6 of the Civ. Pro. Code. The case went to trial in both lower Courts without objection. **Held** that such an objection cannot for the first time be raised in second appeal. *Dwarik Bala v. Nidhi Ram Bala*, 40 Ind. Cas. 462.

FLETCHER and NEWBOULD, JJ.

(2) Suit for partition of immoveables, moveables and funds of joint family business—Split if bad as showing. See COURT FEES ACT, No. 17, 22 C.W.N. 669.

Misjoinder of Parties.

Alienations by two daughters respectively of their father's property — Son of one daughter, Alienations attacked by—Suit against all the alienees if bad for misjoinder of parties.

In a suit for possession on the ground of heirship of the whole of the properties alienated by different alienors against the several alienees the contention was that there was a misjoinder of parties and the Court ordered the return of the plaint with a direction that the suit should be continued against any one set of defendants the plaintiffs may select. *Held* that a revision against the order and that the balance of convenience lay on the side of allowing the suit to proceed against all the defendants jointly. *Lal Chand v. Musst. Manohri*, 59 P.R. 1918=64 P.W.R. 1918=44 Ind. Cas. 549.

LESLIE-JONES, J.

References:—167 P.L.R. 1911; 83 B. 293; 29 C. 871; 24 P.R. 1899, *Rel. on*; 6 Ind. Cas. 577, *Dist. and Diss.*

Misjoinder of Parties and Causes of Action.

Civ. Pro. Code (Act XIV of 1882)—Civ. Pro. Code, O. I, rr. 1, 3; O II, rr. 3, 4, 5—Rules of the Supreme Court, O. XVI, rr. 1, 4; O. XVIII, r. 1—Any right to relief, and right to any relief, meaning of—Arising out of or in respect of the same act or transaction—Any common question of law or fact—Judgment—Cl. 15 of the Letters Patent—Order asking the plaintiff to elect defendants against whom to proceed, whether a judgment. Ramendra Nath Ray v. Brojendra Nath Das, 21 C.W.N. 794=41 Ind. Cas. 944=45 J. 111=27 C.L.J. 158. See Final Part, 1917, Col 666.

Misrepresentation.

Company — Liquidation — Share-holder's right to be removed from the list of contributors. Principles governing—Liability as contributory how far affected by fraud or misrepresentation—Share-holder when can have his contract to take shares set aside—Repudiation. See CONTRIBUTORY, No. 2, 42 P.R. 1918.

Mistake.

(1) Relief on ground of, Grant of, Principles guiding—Mistake in original decree, Suit to rectify decree on ground of, Maintainability of. See AMENDMENT OF DECREE, No. 5, 3 Pat. L.J. 465.

(2) Limitation Act (1908), S. 5—Appeal, Filing of, beyond time—Legal adviser, Mistake of, Proof. See APPEAL (GENERAL), No. 20, 45 Ind. Cas. 725.

Mistake of Law.

Tenancy, Area of, Mistake as to, if a—Second appeal, Interference in. See FINDING OF FACT, 44 Ind. Cas. 351.

Mixed Question of Fact and Law.

Benami or fraud, Question of, a—Inferences drawn from facts proved, when error of law—Findings of fact, Interference with, in second appeal. See APPEAL (SECOND APPEAL), No. 6-b, 43 Ind. Cas. 49=3 Pat. L.W. 339.

Mokurrari Tenure.

Lessor dispossessing tenure-holder—Right to withhold entire rent. See LANDLORD AND TENANT, No. 31, 44 Ind. Cas. 658.

Money Decree.

(1) Execution of—Mortgage-debt if can be sold by separating debt from security. See PUN. ACT XIII OF 1900 (ALIENATION OF LAND), No. 3, 16 P.L.R. 1918.

(2) Deed of anomalous mortgage—Absence of independent covenant to pay—Provision for personal remedy when sale proceeds insufficient to satisfy debt—Simple money decree if could be passed. See MORTGAGE (ANOMALOUS MORTGAGE), No. 1, 21 O.C. 341.

Money Had and Received.

(1) Partnership of four persons, R and defendants 2 to 4—Insolvency of partner R—Right of R at time of adjudication only to a fourth of firm's assets—Sale by Official Receiver of all outstandings due to firm—Purchase at such sale of all such outstandings by first defendant the purchaser—Collection by first defendant purchaser of certain debt due to firm—Money decree obtained by plaintiff against defendants 2 to 4—Insolvency of defendants 2 and 3—Attachment by plaintiff of money with first defendant as money belonging to defendants 2 to 4—Suit by plaintiff to recover three-fourths of money in hands of first defendant alleging that it was money had and received by first defendant to use of defendants 2 to 4—Maintainability of suit.

Four persons, R and the defendants 2 to 4, formed a partnership, of whom R was adjudicated an insolvent. At the time of adjudication, R was entitled only to a fourth share in the partnership assets, which principally consisted of the outstandings due to the firm by its debtors. In a sale of the whole of such outstandings by the Official Receiver, the 1st defendant became purchaser thereof, under the belief that he was purchasing the whole, and not merely R's one-fourth share of such outstandings. Defendants 2 and 3 subsequently became insolvents one after another. The plaintiff obtained a money decree against defendants 2 to 4, and, after attaching money, alleged to belong to them and to be in 1st defendant's possession was appointed Receiver in his own execution and, in that capacity, sued all the four defendants for recovery of three-fourths of the amount recovered by the 1st defendant from a debtor of the partnership, on the allegation that three-fourths share of the money so recovered by the 1st defendant was money had and received by such 1st defendant for the use of defendants 2 to 4. The defence of the 1st defendant was that

Money Had and Received—(Continued).

the money was a sum due to the defendants 2 to 4 and R, the right to collect which he had acquired legally and that if his own title be bad, some at least of the money had vested in persons other than the plaintiff, those who were administering the 2nd and 3rd defendants' estates in insolvency. Held that the plaintiff's attachment of the shares of the defendants 2 and 3 was legally ineffective as such shares had become vested in the Official Receiver or in the Court, that the plaintiff could execute his decree against them only by proving in their insolvencies, and that the plaintiff, in any event, had no cause of action against the 1st defendant for money had and received by him to the use of the defendants 2 to 4 as there was no privity between the plaintiff and the 1st defendant or between the 1st defendant and the other three defendants.

Per Oldfield, J.—The action for money had and received is no doubt still to be regarded, as it was originally, as based on an implied or fictional promise. But *Sinclair v. Brougham*, (1914) A.C. 398, is completely in accordance with the great body of other authority in negating the possibility of such a promise being deduced from the *aequum et bonum*, as it may appeal to the sympathy of the Court in the particular case, or from circumstances, in which the defendant, having no privity with the plaintiff, when the money was received, need not be supposed to have given and had no duty to give any promise.

Per Sadasiva Aiyar, J.—The scope of the action for money had and received ought not to be extended beyond what would be covered by the principles governing the numerous decisions which have laid down what kinds of actions do come within it and what not while the privity of contract is of course not necessary to sustain such an action, there must what might be called privity of a legally recognisable nature such as some knowledge of particular facts in the person who received the money and some mistake or ignorance of fact on the part of the person who paid the money, or some relation of trust and confidence between the person who received the money and the person claiming the money or a portion thereof on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant. *Ramasami Naidu v. Muthusamia Pillai*, 35 M.L.J. 591—(1918) M.W.N., 796—41 M. 928.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—*Sinclair v. Brougham*, (1914) A.C. 398; 30 M.L.J. 415; 9 M.L.J. 57; 20 C.W.N. 983, R.; 10 M. 69; 37 M. 391; 32 M. 191; 9 B.L.R. 348; 32 O. 527; 2 C. 393, *Dist.*

(3) *Money paid under compulsion of legal process, Recovery of—Decree or judgment under which money paid subsisting—Decree, Suit to set aside, barred by limitation—Suit to recover money paid under decree, Maintainability of.*

Money Had and Received—(Concluded).

Money recovered which has been paid by the plaintiff to the defendant under a compulsion of legal process, which is afterwards found not to have been due, cannot be recovered back as money had and received.

Money paid under a decree or judgment cannot be recovered back in a fresh suit so long as the decree or judgment under which it was recovered remained in force. The decree or judgment must be taken as subsisting until it is reversed or superseded by some ulterior proceeding.

Money paid by the plaintiff to the defendant in excess of the sum due in pursuance of the decree cannot be recovered, as the decree sought to be set aside by the plaintiff remains intact and cannot be set aside on account of the suit being barred by limitation. *Upendra Chandra Singh v. Chlodttil*, 46 Ind. Cas. 563.

JWALA PRASAD, J.

(3) Legal process, Money paid under compulsion of, Recoverability of, *See* AMENDMENT OF DECREE, No. 5, 3 Pat. L.J. 465.

(4) Suit for—*Thruvanti* interest—Limitation for recovery of. *See* LIMITATION ACT (1909), No. 129, 7 L.W. 330.

(5) Rent of house paid to one co-owner—Suit by another to recover his share—Jurisdiction of Small Causes Court. *See* REVISION, No. 5, 16 A.L.J. 679.

Money-lending Transactions.

Court's power to give relief when money-lender not shown to have taken undue advantage of his position. *See* INTEREST, No. 3, 29 C.W.N. 130 (P.C.).

Mortgage.

1.—GENERAL.

2.—ACCESSION TO MORTGAGED PROPERTY.

3.—ANOMALOUS MORTGAGE.

4.—BY CONDITIONAL SALE.

5.—CONTRIBUTION.

6.—DEBT.

7.—ENGLISH MORTGAGE.

8.—EQUITABLE MORTGAGE.

9.—FORECLOSURE.

10.—PRIORITY.

11.—REDEMPTION.

12.—SALE.

13.—SIMPLE.

14.—SUB MORTGAGE.

15.—SUBROGATION.

16.—USUFRUCTUARY.

—1.—General.

(1) *Mortgage by ghatwal—Property inalienable but subsequently became alienable.*

A mortgage by a ghatwal of a certain property which was subject to certain restrictions on his right of alienation at the time of execution but which were removed afterwards and before the institution of suit, though it operates as a conveyance, is operative as an executory agreement, which attaches to the property, the

Mortgage—(Continued).**—1.—General—(Continued).**

moment the restrictions are removed and in equity transfers the beneficial interest to the mortgagee without any act done by the mortgagor to confirm the mortgage (a). *Surendra Nath Dey v. Rajendra Chandra Chandra*, 27 O.L.J. 289 = 43 Ind. Cas. 740.

MOOKEBJEE and BEACHCROFT, JJ.

References:—(a) *Holroyd v. Marshall*, (1862) 10 H.L.C. 191; *Colleyer v. Issacs*, (1811) 19 Ob. D. 342; *Tailby v. Official Receiver*, (1888) 13 A.C. 523; 7 O.L.J. 387; *Mackinlay v. Dunlop*, 1 Tay. and Bell. 498; 31 C. 667; 10 A. 189; 29 A. 163; 40 C. 173. R.; *Purna Cuhapa v. Soudamini Baishnabi*, (Unrep.) S.A. No. 1884 pt 19C3, Dist.

- (2) *Mortgage suit — Mortgagees related to mortgagor—Bond executed in consequence of mortgagees becoming aware of the demand by another creditor of mortgagor for repayment of his dues—Mortgage bond whether fraudulent.*

Where the defendants Nos. 1 to 3 executed a mortgage bond in favour of the plaintiff for Rs. 16,000 due to the latter in consequence of the latter having come to know that defendant No. 4, another creditor of the defendants Nos. 1 to 3, was pressing for payment and thereafter defendant No. 4, obtaining a decree against defendants Nos. 1 to 3, purchased the mortgage properties, and then the plaintiff brought the present suit to enforce the security whereupon the defendant No. 4 contended that the mortgage was fraudulent:

Held, that because the plaintiff was related to defendant No. 2 and was aware of the fact that defendant No. 4 was demanding his dues from defendants Nos. 1 to 3 and was bringing pressure to bear upon them were no reasons why the plaintiff should not require the defendants Nos. 1 to 3 to secure the repayment of the money due to him (a). *Rash Mohan Saha v. Kristodas Ray*, 22 C.W.N. 984 = 47 Ind. Cas. 412.

TEUNON and RICHARDSON, JJ.

References:—(a) 43 C. 521 = 20 C.W.N. 993 = 23 C.L.J. 406; 21 C.W.N. 585 (P.C.), F.; 18 C.W.N. 841 (P.C.) = 37 M. 227, Dist.

- (3) *Mahomedan Law—Mortgage of the office of a mutwali, if valid and enforceable in law—Such office, if alienable at all.*

One Ahadali, a priest of Peer Sahib, mortgaged his right in the office to three persons, and subsequently one of the mortgagees brought a suit against Ahadali's minor son to enforce the mortgage by sale of the mortgaged turn of worship. The latter two brought a suit for getting the mortgage set aside:

Held—That the office of the priest in such cases is not alienable and therefore the mortgage cannot be enforced. *Munshi Sahed Buksh v. Golam Nabi Khandkar*, 22 C.W.N. 996 = 47 Ind. Cas. 117.

FLINTOBER and SHAMSUL HUDA, JJ.

Mortgage—(Continued).**—1.—General—(Continued).**

- (4) *Co-mortgagees—Payment by mortgagor, to one of them who gives him full discharge—Other mortgagees if bound by it—Effect on the interest of mortgagees who gave the discharge.*

Payment to one of several joint creditors does not necessarily operate as a discharge of the debt in so far as the other creditors are concerned.

In the absence of any evidence or circumstances which would justify a contrary inference, it will be presumed notwithstanding the form of the obligation that a debt due to a number of joint creditors is due to them in severalty.

Where after relations between co-mortgagees had become strained one of them acknowledged receipt of payment from the mortgagor and gave the latter a discharge in respect of the mortgage debt.

Held, that the discharge operated as a valid discharge in respect only of the share of the mortgage money due to the co-mortgagees by whom it was given. *Shalkh Hakim v. Adwalta Chandra Das Datal*, 22 C.W.N. 1021.

N. R. CHATTERJEE and NEWBOULD, JJ.

References:—13 C.L.J. 3; 17 C.L.J. 372; 6 C.L.J. 383; 41 B. 310 (P.C.); *Powell v. Brodhurst*, (1901) 2 Ch. 160, R.; 20 M. 461, Not F.

- (5) *Joint mortgagees—Duty of a joint mortgagee to inform his joint co-mortgagee as to any claim which he has in respect of the mortgage property prior to their joint mortgage—Estoppel—Evidence Act, S. 115.*

Where N, jointly with P lent money to S, on a mortgage-deed intending to extinguish a prior mortgage on the same property in which prior mortgage P and another were interested, it is a legal duty on the part of P to inform N as to any claim in respect of the prior mortgage. If P should have omitted to inform N of the subsisting claim and allowed him to alter his position for worse, P and his representatives are estopped under S. 115, Evidence Act, to enforce any claim under the prior mortgage to the disadvantage of N. *Pandurang Shamji v. Narayana Rao*, 44 Ind. Cas. 547.

MITTRA, A.J.C.

- (6) *Money advanced by co-mortgagees—Presumption as to interest of each of the co-mortgagees—Acceptance of satisfaction by one co-mortgagee—Effect on the interest of the other co-mortgagees.*

Where mortgage money was advanced by two joint mortgagees, without any specification of shares, the presumption is that each of the co-mortgagees advanced half the money, and if one of them accepts satisfaction of his interest as mortgagee, the result would be that the mortgage interest of the other mortgagee would remain outstanding and it would extend to one-half of the mortgage money. *Ram Datt v. Deota Din*, 44 Ind. Cas. 621 = 4 O.L.J. 735.

LINDSAY, A.J.C.

Mortgage—(Continued).**—1.—General—(Continued).**

(6-a) *Four brothers effect a first mortgage of certain properties—They and a fifth brother, a minor represented by his duly appointed guardian the eldest of the four adult brothers, executed a second mortgage of the same properties in favour of another person—That four adult brothers next executed a third mortgage in favour of a third person.*

Whether second mortgage is entitled to priority over third mortgage, discussed. *Gopinath Nandal v. Ashtosh Ghose*, 44 Ind. Cas. 1008.

TEUNON and NEWBOULD, JJ.

(6-b) *Occupancy tenant mortgaging his holding to landlord—Landlord selling the mortgaged land to third person—Tenant suing to redeem mortgage—Nature of suit—Limitation Act (1908), Art. 134.*

An occupancy tenant gave a usufructuary mortgage of his holding to the Zamindar. The Zamindar sold his property rights, together with the mortgaged lands to third persons. Then the mortgagor brought a suit to redeem his holding. *Held* that the suit was not a suit by a tenant to recover possession of a holding from which he had been unlawfully dispossessed, but it was a suit by mortgagor to recover possession from his mortgagee and certain persons to whom the mortgage had been transferred. Art. 134 of the Limitation Act applied to the case. *Abhilaikh Dhalphora v. Liladhar Dhalphora*, 45 Ind. Cas. 549.

TUDBALL, J.

Reference :—2 A.L.J. 471, *Dist.*

(7) *Pardanashin lady, Execution by—Witnesses to—Muhammadan Law—Gift—Burden of proof—Mortgage suit—Trial of issue regarding paramount title to mortgagor—When necessary—Transfer of Property Act, S. 59.*

In the case of a document executed by a pardanashin lady it is not necessary that the witnesses should be actually inside the Pardah and they will be deemed to be present at the execution of the document, if the bond was read over and explained to pardanashin ladies, although the witnesses may be screened off from the executant by a Paruah.

It is well established that the onus of proving the bona fides and the validity of a gift executed by a pardanashin lady lies upon those seeking to claim under it.

The general principle is that in an ordinary mortgage suit, title paramount to and independent of the mortgagor is not a necessary issue and should, as far as possible, be excluded from the trial of a mortgage suit; but that is not an absolute principle which should apply to every case. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in

Mortgage—(Continued).**—1.—General—(Continued).**

the mortgage suit. *Zakirraza v. Madhusudhan Dass*, 45 Ind. Cas. 691—4 Pat. L.W. 417.

MILLER, C.J. and JWALA PRASAD, J.

Reference :—8 C.W.N. 365, *F.*

(8) *Bond made up of principal and prospective interest—Stipulation to pay, by instalments with provision in case of default—Failure to pay instalments—Interest, Payment of.*

Parties had dealings in money and accounts were made up and a sum was found due from the defendants to the plaintiff. A mortgage bond was executed on the 4th October 1896. To the principal sum, an addition was made as prospective interest and instalments were settled for payment of the aggregate. It was also stipulated that in default of any instalment, it should carry interest at 12 per cent. per annum to be compounded every year and that in default of any two instalments, the whole sum should become immediately recoverable. Default was made in respect of two instalments on 26th January 1899 :—

Held :—(1) that the plaintiff was entitled to recover (a) the sum found due on making up accounts, and (b) interest up to the 26th January 1899; this interest payable under the two stipulations, (i) a proportion of the prospective interest and (ii) compound interest at 12 per cent. per annum on instalments in arrear; and (2) that the plaintiff was not entitled to any interest after the 26th January 1899 till the date of suit. *Bhauji v. Bhagwant Atmaram Dhongdi*, 45 Ind. Cas. 722.

STANYON, A.J.C.

(9) *Consideration, Part of, kept in deposit and paid afterwards—Mortgage, Remedies of—Contract Act (IX of 1872), Ss. 16, 74—Interest, high rate of—Undue influence—Penalty—Plea of.*

At the time of the execution of a mortgage bond for Rs. 3,000, only the sum of Rs. 1,000, was advanced to the mortgagor, the balance being kept in deposit with the mortgagee, it was subsequently paid over to the mortgagor on a registered receipt after the expiry of the due date of repayment stipulated in the mortgage bond.

The remedy of the mortgagee in regard to the balance of Rs. 2,000, subsequently advanced was *held* to be not a mere personal action based on a separate contract, but by a suit on mortgage security for the full amount of Rs. 3,000.

In the absence of evidence of undue influence exercised or unfair means adopted, a rate of interest contracted by the parties cannot be disallowed as being penal, unless it is so high as to shock the conscience of the Court. *Chowdhury Kazi Nath Mitra v. Bhikan Charan Maiti*, 45 Ind. Cas. 778.

FLETCHER and SHAMSUL HUDA, JJ.

Mortgage—(Continued).**—1.—General—(Continued).**

(9-a) *Puisne mortgages, Rights of—Mortgagor creating additional burden subsequent to mortgage—Puisne mortgages, Liability of, to discharge—Damdupat, Hindu Law rule of, Applicability of, to Berar and to mortgage debts.*

In Berar it has been the practice from time immemorial to apply the rule of Damdupat to all debt cases including mortgage contracts.

A mortgagee cannot have his rights created on the date of his mortgage impaired by any subsequent act or agreement of the mortgagor to which he is not a party.

The plaintiff took a mortgage for Rs. 200 on 18th February 1906 and the defendant also took a mortgage from the same mortgagors over the same property on 27th May 1909. On the 20th December 1909 accounts on the mortgage of 1906 were made up between the plaintiff and his mortgagors and the plaintiff took a fresh mortgage for the amount of Rs. 300 that was found due. On the 18th February 1913 the defendant brought a suit for foreclosure on his intermediate mortgage joining the plaintiff as a subsequent mortgagee, who pleading his mortgage of 1906 elected to fall back on it with the result that he was discharged. Defendant having obtained a foreclosure decree on the 4th August 1914 became the owner of the property on the 10th August 1915. On the 1st December 1915 the plaintiff sued to enforce his prior mortgage of 18th February 1906 and claimed Rs. 600 as due to him using the acknowledgment made in the subsequent deed of 20th December 1909 as the basis of calculating interest under the rule of Damdupat.

Held, that the burden imposed by the prior mortgage upon a second mortgagee cannot be added to by any contract made subsequent to the second mortgage by the prior mortgagee and the mortgagor behind the back of the second mortgagee, that as in the present case the mortgagors entered into a fresh contract with the plaintiff after the execution of the second mortgage to which contract the defendant was not a party, the additional burden created by that mortgage could not be imposed upon the defendant and that he was, therefore, entitled to redeem the plaintiff's mortgage upon the payment of Rs. 400. *Jairam v. Debdaiyal Surajprasad*, 46 Ind. Cas. 789.

STANYON, A.J.C.

(9-b) *Mortgagor and mortgagee—Possession of mortgages, not through mortgagor—Adverse possession—Liabilities of such mortgagee—Redemption Right of, if affected by such possession—Transfer of Property Act (IV of 1882), S. 76.*

Where a person having a mortgage in any form over a property takes possession of such property, rightly or wrongly with, without or against the consent of the mortgagor, under whatsoever claim or title, his possession will be that of a mortgagee subject at least to the same liabilities: and such possession for any length of time short of the statutory period, except in

Mortgage—(Continued).**—1.—General—(Continued).**

cases where the right of redemption has been released by the mortgagor, will be no bar or defence to a suit for redemption where the plaintiff is otherwise entitled to redeem. *Awdh Singh v. Nanhal*, 46 Ind. Cas. 872.

STANYON, A.J.C.

(9-c) *Mortgage suit—Decree absolute, Validity of, if can be questioned in execution—Execution proceedings, Pendency of, when Civ. Pro. Code (1908) came into force—Applicability of S. 48 to.*

An order absolute in a mortgage suit made by the Court in the presence of both parties and on a proper adjudication should not in execution be challenged on the ground that the Court had no jurisdiction to make the order, the application for making the decree absolute having been barred by limitation.

The mere fact of the coming into force of the new Code of Civil Procedure pending a suit on a mortgage does not make the new S. 48 applicable to those proceedings in execution. *Syam Chand Malal v. Baikunatha Nath Mandal*, 47 Ind. Cas. 143.

FLETOHER and SHAMSUL HUDA, JJ.

(10) *Mortgage-deed, Attestation of—Execution by Pardanashin—Direct evidence of execution necessary—Transfer of Property Act, S. 59—Remand for taking fresh evidence if will be made by Privy Council.*

A mortgage-deed, purporting to have been granted by a pardanashin lady on behalf of her minor son was executed as follows: The lady was behind the parda when the document was taken to her for signature; none of the witnesses saw her sign it, her son came from behind the parda and said that it had been signed by her; and then the witnesses attested it. *Held* that such attestation was not enough to satisfy the terms of the statute and that the mortgage was void (a).

In this case their Lordships saw no justification for taking the unusual course of referring back an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below. *Raj Ganga Pershad Singh v. Ishri Pershad Singh*, 34 M.L.J. 545=6 L.W. 176=20 Bom. L.R. 587=23 M.L.T. 388=(1919) M.W.N. 882=16 A.L.J. 409=27 C.T.J. 548=4 Pat. L.W. 349=12 C.W.N. 697=45 C. 748=45 Ind. Cas. 1 (P.C.).

LORD HALDANE, SIR JOHN EDGE, MR. AMFER ALI and SIR PHILLIMORE, BART.

References:—(a) 39 I.A. 219=14 Bom. L.R. 1034=35 M. 607, F.; 42 I.A. 163=37 A. 474, Dist.

(11) *Benami—Suit by benamidar mortgagee—If maintainable.*

A benami mortgagee may maintain a suit upon a mortgage (a).

Mortgage—(Continued).**—1.—General—(Continued).**

Nature of suits by *benamidars* considered. *Singa Pillai v. Ayyaperi Govinda Reddy*, (1918) M.W.N. 107=41 M. 435=43 Ind. Cas. 905.

SPENCER and SESHAGIRI AIYAR, JJ.

References:—(a) 6 M.I.A. 53, F.; 19 C.L.J. 198; 87 A. 113; 30 M. 245, R.

- (12) *Mortgage—Non-payment of consideration—Execution of deed and mortgage put into possession—If mortgage good—Suit for declaration that it is void—If maintainable—Specific Relief Act, S. 39.*

When a deed of mortgage had been completed by the execution of a registered instrument, the transfer is complete and can be enforced though no consideration has passed. The mortgagor would not then be entitled to sue for cancellation of the instrument, but if the consideration was not paid to him he would have his remedy by way of damages for breach of contract.

As the mortgagee was also put into possession in this case, their Lordships refused to grant any declaration. *Abdul Hashim Sahib v. Kader Batcha Sahib*, (1918) M.W.N. 769=8 L.W. 543=24 M.L.T. 478=35 M.L.J. 740.

PHILLIPS and KUMARASWAMI SASTRI, JJ.

References:—5 Bom. L.R. 392, F.; 23 Ind. Cas. 805; 35 Ind. Cas. 455, Diss.

- (13) *Transfer of Property Act (IV of 1882), S. 59—Mortgage—Execution by two—Attestation after execution by one—Attorneys present when executed by the second person, but no fresh attestation—If instrument valid—Admission of execution—Effect of—If dispenses with proof of—Valid attestation—Evidence Act, S. 58—Civ. Pro. Code, 1908, O. VIII, r. 5.*

A mortgage was executed by two persons; when it was executed by the first, the two attesters were present and attached. Then it was taken to the second executant, who executed the same in the presence of the attestators but there was no fresh attestation.

Held, the mortgage was not validly executed under S. 59 of the Transfer of Property Act.

Even when a party admits the execution of a mortgage, the Court is not bound by the same and may require proof of execution under S. 58 of the Evidence Act and O. VIII, r. 5, Civ. Pro. Code.

The question of valid attestation is not a mere question of proof but a question of the validity of the document. *Munlappa Chettiar v. Yellaobamy Hannadi*, (1918) M.W.N. 853.

ABDUR RAHIM and OLDFIELD, JJ.

References:—35 M. 607 (P.C.); (1916) 1 M. W.N. 428; (1916) 2 M.W.N. 33, F.

- (14) *Ancient mortgage, proof of—Entry in partition record, how far evidence of.* *Bhishnar Singh v. Brij Bhokhan Singh*, 20 O.C. 886=5 O.L.J. 18=43 Ind. Cas. 300. See Final Part, 1917, Col. 676.

Mortgage—(Continued).**—1.—General—(Continued).**

- (15) *Decree in mortgage suit how far evidence of the liability of defendants inter se—Presumption where mortgagor makes several transfers—Mortgagor's heir merely his alter ego—Considerations which govern the rights of a person's heir and his lessee.*

A decree may very often be *prima facie* evidence of a common liability as co-obligors or co-debtors between the persons against whom it is passed: but where, as in the case of a suit on a mortgage, the mortgagors and their subsequent transferees are merely impleaded as defendants to give them a right to redeem, it is not evidence of the rights of the defendants *inter se*.

Where a mortgagor makes several transfers subsequent to the mortgage, the presumption is that each successive right shall operate on what was left with the transferor at the time of the transfer, unless such rights cannot all co-exist or be exercised to their full extent together.

The liability to pay a debt due on a simple mortgage is as between the mortgagor and his subsequent mortgagee or lessee primarily on the former and if the mortgagor or his heir pays that debt, he cannot claim contribution in respect of that payment from his mortgagee or lessee. The position of the heir of the mortgagor, who is merely his *alter ego*, is in this respect no way better than that of the person to whom he succeeds.

The considerations, which govern the rights of the co-heirs *inter se*, do not govern the rights between the heir or heirs of a person, on the one hand, and a lessee from him on the other; and in this respect there is no difference between a voluntary conveyance and a conveyance for valuable consideration so long as the conveyance is not burdened with a liability for payment. *Gajraj Kunwar v. Indrapal Kunwar*, 21 O.C. 360.

KANHAIYA LAL and DANIELS, A.J. C.S.

References:—14 A.I.J. 275; 25 M. 599; 39 M. 795, Dist.; *Herbert's case*, 76 Eng. Rep. 647; *Ker v. Ker*, 1r Rep 4 Eq. 15; *Rexdall v. Darby*, (1907) 2 Ch. D. 465, R.

- (15-a) *Code of Civil Procedure (old), Ss. 268 and 274—Simple mortgage debt is not immoveable property within S. 274 of Civ. Pro. Code—General Clauses Act (X of 1897)—Immoveable property—Sub-mortgagee purchasing mortgage-debt in execution of his mortgage decree, Effect of—Sale in execution of decree—Party to the sale cannot question auction-purchaser's title—Auction-purchaser—Interest during the continuance of prohibitory order.*

Held that a sub-mortgagee, who purchases the original mortgage-debt at an auction sale in execution of his decree on the sub-mortgage, is not, by reason of the prohibitory order issued at his instance, precluded from claiming the interest due on the mortgage.

Mortgage—(Continued).**—1.—General—(Continued).**

It is not open to persons, who were parties to a sale held in execution of a decree, to question the title of the auction-purchaser after the sale has become absolute.

Held, further that, though a simple mortgage-debt may be regarded as immoveable property within the meaning of S. 3, cl. 25 of the General Clauses Act (X of 1897), it cannot be so treated for the purpose of S. 274 of the old Code of Civil Procedure (Act XIV of 1892).

An attachment of a simple mortgage-debt can validly be made in the manner provided by S. 268 of the old Code of Civil Procedure. **Muhammad Yusuf v. Lachhmi Narain**, 21 O. C. 400.

KANHAIYA LAL and DANIELS, A.J. O.S.

References:—15 A. 134; 12 C. 516; 20 C. 805; 26 B. 305; 37 M. 51, R.

(16) *Attestation of mortgage, what is—Transfer of Property Act, S. 59—Appellate Court, Duty of, to take notice of defect in attestation.*

Merely acknowledgment of his signature or execution made by the executant of a mortgage-deed to the attesting witnesses is not sufficient for the purposes of attestation. The attesting witnesses must sign only after seeing the actual execution of the deed. The provisions of S. 59, Transfer of Property Act, are imperative and although a defect to the attestation of a deed is not noticed in the lower Court, an appellate Court is bound to take cognisance of it. **Periannan Chetty v. Maung Ba Thaw**, 9 L.B. R. 159=43 Ind. Cas. 916.

TWOMEY, C.J. and PARLETT, J.

Reference:—35 M. 607, R.

(17) *Mortgage to two mortgagees in equal shares—Condition in mortgage enabling mortgagee to take possession on default of mortgagor to pay interest for two successive years—Waiver of such condition by mortgagee—Mortgagee's right to enforce such condition on fresh default—Notice, whether should be given to mortgagor before enforcement.*

A person mortgaged in 1891 his properties to two persons K.M. and S.R. in equal shares for a certain consideration. The relevant conditions of a mortgage-deed were that the mortgagor should pay a certain sum as interest in two half-yearly instalments and if the mortgagor failed to pay interest and compound interest for two successive years the mortgagees were at liberty to take possession of the mortgaged land or, not disposing him, to allow interest to continue.

Interest payable to K.M. under the mortgage was paid up to the 20th February 1911 and to S. R.'s share up to June 1907. On the 12th November 1911, K. M.'s heirs sent a written notice to the mortgagor informing him that he had purchased the rights of S.R. and asking him to pay interest and compound interest due up to that date on adjustment of account. On the 10th May 1912 and again on the

Mortgage—(Continued)..**—1.—General—(Continued).**

29th April 1913, the mortgagor tendered by money order interest and compound interest to K.M.'s heirs in respect of the latter's share in the original mortgage, but both these tenders were refused. K.M.'s heirs, who had become the sole mortgagees, instituted a suit in 1913 for possession on the ground of the default mentioned above justifying their refusal of the tenders of interest as they being sole mortgagees, were entitled at that time to the whole of the interest due on the mortgage money. *Held*, that whether the transaction be looked upon as two separate and indivisible mortgages or merely as one indivisible mortgage there was clearly a waiver, binding on the plaintiffs, of their right to enforce the provisions as to taking possession; that, under all the circumstances of the case, the mortgagees, who had waived their right to take possession of the mortgaged land upon default in payment, must, if they desire to avail themselves of that right upon a future date, give the mortgagor clear and reasonable notice of their intention and that the mortgagees having admittedly not done so, their present suit must fail (*as*). **Banu Mal v. Pararam**, 30 P.R. 1918=47 P.L.R. 1918=35 P.W.R. 1918=43 Ind. Cas. 656.

RATTIGAN, C.J. and SHAH DIN, J.

References:—(a) 35 B 511, P.; 8 P.R. 1917, Dist.

(18) *First suit for interest on mortgage—Subsequent suit for principal and interest, if maintainable—Transfer of Property Act, S. 99—Civ. Pro. Code, 1908, O. II, r. 2, O. XXXIV, r. 14—Estoppel.*

A mortgagee first sued for interest and obtained a decree therefor with a charge on the property mortgaged. In execution proceedings, the judgment-debtor successfully objected that the property could not be sold under the decree quoting Civ. Pro. Code, O. XXXIV, r. 14. The mortgagee then brought a suit for principal and interest, which was dismissed as barred by Civ. Pro. Code, O. II, r. 3. He contended on appeal that the defendant, having himself, invoked the aid of O. XXXIV, r. 14, was estopped from pleading O. II, r. 2. *Held* that the defendant never meant to rely on the latter part of cl. 1 of O. XXXIV, r. 14, or to bind himself down not to plead O. II, r. 2, that there was no estoppel and that the suit was barred by O. II, r. 2, as at the time when he sued for interest, he could also have sued for the principal.

The principles of S. 99, Transfer of Property Act, cannot be applied to the Punjab as this section has been deliberately repealed by the legislature and has been replaced by O. XXXIV, r. 14, which has been expressly held to be not applicable to the Punjab. **Kishan Narain v. Pala Mal**, 88 P.R. 1918=104 P.L.R. 1918=167 P.W.R. 1918=47 Ind. Cas. 937.

CHEVIS and BROADWAY, JJ.

References:—2 P.R. 1907 doubted; 18 P.R. 1916, R.

Mortgage—(Continued).**—1.—General—(Continued).**

- (19) *Deed allowing part payment of mortgage money—Tender made after demand by mortgagees, Validity of—Interest, Rebate of.*

Plaintiffs sued to recover a certain amount of money, principal as well as interest, as a charge on property, mortgaged to them by the predecessors in interest of the defendants. There was no provision in the mortgage-deed for piecemeal redemption, but it was contemplated that part-payment of the principal mortgage money should be allowed. It appeared that a tender of a certain sum was made by some of the defendants on the 14th August, 1909, but the plaintiffs refused to take part-payment as they had become entitled to the entire mortgage money and did not wish that part of the property should be redeemed. The defendants did nothing till October, 1913, when they again tendered the same sum. But on 28th January, 1913, the plaintiffs had sent notices to all the mortgagors demanding payment of the full sum due under the mortgage:

Held, that under the circumstances no offer by any of the defendants subsequent to the 28th January, 1913, could be valid tender so as to entitle them to claim rebate of interest on the sums tendered, and the plaintiffs were, therefore, entitled to recover the full amount of principal as well as interest. *Sallig Ram v. Sabghat-ullah*, 83 P.W.R. 1918=81 P.L.R. 1918=45 Ind. Cas. 175.

SCOTT-SMITH and LE-ROSSIGNOL, JJ.

(20) Mortgage of share of non-transferable occupancy holding if an incumbrance—Purchaser of holding at rent sale how far bound by mortgage—Suit to enforce mortgage against tenants and purchaser—Landlord not essential party. See BEN. ACT VIII OF 1885 (TENANCY), No. 78, 22 C.W.N. 662.

(21) Mortgage-debt if can be sold in execution of money decree by separating debt from security. See PUN. ACT XIII OF 1900 (ALIENATION OF LAND), No. 3, 16 P.L.R. 1918.

(22) Sale of mortgaged properties by decree in mortgage suit—Appeal by purchaser of one such property at revenue sale—Exemption of purchaser from liability under mortgage—Exemption if enured for benefit of other defendants-mortgagor. See APPEAL (GENERAL), No. 30, 3 Pat. L.J. 166.

(23) Execution-sale, Auction-purchaser at—Mortgage executed prior to attachment, Binding nature of. See AUCTION PURCHASER, No. 3, 45 Ind. Cas. 877=5 O.L.J. 114.

(24) Two mortgages on same property—Second mortgage secured by promissory note from sureties—Sale on first mortgage—Subsequent sale by second mortgage—Second mortgage-debt not satisfied by reason of property sold by him being insufficient to raise amount of debt due to him—Personal decree against sureties, where sureties after purchasing equity

Mortgage—(Continued).**—1.—General—(Continued).**

of redemption sub-mortgaged properties to second mortgagee before litigation began. See CIV. PRO. CODE (1908), No. 444, 45 C. 702.

(25) Final decree in mortgage suit—Alteration of its terms in execution if permissible. See CIV. PRO. CODE (1908), No. 440, 43 Ind. Cas. 22.

(26) Mortgage by judgment-debtor made in defiance of prohibition contained in Civ. Pro. Code—Validity. See CIV. PRO. CODE (1908), No. 561, 14 N.L.R. 181 (P.C.).

(26-a) Minor, Executed by, on attaining majority—Consideration, Fresh advances and old minority debts—Validity of. See CONTRACT, No. 6, 46 Ind. Cas. 765.

(26-b) Contract Act (1872), S. 2, cl (d)—Several mortgagors—Mortgage benefiting only some of—if binding on others also—Consideration. See CONTRACT ACT (1872), No. 1-a, 22 C.W.N. 188.

(27) Attesting witness to mortgage-deed called but not examined—Admissibility of document. See EVIDENCE ACT (1872), No. 21, 16 A.L.J. 121.

(28) Mortgage by father for necessity at onerous rate of interest—Right of sons—Position of mortgagee. See HINDU LAW (ALIENATION), No. 3, 40 Ind. Cas. 369.

(28-a) Hindu Law—Joint family—Coparcener, Mortgage by, of his own share without legal necessity, Validity of. See HINDU LAW (ALIENATION), No. 8, 46 Ind. Cas. 754.

(29) Mortgage by managing member—Burden of proving necessity. See HINDU LAW (ALIENATION), No. 9, 7 L.W. 323 (P.C.).

(30) Personal covenant in simple mortgage, if antecedent debt binding on sons. See HINDU LAW (DEBTS), No. 10, 21 O.C. 200.

(31) Execution of mortgage by widow and next reversioner—Decree against both—Application for execution also against both—Objection to award of interest after period of grace made by widow if may be continued by reversioner on her death during execution—Application for amendment of decree if may also be filed by reversioner—Proper period for allowing further interest after period of grace. See INTEREST, No. 2, 27 C.L.J. 573.

(32) Interest payable in paddy—Charge on immoveable property. See INTEREST, No. 3, 46 Ind. Cas. 384.

(33) Mortgage effected between tenants, not binding on landlord. See LANDLORD AND TENANT, No. 38, 45 Ind. Cas. 474.

(34) Suit on mortgage—Decree passed by High Court in appeal—Application for decree absolute—Limitation. See LIMITATION ACT (1908), No. 31, 16 A.L.J. 85.

*Mortgage—(Continued).**—1.—General—(Continued).*

(35) Property of three co-sharers purchased in execution of decree against two of them—Redemption of existing mortgage on entire property by such purchaser—Determination of mortgage and creation of charge on third share of co-sharer in favour of purchaser—Limitation. See LIMITATION ACT (1908), No. 196, 22 C.W. N. 697.

(36) Mortgage in respect of a loan of paddy—Mortgage suit—Applicability of Art. 116 or 120, Limitation Act. See LIMITATION ACT (1908), No. 158, 44 Ind. Cas. 618.

(37) Sub-mortgagee, receipt by, of his share of interest from mortgagors within six years of suit—Cause of action against principal mortgagee if kept alive to sub-mortgagee. See LIMITATION ACT (1908), No. 85, 3 P.R. 1918.

(38) Execution of mortgage by Karnavan in satisfaction of a barred decree debt—Validity—Powers of Karnavan. See MALABAR LAW, No. 13, (1918) M.W. N. 144.

(39) Purchase of portion of mortgaged property by mortgagee—Effect of purchase on mortgage. See MORTGAGOR AND MORTGAGEE, No. 2, 21 O.U. 172.

(40) Mortgage by occupancy tenant—Tenant dies without heirs—Effect on the mortgage. See OCCUPANCY HOLDING, No. 1, 43 Ind. Cas. 912.

(41) Suit against minors on mortgage—No question raised on minors' behalf during trial as to propriety of execution of document—Decree—Right of minor to object to such execution on appeal. See PLEADINGS, No. 7, 35 M.L.J. 372.

(41-a) Mortgage with possession—Long possession by mortgagor, presumption arising from—Satisfaction of mortgage-debt—Evidence Act (1872), S. 114—Onus to rebut presumption. See PRESUMPTION, No. 3, 46 Ind. Cas. 676.

(41-b) Suit on, after 36 years—No demand or payment made during the interval—Genuineness of mortgage, Presumption as to, under Evidence Act (1872), S. 114, Applicability of—Burden of proof as to genuineness. See PRESUMPTION, No. 4, 46 Ind. Cas. 806.

(42) First suit by mortgagor for redemption against some only of mortgagees—Subsequent suit against other mortgagees, Maintainability of. See RELINQUISHMENT OF PORTION OF CLAIM, No. 1, 8 L.W. 152.

(43) Mortgaged property sold and partly mortgaged to persons induced by some of the mortgagees themselves to believe property to be free from encumbrances—Estoppel—Remedy of party suffering by misrepresentation. See TRANSFER OF PROPERTY ACT, No. 35, 22 C.W.N. 641.

*Mortgage—(Continued),**—1.—General—(Concluded).*

(44) Deposit in Court by mortgagor of more amount than that due—Deposit if a valid tender—Mortgagee's right to interest on amount so deposited. See TRANSFER OF PROPERTY ACT, No. 64, 34 M.L.J. 439.

(45) Offer by mortgagor to repay debt—Assertion by mortgagee of absolute right to property—Tender if dispensed with—Amount not paid by mortgagor—Exoneration of mortgagor from payment of interest. See TRANSFER OF PROPERTY ACT, No. 67, 34 M.L.J. 488.

(46) Deposit of mortgage money after institution of suit by mortgagee—Deposit not valid—Interest, Running of, not prevented by such deposit. See TRANSFER OF PROPERTY ACT, No. 63, 35 M.L.J. 605.

(47) Right of mortgagee as against trespassers. See TRANSFER OF PROPERTY ACT, No. 51, 3 Pat. L.J. 162.

(48) Widow and her reversioners, Agreement between, to divide her husband's estate equally on her death—Only one of such reversioners being next reversioner, the rest being remotely entitled—Mortgage by widow of such estate of her husband to said reversioners—Next reversioner, Devise by, of share allotted to him by agreement to his wife—Death of next reversioner before widow—Devisee entitled to mortgage interest only. See WILL, No. 12, 35 M.L.J. 684.

—2.—Accession to Mortgaged Property.

Mortgage of kumki lands—Kumki lands subsequently granted on darkhast to mortgagor as wargdar of adjoining lands—Right of mortgagee to kumki as accession to mortgaged property. See TRANSFER OF PROPERTY ACT, No. 12, 8 L.W. 100.

—3.—Anomalous Mortgage.

(1) Mortgage-deed of anomalous mortgage—Personal covenant, Absence of—Limitation—Simple money decree, if could be passed—Registration, which is nullity for one purpose, if can be good for any other purpose—Fraud upon registration authority.

A deed of anomalous mortgage did not contain any independent covenant to pay except the usual stipulation for repayment after the fixed term; there was, however, a personal remedy against the debtor available to the creditor, if the whole of the debt could not be satisfied out of the sale-proceeds of the mortgaged property. The document was put in suit and the remedy against the property, if it was held, could not be enforced because of invalid registration.

Held that the creditor could not rely on the personal covenant and get a simple money decree as that covenant could be availed of only in a certain contingency (*vis.*, the insufficiency of the sale-proceeds to discharge the whole debt), which had not arisen.

Mortgage—(Continued).**—3.—Anomalous Mortgage—(Concluded).**

Held further that an act which constituted a fraud upon the registration authority could not be treated as a valid act for any purpose whatsoever. If the registration was a nullity the document must be treated as unregistered for all purposes. *Kalka v. Mathura Das*, 21 O. C. 341.

DANIELS, A.J.C.

References:—41 O. 972; 12 O.C. 275; 14 A. L.J. 107; 31 C. 146, R.

(2) Demise in perpetuity by way of *kanom* with covenant for renewal every twelve years—Right of redemption, clog on. See MALABAR LAW, No. 3, 7 L.W. 119.

(3) Contract to annually pay definite portion of income to mortgagor if anomalous or usufructuary mortgage. See REGISTRATION ACT (1908), No. 13, 24 M.L.T. 315.

—4.—By Conditional Sale.

(1) *Reg. XVII of 1806, S. 8—Mortgage by way of conditional sale—Redemption—Right when lost—Service of notice on mortgagor—Foreclosure proceedings.*

In a suit for redemption of a mortgage by way of conditional sale made in the year 1866 it was pleaded that the right had been extinguished, inasmuch as in the year 1876 the mortgagee had served a notice, under the seal and official signature of the District Judge, upon the mortgagor warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The service of the notice was sought to be proved by means of certain records of the Court:—**Held** that the records of the Court were not *prima facie* proof of the fact of service of the notice and consequently the right to redeem was not lost (a). *Ram Baran Rai v. Har Sewak Dube*, 16 A.L.J. 377—40 A. 387—45 Ind. Cas. 488.

PIGGOTT and WALSH, JJ.

Reference:—(a) 4 A.L.J. 717, F.

(2) *Simple mortgage and, Distinction between—No personal covenant to pay—Personal decree against mortgagor, if can be passed—Transfer of Property Act (IV of 1882), S. 58—Contracts not in accordance with statutory requirements, if contracts—Contract Act, 1872, S. 65.*

The definition of a simple mortgage includes a personal covenant to pay whereas the definition of a mortgage by conditional sale makes no mention of such a covenant. In a suit based on a deed of mortgage by conditional sale the mortgagee is not therefore entitled to a personal decree, even in case he fails to get a mortgage decree.

A contract which is not in accordance with the statutory requirements is no contract at all, and does not become void and is not

Mortgage—(Continued).**—5.—By Conditional Sale—(Continued).**

discovered to be void in the sense of S. 65 of the Contract Act. *Anand Rao v. Tukaram*, 46 Ind. Cas. 326.

BATTEN, A.J.C.

Reference:—27 A. 592—(1905) A.W.N. 111—2 A.L.J. 321, F.

(3) *Reg. XVII of 1806, S. 8—Mortgage by conditional sale—Foreclosure—Notice—Omission to mention shamlat vitiates the notice.*

Held, that, where the foreclosure notice under S. 8 of Reg. XVII of 1806 misdescribes the mortgaged property the mortgagor is very likely to be misled by the misdescription, and that such a notice cannot be considered to be valid as regards one part of the mortgaged land and invalid only as regards the other part, so a notice which omits to refer to *shamlat* is materially defective and does not extinguish the mortgagor's rights in any portion of the mortgaged land. *Karam Ilahi v. Hindra Ban*, 18 P.L.R. 1918—17 P.R. 1918—89 P.W. R. 1918—44 Ind. Cas. 540.

CHEVIS and LESLIE JONES, JJ.

References:—109 P.R. 1901, F; *Ghulam Muhammad v. Dewan Kirpa Ram* (No. 492 of 1908) Unrep., Diss.; 85 P.W.R. 1914—43 P. L.R. 1914, R.

(4) *Bai-bil-wafa mortgage of land—Condition invalid after 8th June 1901, the date of commencement of Act XIII of 1900, S. 10—Patent legal point can be raised in second appeal for the first time—Interest at Rs. 19-0 per cent. per mensem allowed and made charge on mortgaged property after expiry of date of redemption.*

Held that:—

1. In any mortgage of revenue paying land made after the commencement of the Punjab Alienation of Land Act, XIII of 1900 (which came into force on 8th June, 1901), every condition which is intended to operate by way of conditional sale is null and void under S. 10 of the Act, and that whether the mortgagor is a member of an agricultural tribe or not, it does not make any difference so far as the operation of this section is concerned.

2. The question whether a mortgagee is entitled to receive interest and the question whether it is a charge upon the mortgaged property after expiry of the date fixed for its redemption must be decided according to the terms of the mortgage-deed which must be construed in a reasonable manner and with due regard to the ordinary expectations of persons entering into a transaction of this character.

3. In the absence of any proof of undue influence, a mortgagee is entitled to get full interest at the stipulated rate, though excessive but not exorbitant, up to the date of redemption before the mortgagor can be allowed to redeem the mortgaged property (a).

In this case the mortgagee was allowed full interest up to the date of redemption. The

Mortgage—(Continued).**—6.—By Conditional Sale—(Concluded).**

mortgage-deed provided that (1) the principal money together with interest was to be paid, within one year; (2) in default the transaction was to be deemed a sale; (3) interest at Rs. 1-9-0 p.c. p.m., will be payable year to year and in the event of non-payment every year compound interest will be charged and (4) the mortgagor was not at liberty to transfer the property until redemption.

(4) A legal point which is patent on the face of the record can be raised for the first time in second appeal by any one of the parties to it, and can also be taken into consideration *suo motu* by the Chief Court. *Allah Din v. Fateh Din*, 27 P.L.R. 1918=31 P.R. 1918=54 P.W.R. 1918=45 Ind. Cas. 101.

SHADI LAL, J.

References:—19 A. 19 (P.C.); 5 P.R. 1910=23 P.W.R. 1910, F.

(5) Stipulation in usufructuary mortgage restricting right of redemption to a period of two years—Implied contract that mortgagees should become owner on default—Mortgage in effect one by condition of sale. See MORTGAGE (REDEMPTION), No. 19, 14 N.L.R. 184.

(6) Original intention to execute conditional deed of sale abandoned—Execution and registration of absolute sale.—Execution and registration after only a couple of days of agreement to recovery—Transaction as between vendor and purchaser if may be looked upon as English mortgage or conditional sale. See PRE-EMPTION, No. 20, 74 P.R. 1918.

(7) Innocuous defects in notice of foreclosure. See REG. XVII of 1806 (MORTGAGE BY CONDITIONAL SALE), No. 2, 80 P.L.R. 1918.

(8) Mortgage by conditional sale—Foreclosure proceedings—Decree in favour of mortgagee against widow—Suit for redemption by reversioners, maintainability of. See RES JUDICATA, No. 40, 44 P.L.R. 1913.

—8.—Contribution.

Co-mortgagor. Payment by, if can create charge—Co-mortgagor, Natural guardian of. Payment by, if can create charge, when such guardian not appointed by Court—Transfer of Property Act, S. 95. See CONTRIBUTION, No. 4, 45 Ind. Cas. 901.

—9.—Debt.

Payment to co-mortgagees if discharges joint debt—Contract Act, S. 38—Presumption of equity of English Law if applicable to India. *Maung Nyan Mo v. Ma Po*. U.B.R. (1917), 4th Qc., 42=44 Ind. Cas. 627. See Final Part, 1917, Col. 685.

—10.—English Mortgage.

(1) Crown not entitled to priority over English mortgage of immovable property. See CROWN DEBTS, No. 1, 22 Q.W.N. 793.

(2) Original intention to execute conditional deed of sale abandoned—Execution and registration of absolute sale—Execution and registration after only a couple of days of agreement

Mortgage—(Continued).**—7.—English Mortgage—(Concluded).**

to recovery—Transaction as between vendor and purchaser if may be looked upon as English mortgage or conditional sale. See PRE-EMPTION, No. 20, 74 P.R. 1918.

—8.—Equitable Mortgage.

(1) *Equitable mortgage of loose chattels—Indian Contract Act (IX of 1872), S. 172, if prohibits such hypothecation—Equitable mortgage of land—Fixtures if pass to mortgagee—Letter written by mortgagor stating purposes of deposit of title-deed if must be registered as a document of mortgage—Transfer of Property Act (IV of 1882), S. 59.*

There is nothing in the Indian Contract Act, which contains only a portion of the law of contract applicable in British India, to prevent a person from hypothecating his goods to another person for security.

As between mortgagor and mortgagee, the law is settled that fixtures pass with the land to the mortgagee.

A letter written by the mortgagor to the mortgagee stating the purpose for which the title-deed has been deposited with the latter is not a document requiring registration under the provisions of the Indian Registration Act as being a mortgage. *Haripada Sadhukhan v. Anath Nath Das*, 22 C.W.N. 752=44 Ind. Cas. 211.

FLETCHER and SHAMSUL HUDA, JJ.

(2) *Memorandum of securities handed over to mortgagees—Registration, if necessary—Registration Act (XVI of 1908), S. 17—Secured creditor, Suit by, to realise security—Leave of Official Assignee, Necessity of—Presidency Towns Insolvency Act (III of 1909), S. 17.*

Where a document merely recites what securities were handed over to an equitable mortgagee, it is a memorandum and not a mortgage and therefore does not require registration.

A secured creditor of an insolvent can bring a suit to realise his securities without the leave of the Official Assignee under S. 17 of the Presidency Towns Insolvency Act. *D. Badria Das v. The Chetty Firm of O.A.M.K.*, 45 Ind. Cas. 918.

ORMOND and PRAT, JJ.

(3) *Mortgage by deposit of title-deeds by plaintiffs—Payment to mortgagees of mortgage-debt by defendants at plaintiffs' request—Defendants put in possession of land with plaintiffs' consent with liberty to appropriate rents and profits towards interest—Defendants, if liable to give up possession to plaintiffs before satisfaction of mortgage-debt—Implied promise to execute necessary instrument—Contract Act, S. 302—Views of relationship between plaintiffs and defendants—Registered document if necessary to support defendants' right to possession—Transfer of Property Act, Ss. 51, 59—Plaintiffs' right to redeem.*

Mortgage—(Continued).**—8.—Equitable Mortgage—(Concluded).**

In a suit to recover possession of certain lands, it was found that the defendants, in consideration of paying off a mortgage created on the lands by the plaintiffs by deposit of title-deeds, were put into possession of it by the consent of the plaintiffs with liberty to appropriate the rents and profits of the land towards interest. The plaintiffs did not sue to redeem their mortgage and even denied the existence of any mortgage on the defendants, but based their suit on the ground that no interest in the lands passed to the defendants in the absence of a registered instrument. *Held* that the plaintiffs were neither entitled to a decree for redemption nor to recover possession of the lands, there being nothing in the Transfer of Property or Registration Act to require a registered document for such a transfer of possession as was effected in this case and the transaction not being one of sale or mortgage requiring such an instrument under Ss 54 and 59 of the Transfer of Property Act.

Held, also, that, assuming that a mortgage by deposit of title-deeds, put into possession of the mortgaged property by or with the consent of the mortgagor, has no right to retain possession of the land until the charge is paid off, there was an implied promise by the plaintiffs to execute the legal documents necessary to give effect to such intention; the defendants would still have the right to sue for specific performance of that agreement and the plaintiffs would not be entitled to sue for possession (a).

Held, further, that the defendants might be regarded as having received authority from the plaintiffs to manage the lands and to receive the rents and profits in lieu of interest and, as such authority was given to them in consideration of the loan to the plaintiffs, the authority could not be terminated, under S. 202, Contract Act, until the loan was repaid. *Shwe Lon v. Hla Gywe*, 9 L.B.R. 172=47 Ind. Cas. 133.

TWOMEY, C.J. and ORMOND, J.

Reference:—(a) 29 Ind. Cas. 707, R.

—9.—Foreclosure.

(1) Registered mortgage of sir lands—Mortgage registered before commencement of C. P. Tenancy Act of 1893—Award of Conciliation Board, Effect of. See C. P. ACT XI OF 1898 (TENANCY), No. 9, 24 M.L.T. 345 (P.C.).

(2) Suit for, Decree in, for costs to be recovered personally, Validity of—Appeal if lies from such a decree. See COSTS, No. 3-b, 47 Ind. Cas. 542.

(3) Bai-bil-wala mortgage—When possession of mortgagor becomes adverse to mortgagee—Suit for possession by mortgagee—Limitation. See LIMITATION ACT (1909), No. 178, 25 P.L.R. 1913.

(4) Foreclosure notice under Reg XVII of 1906, S. 8—Contents of notice. See MORTGAGE (CONDITIONAL SALE), No. 3, 18 P.L.R. 1918.

(5) Mortgage made after coming into force of Transfer of Property Act—Mortgage by

Mortgage—(Continued).**—9.—Foreclosure—(Concluded).**

conditional sale—Decree for foreclosure—Property brought to sale—Suit for possession alleging custom of pre-emption—Remedy of pre-emptor. See PRE-EMPTION, No. 7, 16 A.L.J. 561.

(6) For innocuous defects in notices of foreclosure. See REG. XVII OF 1906 (MORTGAGE BY CONDITIONAL SALE), No. 2, 30 P.L.R. 1918.

—10.—Priority.

Not to be claimed by subsequent mortgagees who have not searched in Registration office.

The mere failure of an earlier registered mortgagee to demand and retain with him title-deeds relating to the property will not support a claim of priority over him by a subsequent mortgagee who has purposely not made a search in the Registration Office. *The Bank of Bengal, Akyab v. Aung Tha Hla and others*, 47 Ind. Cas. 774.

SIR DANIEL TWOMEY and MAUNG KIN, JJ.

—11.—Redemption.

(1) *Suit for redemption—Mesne profits directed to be ascertained in the execution department—Time begins to run from date of such ascertainment.*

In a suit for redemption of a mortgage, where the decree directs the mesne profits due to the mortgagee to be ascertained in the execution department, time begins to run when the profits are so ascertained (a). *Narain Singh Dass v. Debi Prasad*, 16 A.L.J. 88=40 A. 211=43 Ind. Cas. 232.

RICHARDS, C.J. and BANERJI, J.

Reference:—(a) 25 A. 335, F.

(2) *Agra Tenancy Act (II of 1901), S. 20—Mortgage of occupancy holding—Mortgage void—Suit for redemption—Suit maintainable.*

A usufructuary mortgage was made of an occupancy holding in 1906. The mortgage was void under S. 20 of the Tenancy Act. The mortgagor sued to redeem the mortgage and offered to pay the money due thereunder:—*Held* that the plaintiff was entitled to get back possession on his paying the mortgage money as he had offered to do. *Ramzan v. Bhukhal Rai*, 16 A.L.J. 747=47 Ind. Cas. 852.

RICHARDS, C.J. and TUDBALL, J.

(3) *Transfer of Property Act (IV of 1892), S. 91—Usufructuary mortgage of sir lands prior to Tenancy Act—Sale of mortgagor's proprietary rights after Tenancy Act—Exproprietary tenancy originated—Redemption of mortgage.*

In 1898 and 1899 two usufructuary mortgages of certain sir plots were made. After 1902 the mortgagor's proprietary rights were sold and purchased by the defendants. The defendants subsequently acquired the mortgagee rights also. The mortgagor then brought the present suit for redemption:—*Held* that, upon the sale of proprietary rights, the mortgagor

Mortgage—(Continued).**—11.—Redemption—(Continued).**

became entitled to occupy the *sir* land as ex-proprietary tenant, and, as such, he had interest in the property within the meaning of S. 91 of the Transfer of Property Act, which enabled him to redeem the usufructuary mortgage. **Muhammad Hussain v. Hanuman**, 16 A.L.J. 796 = 47 Ind. Cas. 861.

* **RICHARDS, C.J. and TUDRALL, J.**

(4) *Transfer of Property Act* (IV of 1882), Ss. 74, 75.—*Improvements made by a mortgagee in possession—Mortgagee can recover the costs of the improvements from the mortgagor.*

A mortgagee in possession is entitled to recover from his mortgagor reasonable costs incurred in making improvements.

The Court, in allowing costs of improvements, must not be on its guard against extravagant or unfounded claims. It shall inquire strictly into the *bona fides* and fairness of the claim in each particular case. **Nijalingappa v. Chanabasawa**, 20 Bom. L.R. 895 = 47 Ind. Cas. 751.

BATCHELOR, AG. C.J. and MARTEN, J.

References:—19 M. 327, *Not F.*; *Henderson v. Astwood*, (1894) A.C. 150; *Shepard v. Jones*, (1832) 21 Ch. D. 469, *F.*

(5) *Mortgage—Mortgagee-purchaser of equity of redemption—Purchase in execution of money decree—Mortgagee, if trustee.*

A mortgagee can purchase an equity of redemption at a sale held in execution of a money decree obtained by a stranger against the mortgagor. He does not hold the equity of redemption as a trustee for a mortgagor and for his benefit. **Bharat v. Ishan**, 27 C.L.J. 431 = 43 Ind. Cas. 212.

MOOKERJEE and BEACHCROFT, JJ.

References:—33 M. 377, *Diss.*; 14 C.W.N. 579, *Dist.*; 24 M. 96; 12 M.L.J. 390; 27 M. 428; 5 C. 198; *Shaw v. Bunnay*, (1864) 139 R. R. 190; *Kirkwood v. Thompson*, (1865) 2 H.L. M. 392; 32 C. 296, *R.*

(6) *Partial owner of equity of redemption if can redeem whole mortgage. Balkantha Nath Dey v. Mohesh Chandra Dey*, 22 C.W.N. 128 = 44 Ind. Cas. 77. See Final Part, 1917, Col. 690.

(7) *Mortgage suit—Purchaser of mortgaged property, applying to be made a party, not allowed on plaintiff's objection—Subsequent suit by purchaser at mortgagee's sale to recover possession—Right of previous purchaser to redeem.*

Where an application by a purchaser A, of mortgaged property to be made a party in the mortgage suit was, on the mortgagee's objection, refused, and he was thus prevented from exercising the right of redemption amongst other reliefs which he desired to claim:

Held—That, in a suit by the purchaser at the sale in execution of the mortgage decree, B, to recover the property from A, who was in

Mortgage—(Continued).**—11.—Redemption—(Continued).**

possession, A was entitled to redeem B (a). **Rebati Mohan Das v. Nadlabashi De**, 22 C. W.N. 543 = 44 Ind. Cas. 521 = 28 C.L.J. 466.

RICHARDSON and BEACHCROFT, JJ.

References:—(a) 12 C. 414; 33 C. 426, *Dist.*; 39 C. 513, *R.*

(8) *Partial owner of equity of redemption if can redeem the whole of the mortgaged property.*

A partial owner of the equity of redemption is entitled to redeem the whole of the mortgaged property (a). **Protap Chandra Dhar v. Peary Mohan Dhar**, 22 C.W.N. 800.

RICHARDSON and WALMSLEY, JJ.

References:—(a) 22 C.W.N. 128, *F.*; 22 M. 209; *Pearse v. Marris*, L.R. 5 Ch. Ap. 227, *R.*

(9) *Suit for ejectment—Decree for redemption, whether valid.*

A Court can, in its discretion, pass a decree for redemption in a case in which the plaintiff sued for an ejectment. **Krishnaji Hetkar v. Raoji**, 44 Ind. Cas. 921.

PRIDRAUX, A.J.C.

References:—20 B. 196; 5 C.L.J. 527; 35 B. 507, *Appr.*

(10) *Mortgages in possession—Mortgagee undertaking to pay Government revenue—Willful default—Sale for arrears of revenue, collusive—Effect of, on Redemption.*

Defendant, the mortgagee in possession of a share in a taluk, had undertaken to pay the Government revenue, but made default in payment of the revenue, with the result that the taluk was sold for arrears of revenue. It was purchased by A, who sold it to B, from whom the defendant shortly afterwards purchased it. Plaintiff, a purchaser from the mortgagor sued to recover possession of the taluk from the defendant on redemption. The sale for arrears of revenue and the subsequent sales to B and the defendant were found to be collusive transactions engineered by defendant for obtaining possession of the taluk as owner.

Held, that such collusive transactions could not affect the rights of the mortgagor or of the plaintiff, a transferee from the mortgagor, and that the plaintiff was, therefore, entitled to redeem. **Jamila Khatun Chowdhury v. Mahamud Khatun Chowdhury**, 45 Ind. Cas. 735.

RICHARDSON and BEACHCROFT, JJ.

(11) *Original mortgage—Simple deed executed subsequently in favour of mortgagee—Mortgaged property, Transfer of—Transferee, if bound to pay off both deeds at time of redemption—Arrears due from tenants to be paid to mortgagee on redemption, meaning of.*

Where the executant of a deed of mortgage executes a subsequent simple deed, by which he creates a personal covenant not to redeem the mortgage until he satisfies the amount on the subsequent deed, such a covenant

Mortgage—(Continued).**—11.—Redemption—(Continued).**

cannot be enforced against a subsequent transferee of the mortgaged property. But, where the subsequent deed pledges as security the property mortgaged under the first deed, the effect is a consolidation of the two mortgages, and a subsequent transferee must satisfy the amount due on both as a condition precedent to redemption (a).

Where in the mortgage deed there was a condition that at the time of redemption all arrears due from the tenants must be paid to the holder of the deed.

Held, that the provision meant that the arrears at that time legally due from the tenants, in other words, arrears, the recovery of which was not barred by limitation, must be paid in as a condition precedent to redemption. *Jang Bahadur v. Matadin*, 46 Ind. Cas. 80 = 5 O.L.J. 159.

STUART, A.J.C.

Reference:—(a) 25 Ind. Cas. 905 = 17 O.L. 303, *Expl.*

(12) *Usufructuary mortgage—Lease to mortgagor—Rent, arrears of, Decree for, obtained by mortgagee—Equity of Redemption, Auction sale of—Mortgagee, Purchaser at, Position of—Transfer of Property Act (IV of 1882), S. 93.*

A mortgagor while executing a usufructuary mortgage of certain land, took at the same time a lease of the same property from the mortgagee. The mortgagee then brought a suit for arrears of rent due under the lease and in execution of the decree had the equity of redemption of the property brought to sale in contravention of S. 93 of the Transfer of Property Act, and himself purchased it:

Held, that the mortgagee purchasing the equity of redemption became a trustee for the mortgagor and that it was unnecessary for the mortgagor to get the execution sale set aside to redeem the property. *Narayan Chandra Poddar v. Keshab Lal Dhal Bhal*, 46 Ind. Cas. 493.

FLETCHER and SMITHEE, JJ.

Reference:—6 Ind. Cas. 47 = 14 C.W.N. 579 = 12 O.L.J. 574, *F.*

(12-a) *Mortgagee, acquisition by, of portion of mortgaged property—Effect of, or right of redemption of owner of other portion—Equity of Redemption, Acquisition of portion of, by mortgagee, pending suit—Effect of—Transfer of Property Act, Ss. 52, 60, Applicability of.*

Where a mortgagee acquires a portion of the mortgaged property, the right of the owner of the other portion of the property to redeem the whole is not absolute. The right of redemption depends upon the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage; but if he acquires any portion of the mortgaged estate, he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate.

Mortgage—(Continued).**—11.—Redemption—(Continued).**

Although the mortgagee may acquire a portion of the equity of redemption pending the suit for redemption by other mortgagor, it cannot be said that by taking a transfer, he affects the rights of the plaintiff under the decree or order which may be made in the suit. In other words, the right of the plaintiff not being absolute no case of prejudice can arise. S. 52 of the Transfer of Property Act can have no application to such a case and the mortgagee can then insist upon his right to confine the plaintiff to a suit for redemption of his share of the mortgaged property only. *Ramadhin v. Jokhan*, 47 Ind. Cas. 115.

LINDSAY, J.C.

(13) *Suit for redemption—Burden of proof—Existence of mortgage admitted—Onus of proving its irredeemability—On whom lies—Plaintiff's failure to establish mortgage sued on—Existence of mortgage—If can be spelled out of defendant's documents—Transfer of Property Act (IV of 1882), S. 83—Proceedings under—Admission of mortgage in the mortgagee's statement—If can be relied on by mortgagor-plaintiff—Acquisition of subsequent right depriving redemption—Who should prove.*

Ordinarily, a plaintiff who fails to establish the specific mortgage sued on, should not be given a redemption decree on a mortgage to be spelled out from documents or pleadings to which the defendant was a party (a).

Where, however, the plaintiff is under a *bona fide* mistake, or has been led into the error by the conduct of the defendants, he may notwithstanding his failure to prove the specific mortgage, be permitted to amend his plaint and claim a decree on the admission of the defendant (b).

Where in proceedings under S. 83 of the Transfer of Property Act, 1882, the mortgagee in his statement admitted the existence of the mortgage but contended that the amount deposited was below what was due and payable thereunder.

Held (in a subsequent suit by the mortgagor for redemption),

(1) that the statement amounted to an admission that the mortgage was capable of being redeemed,

and (2) that the burden of proving any acquisition of an irredeemable right subsequent to the date of that statement lay on the mortgagee (c).

In cases where the existence of the mortgage is admitted and the only question is whether it is subsisting or has become irredeemable, the burden of proving that it has become irredeemable will lie on the mortgagee (d). *Madhavan Yydlar v. Lakshmana Pattar*, 7 L.W. 384 = (1918) M.W.N. 189 = 44 Ind. Cas. 447.

SESHAGIRI AYYAR and NAPIER, JJ.

References:—(a) 18 M. 462; 18 M.L.J. 374; 28 M.L.J. 266, R. (b) (1916) 1 M.W.N. 171; 30 M. 398, R. (c) 26 A. 318; 1 A. 117, R. (d) 38 A. 540, R.

Mortgage—(Continued).**—11.—Redemption—(Continued).**

(14) *Money-decree against heirs of woman mortgagor—Payment of decretal amount by another different kind of apparent heir—Charge in favour of such person—Execution sale of interest of charge holder if passes any interest to auction-purchasers—Suit for redemption by one of the heirs against whom money decree passed—Procedure.*

In a suit for redemption, it appeared that the mortgagee from a Burmese widow obtained a decree against her heirs, consisting of the plaintiffs and defendants 4, 5 and 6 for the amount of the mortgage debt, which the first defendant (the son-in-law of the widow at that time apparently entitled to a share as a co heir through his wife), paid off and for which he, with the consent of the heirs, remained in possession of the land. It was subsequently attached and sold by the first defendant's creditors in execution of money decrees against the said first defendant and purchased by the second and the third defendants. The first defendant, the two auction-purchasers and the three co-heirs of the plaintiff were made parties to the suit as defendants 1 to 6. *Held* that the first defendant was not a mortgagee but only the holder of a charge on the joint undivided share of the plaintiff and defendants 4 to 6 in the land, the charge not being an interest in the land which could pass to defendants 2 and 3 the auction-purchasers; that the first defendant's charge was for the sum of money advanced by him to pay off the mortgage-debt less his own share of such debt, if, through his wife, he be entitled to any share in the estate of the deceased widow; and that the plaintiff being one of, was entitled to a decree for possession of the undivided share of the co-heirs less than due to the first defendant, on payment of the amount of the actual charge of the first defendant. *Kya Zan v. Tun Gyaw*, 9 L.B.R. 169=47 Ind. Cas. 121.

TWOMEY, C.J. and ORMOND, J.

(15) *Usufructuary mortgage—Stipulation for discharge of mortgage-debt by applying usufruct—Provision for earlier redemption inserted for benefit of mortgagors—Mortgagor's failure to avail himself of provision—Original stipulation if clog on redemption—Mortgagor if entitled to redeem after time provided for earlier redemption—Transfer of Property Act, Ss. 60 and 62.*

In a deed of usufructuary mortgage executed in 1902 it was stipulated that the mortgage amount and interest were to be worked off by the usufruct of the property, the property being retained in the mortgagee's possession for the requisite number of years for the purpose. An option was given to the mortgagor to pay the amount due on 12-1-1912 in default of which it was provided that the original stipulation should continue. The mortgagor, having failed to pay on 12-1-1912 under that option, subsequently brought a suit for redemption but before the debt had been worked off completely. *Held*, that the suit to redeem was premature and must be dismissed. *Held*, also, that the

Mortgage—(Continued).**—11.—Redemption—(Continued).**

stipulation for payment on 12-1-1912 was not a personal covenant to pay entitling the mortgagor under S. 60 of the Transfer of Property Act to redeem after the time fixed for payment had expired, but that it was a provision inserted for the benefit of the mortgagee. *Held*, further, that the express covenant between the parties that redemption should take place only after the mortgage-debt has been paid off by appropriation of the usufruct was not a clog on the equity of redemption, but that such a covenant is expressly recognised in S. 62, Transfer of Property Act. *Aga Muhammadally Beg v. Venkatapayya*, 35 M.L.J. 297.

PHILLIPS and KRISHNAN, JJ.

References:—36 A. 551; 38 M. 667; 22 Ind. Cas. 907, D-st.; 10 Ind. Cas. 243; 10 A.L.J. 157; 23 Ind. Cas. 129; 16 M. 486; 27 M.L.J. 296; 29 A. 471; 31 M.L.J. 39; 36 A. 195; 23 M. 33; 2 M. 314, R.

(16) *Usufructuary mortgage—Mortgagor in possession for stipulated rent—Provision in case of default for recovery of possession by mortgagee and for interest—Decree obtained by mortgagee on default as stipulated—Possession under decree—Decree not satisfied as to arrears of rent—Right of mortgagee to demand decretal amount together with subsequent interest before redemption—Merger in decree of amount claimed—Amount, if can be claimed after decree is barred—Election.*

A usufructuary mortgage of 1863 provided that the mortgagor was to take back possession and pay a stipulated rent, and that, in default of payment of this rent, the mortgagee was to recover possession and the mortgagor was to pay a sum equivalent to 12 per cent. on the amount lent as rent from the date of the mortgage-deed until the mortgagee got back possession. On the mortgagor's failure in 1871 to pay rent as stipulated, the mortgagee obtained a decree in 1873 for possession and for a certain sum claimed as rent and for future rent and interest at the rate above specified. In execution of this decree possession was taken by the mortgagee, but it did not appear that he was paid the rent decreed. In a suit for redemption instituted in 1915 by the mortgagor, merely on payment of the principal loan, the mortgagee claimed to be paid before redemption that rent with interest added to it for the last 40 years and more. It was contended by the mortgagor that the amount due became merged in the decree and that, as the decree had become barred, the amount could not be claimed. *Held* that the mortgagee's claim was not valid and that the mortgagor could redeem on payment of the mortgage money only. *Narain Rao v. Shiva Row*, 35 M.L.J. 414=24 M.L.T. 370=8 L.W. 405=(1918) M.W.N. 917=41 M. 1043.

PHILLIPS and KRISHNAN, JJ.

References:—20 A. 401; 16 C. 307; 33 M.L.J. 581; 32 M.L.J. 317; 37 A. 634, R.; 5 L.W. 593; 25 M.L.J. 561, Dist.

Mortgage—(Continued).**—11.—Redemption—(Continued).**

(17) *Decree and sale at instance of prior mortgagee — Subsequent mortgagee, not party—Redemption, suit for, by subsequent mortgagee—Interest on prior mortgage — Mortgagee's property, profit on—Mortgagee-purchaser, accountability of — Partial redemption—Improvements.*

The owner of certain houses and lands created 3 simple mortgages on them; the first, on the houses to a Fund; the second, on the houses and the lands to S; the third, on the houses to the plaintiff's husband. S used on his mortgage without making the plaintiff's husband a party, obtained a decree for sale, and himself purchased the properties mortgaged to him for an amount which nearly paid off his debt. He obtained possession and assigned them to third parties. The properties having risen in value, the plaintiff now sued on the mortgage to her husband and offered to redeem the assignees of S who were in possession of the houses, and had improved them at great expense. The assignees of S in possession of the lands were not impleaded in the suit. On the question of the terms of redemption:

Held (1) S and his assignees are entitled on redemption to get the principal and interest according to the terms of the first two mortgages calculated up to the time of payment. The price of redemption is the same whether it is the puisne encumbrancer or the mortgagor who redeems. The first two mortgages which are revived against the mortgagee (S) though extinguished against the mortgagor are kept alive to the fullest extent as if no action had ever been brought on them.

(2) S and his assigns are bound to account for the profits of the properties from the date of possession to the date of payment. It cannot be taken as a rule of law that in such cases the profits should be taken as equivalent to interest. If either party insists, an account of the profits must be taken allowing interest on the mortgage as provided in the bond.

(3) The persons in possession of the lands not being impleaded, and the plaintiff's suit not being based upon but to avoid the mortgagee's purchase, this is not a case for partial redemption and therefore the plaintiff should pay the whole of the mortgage amount found due.

(4) The assignee of S in possession of the houses is not entitled to the value of improvements made to the houses (a). *Muthammal v. Raja Pillai*, 23 M.L.T. 106 = 41 M. 519 = 7 L. W. 420 = (1918) M.W.N. 251 = 44 Ind. Cas. 753.

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 17 I.A. 201; 31 M. 258; 23 M.L.J. 284, F; 21 I.A. 12, E.; 38 M. 18, doubted.

(18) *Lease in perpetuity granted by mortgagor subsequent to mortgage—Lessee's right to redeem—Transfer of Property Act, S. 91 (a)—"Interest in property," meaning of—Malik Mabuza lessor, transfer by, Effect of—Central Provinces Act, 1898, Ss. 60, 85.*

Mortgage—(Continued).**—11.—Redemption—(Continued).**

A permanent sub-tenant, liable to eviction under S. 85, C. P. Tenancy Act, for non-payment of rent is entitled to redeem a prior mortgage of the land leased to him, as a foreclosure or sale in pursuance of the mortgage will prejudice his interests (a).

Under S. 91 (a) of the Transfer of Property Act, a person cannot be said to have any interest in the property he seeks to redeem unless he can be prejudiced by a foreclosure or sale in pursuance of the mortgage (b).

The owner of certain *malik mabuza* lands mortgaged them, and subsequently gave an ordinary agricultural lease of the same under which the lessee should hold the land so long as he paid the rent. He next executed an *inikultnama* in favour of the lessee reciting that, in consideration of a certain sum of money received in advance from the lessee, he transferred his *malik mabuza* rights to the lessee for nine years. *Held* that neither of the documents created any proprietary interest in the lessee and that the lessee was only a permanent sub-tenant, liable to eviction for non-payment of rent under S. 85, C. P. Tenancy Act. *Shanker Singh v. Hukumchand*, 14 N.L.R. 117 = 47 Ind. Cas. 99.

MITTRA, A J.C.

References:—(a) 5 C.W.N. 83, R (b) 17 O. L.J. 384 (348); *Tarn v. Turner*, 39 Ch. D. 456; 29 A. 679; 19 M. 151; 8 C. 79, R.

(19) *Simple mortgage, Prior execution of—Subsequent execution on same property of usufructuary mortgage, providing for redemption within two years only—Execution of both mortgages before Transfer of Property Act and C. P. Laws Act of 1975—Right of mortgagor to redeem subsequent mortgage without redeeming earlier mortgage—Contract curtailing statutory period for redemption, Validity of—Transfer of Property Act, S. 83.*

On 4-4-1872, certain persons executed a simple mortgage of their house to the predecessors of the defendant and, on 31-7-1872, the same mortgagors executed on the same property a usufructuary mortgage, in which it was stipulated that the mortgagors could redeem only within two years. On 4-7-1914, the plaintiff purchased from the mortgagors their right, title and interest in the house, made a deposit under S. 83, Transfer of Property Act, and, after its refusal, brought a suit for redemption of the subsequent mortgage of 31-7-1872. *Held* that the plaintiff was entitled to redeem the subsequent usufructuary mortgage without redeeming the earlier mortgage of 4-4-1872 (a).

Held, also, that, in spite of the stipulation in the usufructuary mortgage restricting the right of the mortgagor to redeem within two years, which stipulation was laid down only in the interests of the mortgagor, not mortgagees, the law allowed him 60 years for redemption and that a contract curtailing that period of redemption was void.

Mortgage—(Continued).**—11.—Redemption—(Continued).**

Held, further, that, even assuming that there was an implied contract that the mortgagee was to be the owner of the property if the mortgagor failed to pay the principal sum after two years, the mortgage was, in effect, so far a mortgage by conditional sale, and that the right of redemption was not lost under the laws considered to be in force in the Central Provinces prior to the C. P. Laws Act of 1875 (b). *Deochand v. Binjraj*, 14 N.L.R. 184.

MITTRA, J.C.

References:—(a) 16 A. 295; 6 B.H.C. (A.C.) 90; 11 W.R. 310; 7 B. 526; 38 M. 927; 21 M.L.J. 562; 8 N.L.R. 123, R. (b) 8 C.P.L.R. 118; 13 B.L.R. 205, R.

(19-a) *Mortgage-debt, Balance of, Payment of, if amounts to—Redemption, how affected—“Redeem,” Meaning of—Transfer of Property Act (1882), S. 95, Scope and Applicability of.*

* In the ordinary sense, the word 'redeem' means to buy back or set free by payment. The property is bound by the mortgage, and any act taken to cut the bond by payment of money is a redemption.

The payment of the balance due upon the mortgage is as much a redemption as the payment of the whole sum due in a case in which there has been no previous part-payment.

Redemption is effected by the releasing of the security and where the security is extinguished, the property is redeemed by the act which extinguished it.

S. 95, Transfer of Property Act, (1882), is not limited in its scope to cases in which delivery of possession of the property itself is rendered possible by the fact that the mortgage was a usufructuary mortgage. It is also applicable to cases of simple mortgage where the property not being in the possession of the mortgagees cannot be transferred to the party releasing the security. *Musamat Hira Kuer v. Palku Singh*, 3 Pat. L.J. 490=46 Ind. Cas. 479.

ROE and COUTTS, JJ.

References:—31 C. 853; 35 C. 703; 29 A. 483, *Ref. to.*

(20) *Compromise decree in suit on mortgage by conditional sale—Creation by such decree of new mortgage with condition as to sale on default of certain instalments—Decree made subsequent to Punjab Land Alienation Act—Condition as to sale in decree if valid—Mortgagor's right to redeem.*

A compromise decree of 1908 passed in a foreclosure suit based on a mortgage by conditional sale of 1898, recited the consent of the mortgagee to the land being treated as under a mortgage to him for a particular sum and to the redemption thereof by the mortgagor by instalment payments of that sum within a fixed period, and provided that if the mortgagor made default in payment of three consecutive instalments, the land should be considered as

Mortgage—(Continued).**—11.—Redemption—(Continued).**

sold to the mortgagee. **Held** that the compromise decree created a new mortgage between the parties in supersession of the original mortgage; but that, as it was passed after the enactment of the Punjab Land Alienation Act, it was governed by S. 10 thereof, the effect being that the condition and only the condition in the compromise decree intended to operate by way of conditional sale though based on the agreement of the parties, became wholly inoperative and that the mortgagor was entitled to redeem the mortgage created by the decree on payment of the sum mentioned in it. *Debi Sahai v. Ramji Mal*, 56 P.R. 1918=127 P.W.R. 1918=46 Ind. Cas. 460.

SHAH DIN and SCOTT-SMITH, JJ.

References:—93 P.R. 1907; 60 P.R. 1909; 88 P.R. 1909; 35 M. 75, *Dist.*; 132 P.R. 1882, R.; 82 P.R. 1909, F.

(21) *Mortgage—Lekha mukhi mortgage—Redemption, suit for—Failure of mortgagee to keep full and regular accounts, effect of—Presumption—Civ. Pro. Code (Act V of 1908), O. XXII. r. 4—Death of respondent—Application for bringing legal representative on record not made within limitation—Appellant living at great distance from respondent—Sufficient cause—Limitation Act (IX of 1908), S. 5.*

In a suit for redemption of a *lekha mukhi* mortgage, the question of the liability of the mortgagor and the mortgagees *inter se* was referred to a local commissioner, who found that the mortgagees did not keep full and regular accounts of the income and expenditure of the land in suit, and who, therefore, based his report on the statement of the mortgagees' *daubir*.

Held, (1) that it was the duty of the mortgagees to keep full and regular accounts of the income and expenditure of the mortgaged land;

(2) that in view of their failure to keep such accounts every presumption should be made against them;

(3) that the report of the local commissioner based on the statement of the mortgagees' own *daubir* must be accepted as correct.

One of the respondents in an appeal died on the 7th April, 1915. An application to bring his legal representative on the record was not made till the 3rd December. It appeared from the affidavit of the appellant that the deceased lived in Multan City while the appellant himself lived in a village in Muzaffargarh District and that, therefore, he did not know of the death of the respondent till shortly before he made the application.

Held, that the appellant had sufficient cause for not making the application within the prescribed period of limitation. *Allah Yar v. Thakar Das*, 24 P.L.R. 1918=46 P.W.R. 1918=44 Ind. Cas. 9.

SHAH DIN and SCOTT-SMITH, JJ.

Mortgage—(Continued).**—11.—Redemption—(Continued).**

(22) Mortgage—Acquisitions by mortgagees—Redemption—Mortgagor, whether can claim possession on redemption—Unrestricted power of alienation by occupancy tenants by agreement in Wajib-ul-arz—Ss. 56, 111, Act XVI of 1937 (Punjab Tenancy).

Held, that a mortgagee, who has acquired what any stranger or even the mortgagor himself could have acquired equally well despite the mortgage, cannot be compelled to hand over his rights to the mortgagor.

It is, therefore, competent to a mortgagee during the continuance of the mortgage to purchase an absolute occupancy tenure for himself and to treat it as his separate property after the mortgage comes to an end (a).

S. 69 of the Transfer of Property Act (IV of 1882) not applied.

Plaintiff's father had mortgaged certain properties to the defendant, and the latter during the subsistence of the mortgages bought out a number of occupancy tenants. The plaintiffs redeemed the mortgages by private arrangement but the defendants refused to give possession of the land which had been subject to the occupancy tenures, alleging that they had not acquired these tenancies as mortgagees and that they were, therefore, entitled to retain them for their own benefit. Plaintiffs thereupon claimed possession of these tenancies on payment of the sum for which they had been acquired.

Held, that the mortgagees were entitled to retain the benefit of their acquisition for themselves and that the plaintiff's suit must fail.

Held, also, that an agreement in the *wajib-ul-arz* of a village that the occupancy tenants of that place have unrestricted power of alienation is valid under S. 111 of the Punjab Tenancy Act, XVI of 1897, despite the provisions of S. 56 of the same Act. **Girdhari Ram v. Muhammad Karm Dad Khan**, 26 P. L.R. 1918=63 P.R. 1918=53 P.W.R. 1918=44 Ind. Cas. 266.

LESLIE-JONES, J.

References :—(a) 5 C.P.L.R. 105, F.; 5 C. 198=5 C.L.R. 21=36 I.A. 145=4 Sar. P.C.J. 17=3 Subh. P.C.J. 637=Rafique and Jackson's P.O. No. 58=3 Ind. Jur. 426=3 Shome L.R. 1=2 Ind. Dec. (N.S.) 737 (P.C.), R.; 19 Ind. Cas. 90=17 C.W.N. 586, D.

(23) Redemption of mortgage—Right of redemption of reversioner in whose favour a Hindu widow has surrendered possession in lieu of maintenance—Position of such person.

Held, that a reversioner, in whose favour a widow has surrendered possession of land, in which she has life estate in lieu of receiving fixed maintenance, reserving to herself its title, is entitled to redeem a mortgage created in such land by the widow and that, after redemption, the reversioner will stand in the shoes of the prior mortgagee. **Jamina Ram v. Mt. Soni Bai**, 178 P.W.R. 1918.

LE-ROSSIGNOL, J.

Mortgage—(Continued).**—11.—Redemption—(Continued).**

(24) In Malabar redemption suits are by statute treated as ejectment suits—One decree in ejectment provided. See MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS), No. 6, (1918) M.W.N. 551.

(25) Suit for redemption—Withdrawal of suit as against a necessary party—Effect on suit. See CIV. PRO. CODE (-908), No. 432-a, 45 Ind. Cas. 650.

(26) Mortgagor when entitled to possession in redemption suit. See CIV. PRO. CODE (1908), No. 33, 7 L.W. 269.

(27) Plaintiff in redemption suit—Mortgagor's contract to pay compound interest at a certain rate how far binding on plaintiff. See INTEREST, No. 3, 23 C.W.N. 190 (P.C.).

(28) Purchaser of equity of redemption in part of mortgaged property—Redemption by such purchaser of entire property and in possession—Suit against such purchaser for redemption by another purchaser of equity of redemption in part of such property. See LIMITATION ACT (1908), No. 197, 16 A.L.J. 740.

(29) Preliminary decree fixing time for redemption—Confirmation of such decree in appeal therefrom—Application for final decree, Computation of time for making. See LIMITATION ACT (1908), No. 219, 35 M.L.J. 507.

(30) Mahomedan Law—Minor—Mortgage by minor's father and then by mother as guardian—Act II of 1913—Redemption of first mortgage by order of Collector—Possession received by minor—Suit by mortgagee under S. 12—Equity. See MAHOMEDAN LAW MINORITY), 152 P.L.R. 1917.

(31) Mortgage, Possession of, not through mortgagor—if adverse to mortgagor—Redemption, Right of, if affected. See MORTGAGE (GENERAL), No. 9-b, 16 Ind. Cas. 872.

(32) Successors-in-title of original equitable mortgages in possession with consent of mortgagors—Such possession and receipt of rents and profits in lieu of interest to be presumed to be under mortgagor's authority—Termination of possession, Repayment of loan before. See MORTGAGE (EQUITABLE MORTGAGE), No. 9, 9 L.B.R. 172.

(33) Sale in contravention of S. 39, Transfer of Property Act—Purchase by mortgagee—Mortgagor's right to redeem. See MORTGAGOR AND MORTGAGEE, No. 1, 28 C.L.J. 451.

(34) Suit on prior mortgage for recovery of sum due to mortgagee—Puisne mortgagee made party—Subsequent suit by puisne mortgagee if barred. See RES JUDICATA, No. 25, 35 M.L.J. 639.

(35) Suit by prior mortgagee—Puisne mortgagee party—Decree and order absolute—Fresh suit by puisne mortgagee if barred. See RES JUDICATA, No. 82, (1918) M.W.N. 902.

Mortgage—(Continued).**—11.—Redemption—(Concluded).**

(36) Mortgage by conditional sale—Foreclosure proceedings—Decree in favour of mortgage against widow—Suit for redemption by reversioners, maintainability of. See RES JUDICATA, No. 40, 44 P.L.R. 1918.

—12.—Sale.

(1) Suit for sale on mortgage—Decree for costs passed in appeal—Realisable from mortgaged property and not personally from mortgagor—Civ. Pro. Code (Act V of 1908), O. XXXIV, rr. 4, 5, 10. *Dambar Singh v. Kalyan Singh*, 15 A.L.J. 914=40 A. 109=43 Ind. Cas. 557. See Final Part, 1917, Col. 693.

(2) Sale in execution of decree—Sale of sixteen annas semindari—Whether groves comprised therein transferred by sale or not.

One A.M. owned an entire sixteen annas mahal. In execution of decrees against certain persons, he purchased shares in certain groves. Subsequently, he mortgaged his entire sixteen annas zamindari together with all appurtenances. In execution of the decree under the mortgage, the entire sixteen annas were ordered to be sold and were purchased by the plaintiff.—*Held* that the sale was not exclusive of the shares in the groves. *Hasan Ali Khan v. Azharul Hasan*, 16 A.L.J. 300.

RICHARDS, C.J. and TUDBALL, J.

(3) Mortgage decree directing sale of other properties of judgment-debtor if sale-proceeds of mortgaged property insufficient—Limitation as to latter part of decree—Civ. Pro. Code (Act V of 1908), S. 48, O. XX, r. 6—O. XXXIV, r. 6.

Where a mortgage-decree after directing that the available proceeds of the sale to be held under the decree was to be paid in satisfaction of the decretal debt but that if the amount due to the plaintiff was not satisfied by the sale of the mortgaged property, the balance would be realised from other properties and the persons of the defendants.

Held—That limitation for execution of the latter part of the decree did not run from the date of the sale of the mortgaged property, but from the date of the decree as fixed by O. XX, r. 6 of the Civ. Pro. Code. *Khulna Loan Company v. Jancendra Nath Bose*, 22 C.W.N. 145=45 Ind. Cas. 436 (P.C.).

LORD SHAW, LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE and MR. AMEER ALI.

Reference:—31 O. 792, Expl.

(4) Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage bond—Rice lent—Covenant of repayment—Mortgagees to realise money in case of default by sale of mortgaged properties—Suit on mortgage bond, whether a suit for recovery of money charged on mortgaged properties.

Where, in a suit to enforce a mortgage, the plaintiffs lent a certain amount of rice and there was in the bond the usual covenant of repayment and the interest and the bond also

Mortgage—(Continued).**—12.—Sale—(Continued).**

provided that, if default was made in the rice, the mortgagees would be competent to realise the money which would be due at the rate of Rs. 6 per "map," by sale of the mortgaged properties belonging to the mortgagors.

Held—That the primary object of the suit was to recover money and what the Court would give the plaintiffs would be money and not rice, if they succeeded in the suit, and that that money was a charge on the mortgaged property (a).

Held, also—Each case must turn on the construction that the Court places on the mortgage-deed in that particular case. *Sripati Lall Dutt v. Sarat Chandra Mandal*, 22 C.W.N. 793=46 Ind. Cas. 78.

FLETCHER and SHAMSUL HUDA, JJ.

References:—(a) 24 C.L.J. 348, Dist.; 18 C.W.N. cixxiv, R.

(5) Mortgage—Sale in execution of mortgage decree—Sale in execution of money decree before sale under mortgage decree but after mortgage decree—Right of purchaser under mortgage decree.

A purchaser, at a sale in execution of money decrees held after the passing of a mortgage decree but before the sale under the mortgage decree, is bound by the mortgage sale and has no right to possession as against the purchaser in the mortgage sale. *Chandi Charan Bandopadhyaya v. Kazi Jawadal*, 43 Ind. Cas. 624.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—10 C.L.J. 150, R.

(5-a) Mortgaged property, Sale of—Equity of redemption, Purchaser of portion of, if can object to—Execution of decree, Independent title, if can be enforced in—Civ. Pro. Code (Act V of 1908), S. 47.

Where the mortgaged property is sold under a final decree in a mortgage suit, a purchaser of a portion thereof joined as a defendant in that suit cannot, under S. 47, Civ. Pro. Code, object to its sale on the ground that he has acquired a new and independent interest in that portion of the property.

Any right that he has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. *Bindu Basini Dasyya v. Sri-mantha Sii*, 47 Ind. Cas. 374.

FLETCHER and SHAMSUL HUDA, JJ.

(6) Suit for sale by first mortgagee—Second mortgagee to be made party to suit—Omission to make puisne mortgagee, Effect of, on order for sale—Order absolute for sale—Construction of Transfer of Property Act, Ss. 85, 89.

Where a first mortgagee did not make the second mortgagee a party to his suit for sale as he was bound to do under S. 85, Transfer of Property Act, the second mortgagee would not be bound by the order for sale, which could only have been operative subject to his title.

Mortgage—(Continued).**—12.—Sale—(Continued).**

On the making, under S. 89, Transfer of Property Act, of the order absolute, the security as well as the right to redeem are both extinguished, and for the right of the mortgagee under his security, there is substituted the right to a sale conferred by the decree. *Hatram v. Shaderam*, 35 M.L.J. 1-16 A.L.J. 607=28 O.L.J. 188=24 M.L.T. 92=20 Bom. L.R. 798=(1918) M.W.N. 518=22 O.W.N. 1033=40 A. 407=5 Pat. L.W. 88=45 Ind. Cas. 798 (P.C.).

VISCOUNT HALDANE, SIR JOHN EDGE,
MR. AMEER ALI and SIR WALTER
PHILLIMORE, BART.

- (7) *Preliminary decree for sale under Transfer of Property Act—Time fixed for payment of mortgage amount, Expiration of, after coming into force of Civ. Pro. Code—Application for final decree under Civ. Pro. Code, O. XXXIV, r. 5—Application for execution of decree ordered to be made—Limitation Act, Arts. 181, 182.*

The period of six months fixed for payment of the mortgage money by a mortgage-decree, dated 16-7-1908, expired on 16-1-1909. The Court returned an application by the decree-holder for a final decree under Civ. Pro. Code, O. XXXIV, r. 5, on the ground that the application ought to be one for execution of the decree, which was passed when the old Code was in force. In an application re-presented on the execution side, the decree-holder contended that the execution was barred under Art. 181 of the New Limitation Act. *Held* that a final and executable decree was passed in this case under the Transfer of Property Act, notwithstanding that the direction in the decree for sale of the property was made conditional on default of payment of the amount found due to the plaintiff by a certain date; that the introduction of the new Civ. Pro. Code on 1-1-1909 did not have the effect of making it incumbent on the decree-holder to apply under Art. 181 for a final decree under O. XXXIV, r. 5; and that Art. 182 governed the proceedings even in 1914 as it did on 16-7-1908. *Ramaswami Reddi v. Sakkappa Reddi* 5 M.L.J. 194.

SAQASIVA AIYAN and SPENCER, JJ.

References:—32 Ind. Cas. 39; (1915) M.W.N. 643; 29 M. 544; 3 L.W. 468; 36 A. 350 (P.C.), R.; 32 M.L.J. 455, Diss.

- (8) *Suit for sale—Decree defective under the Transfer of Property Act (IV of 1882), S. 88—Sale in execution of such a decree—Confirmation of sale—Mortgagor's right to redeem—Subsequent suit to redeem against the auction purchaser—Practice—Civ. Pro. Code (Act XIV of 1882), S. 244.*

In a mortgage suit for sale of the mortgaged property the decree made did not comply with the provisions of the Transfer of Property Act (IV of 1882), S. 88, for no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court

Mortgage—(Continued).**—12.—Sale—(Continued).**

the amount due. In execution of the decree the mortgaged properties were attached, sold and purchased with the permission of the Court by the mortgage-decree-holder, and the sale was duly confirmed; the mortgagor subsequently brought the present suit to redeem the mortgage.

Held, that the decree was intended to be made in compliance with the Act, and whether or not its provisions were complied with, the property and all right, title and interest of the defendant were in fact sold in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made and that decree was not appealed, and that the mortgagor-plaintiff was barred from a right to redeem:

Held, also, that the question now raised could have been raised before the sale was confirmed, and if so raised, would have been determined by the Court executing the decree, and that the present suit was barred by S. 244 of the Civ. Pro. Code (Act XIV of 1882) (a). *Ganapathy Mudaliar v. Krishnamachariar*, 23 M.L.T. 198=41 M. 409=27 C.L.J. 367=4 Pat. L.W. 310=44 Ind. Cas. 355=34 M.L.J. 463=(1918) M.W.N. 310=16 A.L.J. 553=20 Bom. L.R. 580=22 C.W.N. 553=8 L.W. 427 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE,
SIR WALTER PHILLIMORE, BART. and
SIR LAWRENCE JENKINS.

Reference:—(a) 19 I.A. 166, F.

- (8-a) *Decree absolute for sale. Suit to set aside a, Maintainability of, on ground of application being after limitation period—Application, Notice of, to judgment-debtor, Failure to give, Suit if can succeed on ground of—Jurisdiction, Question of, Question of limitation a—Limitation Act (1908), Ss. 4, 28.*

A suit will not lie to set aside a decree absolute for sale in a mortgage case merely upon the ground that the decree absolute was obtained after the period provided by the law of limitation.

A suit to set aside a decree absolute for sale cannot succeed merely upon the ground that no notice was given to the mortgagor of the mortgagee's application for a decree absolute.

Under Limitation Act, 1908, it is clear that a question of limitation is not a question of jurisdiction.

The jurisdiction of a Court is not affected by failure to give notice.

A Court has inherent power to allow an application to set aside the decree absolute on the ground of want of notice and to treat as an application a suit filed within 30 days from the date of knowledge of the sale. *Bhalga Parida v. Ganuath Khandal*, 3 Pat. L.J. 478=46 Ind. Cas. 569.

CHAPMAN and ROE, JJ.

References:—11 O. 287; (1895) 1 Ch. D. 219. *Ref. to.*

Mortgage—(Continued).**—12.—Sale—(Continued).**

- (9) *Mortgage decree passed on compromise—Provision in decree for proceeding against other properties of judgment debtor if sale of property mortgaged did not realise mortgage amount—Order under r 6 O XXXIV, Civ. Pro. Code, if necessary to pursue other properties—Fact of decree being on compromise removes necessity for such order*

A formal order under O. XXXIV, r 6 of the Civ. Pro. Code is a necessary preliminary to pursue other properties of the judgment debtor not covered by the mortgage where after the sale of the mortgaged property there is a balance outstanding. This universal rule is not altered by the circumstance that the original decree was a compromise decree, whose effect was merely to create an undertaking on the part of the judgment debtor not to contest an order under r 6 of O XXXIV.

The benefit of an order under r 6 is that a proper account is taken, the parties know exactly where they stand and the proceedings are in order. *Karimulla Shah v Mirza Mohammad Raza*, 3 Pat. L J 649.

ROE and JWALA PRASAD, JJ

- (10) *'Mortgage—Provision as to power of sale construction of—"Default of payment of mortgage money," meaning of—Mortgage money if refers only to principal and interest in combination—Transfer of Property Act, Ss. 69, 58.*

"Default of payment of the mortgage money" in the first paragraph of S 69, Transfer of Property Act, includes default of payment of interest, as the term "mortgage money," defined in S 58 of the Act as the principal money and interest of which payment is secured, includes interest just as much as principal and is not confined only to principal and interest in combination. There is nothing inconsistent in S 69 with the exercise of power of sale prior to the expiration of the period allowed for redemption. *A C Kundu v Babu H Rukmanand* 9 L B R 106=44 Ind Cas 921.

TWOMEY, C.J. and PARLETT J

Reference —28 W R 91 (P C), D

- (10 a) *Right, title and interest of one not a party to suit—Suit for sale by puisne mortgagee without impleading prior mortgagee—Effect of impleading prior mortgagee—Purchaser at the first sale under second mortgagee's decree—Property brought to sale under two separate decrees—The right of first purchaser to possession and enjoyment—Suit on second mortgage only by one holding both the first and second mortgages, sale to be free of both—Purchaser under second mortgagee's decree after possession obtained by one under first mortgagee's decree.*

Right title and interest of one not a party to suit cannot be sold by Court.

Though a suit for sale is maintainable by puisne mortgagee without impleading the prior

Mortgage—(Continued).**—12.—Sale—(Continued)**

mortgagee, yet, when the latter is impleaded, the sale should not usually be ordered subject to the first mortgage.

A purchaser who obtains possession at a sale held first under the second mortgagee's decree cannot be turned out by the purchaser under the first mortgagee's decree, whose only remedy is a properly framed suit for sale, *qua* first mortgagee. Property being brought to sale by both the first and the second mortgagees separately in two independent suits, the first purchaser gets the present, inalienable right to possession and enjoyment. In the case of a suit brought on the second only by one holding both the first and the second mortgages the sale ordered should be free of both the mortgages. A purchaser under the second mortgagee's decree after possession being obtained by a purchaser under the first mortgagee's decree has only the rights of the second mortgagee, and no right to possession. *Paman Das v Hiranand*, 47 Ind. Cas. 733=12 S L R 1.

HAYWARD, J C and CROUCH A J C.

- (11) *Decree in mortgage suit held executable without final decree for sale—Sale proclamation issue of—Prayer in application for adjournment of sale containing acknowledgment giving fresh starting point for limitation. See ACKNOWLEDGMENT OF DEBT, No 4, 35 M L J 552*

(11 a) *Sale of mortgaged property, Decree for Application for sale in execution of—Attachment, Necessity of—Civ Pro Code (1908), O XXI, r 14, Applicability of, to such an application. See ATTACHMENT, No 1 a, 47 Ind Cas. 639*

- (12) *Application under O XXXIV, r 6, Civ. Pro. Code—Application if one for execution. See CIV PRO CODE (1908), No 447, 16 A L J. 437*

(13) *Payment or settlement out of Court of the mortgage decree during the period between the preliminary and final decrees—Certificate under Civ Pro Code, O XXI, r 2 not obtained—Final decree if may be passed—Remedy of mortgagee. See CIV PRO CODE Nos 435—437, 35 M L J 579*

(14) *Mortgage suit—Decree in, directing possession to mortgagee—Sale of mortgaged property for debts after possession delivered to mortgagee. See EXECUTION PROCEEDINGS, No 2, 46 Ind. Cas 52*

(15) *Final decree for sale under Civ Pro. Code O XXXIV, r 5—Date of preliminary decree of final appellate Court furnishes starting point. See FINAL DECREE, No 1, 21 O C. 176*

(16) *Preliminary decree—Final decree in mortgage suit is decree in suit itself—Application for final decree if application in execution. See LIMITATION ACT (1908), No 206, 16 A L J. 143.*

Mortgage—(Continued).**—12.—Sale—(Concluded).**

(17) Mortgage suit—Preliminary decree for sale passed after Civ. Pro. Code, 1908—Application for final decree—Limitation. See LIMITATION ACT (1908), No. 210. 7 L.W. 438.

—13.—Simple.

Rights of the mortgagor to remain in possession—Civ. Pro. Code (1903), O. XL, r. 1—Appointment of Receiver.

A mortgagor, where the mortgage is a simple mortgage, is entitled to remain in possession of the mortgaged property until such time as that property has been brought to sale in due course of law.

It has been enacted in O. XL, r. 1, that, where it appears to the Court to be just and convenient, a Receiver may be appointed by the Court. *Goviad Ram v. Jwala Pershad*, 43 Ind. Cas. 533.

RICHARDS, C.J. and BANERJI, J.

—14.—Sub-mortgage.

Sub-mortgage—Substitution of original mortgage by subsequent mortgages in ignorance of the sub-mortgage—Rights of sub-mortgagees—Remedies of mortgagor.

In ignorance of the existence of a sub mortgage in favour of the plaintiff's predecessor in title, of some items only of the property originally mortgaged, the original mortgage was substituted by two mortgages covering distinct portions of the property and executed by two different branches of the family of the mortgagor. The suit is brought by the plaintiff (sub-mortgagee) to effect a sale of the mortgagee's rights against the sub-mortgaged property, for the amount due to him.

It was contended as against him that substitution of the mortgage must have the same effect as redemption and that the mortgage having been extinguished, the sub-mortgagee had no right to sue; and also that he could not bring a suit for sale of some items only covered by the original mortgage which were alone sub-mortgaged to him.

Held that the substitution of the original mortgage by a new one could not prejudice the rights of the sub-mortgagee, or affect his rights to bring the mortgagee's rights under the earlier mortgage to sale.

Held, also, that the mortgagor's remedy against the sub-mortgagee was just what he would have against the original mortgagee, if the latter sought to enforce his debt against those particular properties, namely, to redeem by paying the amount sued for, which was less than the amount covered by the original mortgage (a). *Chakrapaal Chetty v. Lakshmi Achi*, 23 M.L.T. 300=35 M.L.J. 303=(1918) M.W.N. 249=45 Ind. Cas. 769.

WALLIS, C.J. and NAPIER, J.

References:—(a) 18 M.L.J. 462; 29 A. 885 (F.B.), F.; *Jones v. Gibbons*, 9 Ves. 407; *Matthews v. Watlyn*, 4 Ves. 118; *Chambers v. Goldwin*, 9 Ves. 254; *Dixon v. Winch*, (1900) 1 Ch. 736, R.

Mortgage—(Continued).**—15.—Subrogation.**

(1) *Mortgagee purchasing in execution of mortgage decree—Keeping alive—Presumption—Transfer of Property Act (IV of 1882), S. 101.*

The widow of the last male holder alienated her husband's properties directing the alienee to discharge a mortgage binding on the estate. During the pendency of a suit for a declaration that the alienation was bad the alienee mortgaged the properties to pay off the existing incumbrance. The mortgagee brought a suit on his mortgage and purchased the properties in execution.

Held that it was for the mortgagee's benefit to keep alive the original mortgage both when he advanced money and when he purchased the properties in execution of his mortgage-decree (a).

The presumption was in favour of the original mortgage being kept alive under S. 101 of the Transfer of Property Act (b). *Suppu Sakkayya Bhattar v. Suppu Bhattar*, 7 L.W. 30=(1919) M.W.N. 41=43 Ind. Cas. 714.

WALLIS, C.J. and AYLING, J.

References:—(a) 31 M. 439; 29 C. 154; *Whisley v. Dlamery*, (1914) App. Cas. 132, R. (b) 29 M.L.J. 583, R.

(2) *Transfer of Property Act (IV of 1882). Ss. 74 and 101—Subrogation. Right of—If enforceable by suit—Purchaser of mortgaged property—Discharge of prior incumbrance by—Intention to keep it alive—Whether a question of law or fact—Presumption applicable to the case.*

The right of subrogation obtained by the discharge of a prior mortgage is an equitable right, and where it is a simple mortgage right, can be enforced by suit as against an auction-purchaser (a).

Where a purchaser of the equity of redemption discharges a prior mortgage, the question whether it was or was not his intention to keep the prior mortgage alive as against puisne mortgagees is one of fact and the presumption is in favour of its being so kept alive when it is to the purchaser's interest to do so. *A. Rama Rao v. Mandachalugal*, 8 L.W. 175=24 M.L.T. 133=35 M.L.J. 467=(1918) M.W.N. 505=47 Ind. Cas. 882.

PHILLIPS and KRISHNAN, JJ.

References:—(a) 34 A. 102, F.; 29 M.L.J. 583; (1916) 2 M.W.N. 92, Diss.

(3) *Compulsory registration—Denial of execution—Burden of proof—Subrogation—Outstanding loan. Pallikandi Katapurath Mammad v. Matancheri Mammad*, (1917) M.W.N. 789=35 M.L.J. 315=43 Ind. Cas. 28. See Final Part, 1917, Col. 696.

(4 & 5) *Person in possession holding up as shield payments made towards prior mortgagee—Suit decreed subject to his lien—Final decree made without mention of lien—Property sold and purchased by mortgagee—Dispossession of*

Mortgage—(Continued).**—15.—Subrogation—(Concluded).**

person in possession—Suit by such person to recover money paid for prior mortgages, if maintainable. See *RES JUDICATA*, No. 5, 16 A.L.J. 685.

—16.—Usufructuary.

(1) *Usufructuary mortgage of zamindari—Theka granted by mortgages at a certain rate of rent to last during term of mortgages—Equity of redemption sold for arrears of rent—Mutation not made in purchaser's favour—Subsistence of Theka—Suit for arrears of rent under theka—Maintainable.*

On July 23rd, 1908, defendant made a usufructuary mortgage of his zamindari in favour of the plaintiff; on the same day the plaintiff granted a theka of the mortgaged property to the defendant at a certain rate of rent, to last during the term of the mortgage. The rent under the lease having fallen into arrears, a suit was brought against the defendant on June 26th, 1912, and, in execution of the decree made in the suit, the equity of redemption was put up for sale on March 20th, 1913. It was purchased by a third person, and the mortgage was proclaimed at the time of sale. The purchaser did not take steps to have mutation effected in his favour and the records continued as before. The plaintiff now sued the defendant for arrears of rent under a theka for a period partly prior and partly subsequent to March 20th, 1913, and the rate fixed therein. The defendant contended that, after the 20th March, 1913, he was not liable to pay any rent, he having become an ex-proprietary after the date of the sale: *Held*, that whether rightly or wrongly, the mortgage must, under the circumstances, be assumed to be subsisting, and as such the lease also must be deemed to subsist and the defendant, as thekadar, was liable for rent as provided in the theka. *Mithan Lal v. Chhajju Singh*, 16 A.L.J. 384 = 40 A. 429 = 45 Ind. Cas. 549.

TUDBALL and ABDUL SAOOF, JJ.

(2) *Subsequent simple mortgages—Suit for redemption by mortgagor—Suit on simple mortgages by mortgagor barred—Right of mortgagor to claim payment of simple mortgages on redemption—Covenant by mortgagor in usufructuary mortgage-deed to pay all rents under lease to be granted by mortgagee of mortgaged property at time of redemption—Settlement as to arrears of rent—Simple mortgage for such arrears—Merger—Right of mortgagee to fall back on covenant—Transfer of Property Act (IV of 1882), S. 61. Ramkrishna Kukklaya v. Nekka Kuppaana, 6 L.W. 621 = 22 M.L.T. 422 = 33 M.L.J. 581 = (1918) M.W.N. 75 = 43 Ind. Cas. 236. See Final Part, 1917. Col. 698.*

(3) *Necessity to register before instituting suit for rent, if applies to usufructuary mortgages. See BEN. ACT VII OF 1876 (LAND REGISTRATION), No. 1, 42 Ind. Cas. 685.*

(4) *Mortgage with mortgagee in possession—Lease of premises to mortgagor on monthly*

Mortgage—(Continued):**—16.—Usufructuary—(Continued).**

rent—Right to evict mortgagor on notice expressly reserved—Relationship of landlord and tenant if created—No reference to lease in mortgage—Mortgage and lease registered on same day—Transactions different—Right of mortgagee to evict mortgagor. See *APPEAL (SECOND APPEAL)*, No. 25, 161 P.W.R. 1918.

(5) *Stipulation as to payment made for benefit of mortgagor choosing his own time—Covenant not personal. See DOCUMENTS (CONSTRUCTION OF), No. 1, (1918) M.W.N. 672.*

(5-a) *Mortgagee refusing to deliver possession—Ejectment, Mortgagor if entitled to maintain a suit for—Mesne profits accruing from date of ejectment suit, Suit for, if lies. See EJECTMENT, No. 4-a, 46 Ind. Cas. 743.*

(6) *Mortgagee standing in a fiduciary position towards the mortgagor—Mortgage for sum due on accounts alleged to be settled—Plea in defence to reopen the accounts—If available—“Tanaka,” meaning of—Whether denotes a mortgage or an assignment of land revenue. See HINDU LAW (IMPARTIBLE ESTATES), 7 L.W. 36.*

(7) *Mortgagor in possession of mortgaged land as lessee and holding, Ejectment of, by notice under Oudh Rent Act, S. 127. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 5, 46 Ind. Cas. 75 = 5 O.L.J. 163.*

(8) *Usufructuary mortgage with possession but not registered—Subsequent execution of lease according to law—Compulsory registration of mortgage after transaction of lease—Mortgage if yields priority to lease. See LEASE, No. 2, 16 A.L.J. 137.*

(9) *Purchaser of equity of redemption of part of mortgaged property—Suit for redemption—Limitation. See LIMITATION ACT (1908), No. 197, 16 A.L.J. 740.*

(10) *Lease to mortgagor—Mortgagee obtaining decree for arrears of rent—Equity of redemption, Auction-sale of, in execution of decree—Mortgagee-purchaser, Position of—Transfer of Property Act (IV of 1882). See MORTGAGE (REDEMPTION), No. 12, 46 Ind. Cas. 493.*

(11) *Landlord in S. 4 (6) of Punjab Tenancy Act includes mortgagee in possession—Sale of occupancy rights to mortgagee with possession—Right of vendor's collateral to pre-empt. See PRE-EMPTION, No. 25, 149 P.W.R. 1918.*

(12) *Contract to pay definite portion of income annually to mortgagee, if anomalous or usufructuary mortgage. See REGISTRATION ACT (1908), No. 13, 24 M.L.T. 315.*

(12-a) *Mortgagor, Suit for accounts by, without asking for redemption, Maintainability of—Usufructuary mortgagee, Suppression by, or failure to keep, of accounts, Presumption arising from. See RES JUDICATA, No. 22-c, 47 Ind. Cas. 21.*

Mortgage—(Concluded).**—16.—Unfructuary—(Concluded).**

(18) Protection of mortgagor's title—Expenses incurred—Mortgagee's right to bring separate suit for such expenses. See TRANSFER OF PROPERTY ACT, No. 56, 34 M.L.J. 177.

Mortgage Bond.

(1) Stipulation in, for payment by instalments—Default in payment—Suit for recovery of whole amount, Limitation for—Art. 132 of Limitation Act (1908)—Hindu joint family, Mortgage by father of a, Son how far a debtor or authorised agent of father. See LIMITATION ACT (1908), No. 85-c, 47 Ind. Cas. 655.

(2) Unregistered, Suit on—No demand for a long time—Presumption as to amount having been forgiven or repaid—Onus of proof as to its still remaining due. See PRESUMPTION, No. 2, 46 Ind. Cas. 657.

(3) Provision in, for capitalising interest in arrear—Undue influence, Presumption as to exercise of, if arises from—Denial of execution by mortgagor—Question of undue influence cannot be raised in case of. See UNDUE INFLUENCE, No. 2, 47 Ind. Cas. 11.

Mortgage-debt.

Immoveable property—Registration, Necessity of, for transfer of such debt. See TRANSFER OF PROPERTY ACT, No. 35, 22 C.W. N. 641.

Mortgage Decree.

(1) Rent decree, Purchaser in execution of—Mortgage decree, Subsequent purchaser in execution of—Former if can oust latter, even when no notice given under S. 167 of the Bengal Tenancy Act (1885), S. 167—Rights of latter. See AUCTION PURCHASER, No. 4-a, 46 Ind. Cas. 921.

(2) Sale of mortgaged property—Balance still due after, Application for recovery of, under O. XXXIV, r. 6, Civ. Pro. Code (1908)—Objection to, by mortgagor—Points not adjudicated in mortgage suit, Mortgagor if estopped from raising. See ESTOPPEL, No. 4-a, 46 Ind. Cas. 892.

(3) Property ordered to be sold under mortgage decree—Claim to such property if can be preferred or entertained. See REVISION, No. 23, 58 P.R. 1918.

Mortgage-deed.

(1) Mortgage with possession—Mortgagor taking lease of mortgaged property—Mortgagee if entitled to evict mortgagor—Construction of documents—Question of law—Second appeal. See APPEAL (SECOND APPEAL), No. 25, 161 P.W.R. 1918.

(2) Execution of, by two persons—Attestation in respect of one, Sufficiency of. See ATTESTATION, 47 Ind. Cas. 9.

(3) Pardanashin lady, Execution by, of a deed of English mortgage—Duly executed, what is. See PARDANASHIN LADY, 22 C.W. N. 226.

Mortgage Interest.

(1) Interest, Rate of, from date fixed for payment to date of realisation—Discretion of Court to allow—Contractual rate when permissible.

The rate of interest which a Court can allow, in a decree in a mortgage suit, from the date fixed for payment to the date of realisation, is in its discretion. In exercising its discretion, the Court will ordinarily refer to the contractual rate, if it be a reasonable one. *Ajodhya Bank, Ltd., Fyzabad v. Abdul Ghanl*, 47 Ind. Cas. 701.

KENDAL, A.J.C.

(2) Stipulation to take less than specified rate of interest, if payment punctually made, how far penalty—Contract Act (1872), S. 74. See PARDANASHIN LADY, 22 C.W.N. 226.

Mortgage Suit.

(1) Joint Hindu family, Manager of, Suit by, on mortgage without joining other members of the family—Manager head of the family and conducting family business, Maintainability of suit—Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 1.

The Manager of a joint Hindu family occupies a position which entitles him to bring a suit to enforce a right belonging to the family without making the other members of the family parties to the suit.

The principle of representation is equally applicable to a suit on a mortgage and particularly so in a case where the contract is made with the Manager who is the head of the joint family and conducts the family business. *Damodhar Namdeo Ghimotey v. Kesheo Govind*, 46 Ind. Cas. 727.

DRAKE BROCKMAN, A.J.C.

References:—3 Ind. Cas. 570; 5 N.L.R. 117, Dist.

(2) Hindu joint family, Father, sons and nephew comprising a—Mortgage in favour of father—Suit by sons after father's death—Statement by nephew of receipt of his share from sons—Deed of assignment, if necessary, to give sons a right to sue—Succession Certificate, Necessity of—Interest, High rate of, if hard and unconscionable—Compound interest, Covenant to pay, if penal.

Where the sons claimed, after the death of the father, the entire money due on the mortgage executed in favour of a person who together with his sons and nephew formed a joint Hindu family, and the nephew stated that he had received his share of the money from the sons and had no objection to the sons realizing the entire money due on the mortgage:

Held, (1) that no deed of assignment by the nephew was in the circumstances necessary to give the sons a right to sue;

(2) that the plaintiff's being the survivors of a joint Hindu family of which the father was the Manager, no succession certificate under Act VII of 1889 was needed.

Mortgage Suit—(Concluded).

A covenant to pay compound interest at the rate originally fixed in case of default is not necessarily penal.

Where in a mortgage-deed, there was a covenant as to payment of interest at Rs 1-8-0 per cent. per mensem and a further covenant to pay compound interest with six-monthly rests if the mortgage money was not paid within a year.

Held, that the rate of interest secured by the deed of mortgage was not penal nor hard and unconscionable. *Ram Sewak v Baldeo Baksh Singh*, 47 Ind. Cas. 649.

STUART and KANHAIYA LAL, A J.Cs.

(3) Suit on mortgage—Title paramount, question of, not to be gone into in. See *PAR-DANASHIN LADY*, 23 O W N 246.

(4) Parties to suit—Party impleaded on his own motion or without objection—Error in impleading, if on complaint of, after decision of suit. See *PARTIES TO SUIT*, No 1-b, 47 Ind. Cas. 536.

Mortgages.

Partition effected with consent of joint owners—Mortgagee's right to be impleaded as party—Partition if bad by reason of absence of mortgagee's consent. See *PARTITION*, N.J. 1, 2 P.R. 1918 (Rev.).

Mortgagor and Mortgagee.

(1) *Mortgagee purchaser*—Sale in contravention of S. 99 of the *Transfer of Property Act* (IV of 1882)—Sale not invalid—Reference to Full Bench.

A sale in contravention of the terms of S 99 of the *Transfer of Property Act* is an irregular sale liable to be avoided.

A Division Bench is not bound to refer a case for the consideration of a Full Bench.

When a mortgagee purchases at an execution sale in contravention of the terms of S. 99 of the *Transfer of Property Act*, the mortgagor is entitled to redeem (a). *Narayan Chandra Poddar v. Keshab Lal Dhal Bhal*, 23 C L J. 151.

FLETCHER and SMITHER, JJ.

Reference :—(a) 12 C L J. 574, F.

(1-a) *Sarpeshgi ijara*, construction of—Whether it is mortgage or no—How to determine.

It is impossible to lay down any general rule as to the effect of a *sarpeshgi* transaction.

Where a *sarpeshgi ijara* executed by plain tiff in favour of the defendant, stipulated that, in the event of the plaintiff's failure to repay the *sarpeshgi* money the defendant would be entitled to retain the land till repayment and further stipulated that, out of the annual consolidated *jama* of the property transferred to the possession of the defendant, the defendant was to retain a sum on account of interest, revenue, cesses and irrigation charges and that the balance would be paid to the plaintiff; **held**, that the intention

Mortgagor and Mortgagee—(Continued).

of the parties was to create the relationship of mortgagor and mortgagee, and not that of simple landlord and tenant. *Mahommed Harif v. Moorat Mahtos*, 44 Ind. Cas. 153—4 Pat. L.W. 146.

MILLER and MULLICK, JJ.

References :—25 A. 115, R.; 24 C. 272; 2 O. W.N. 758. Appr.

(2) *Purchase of portion of mortgaged property by mortgagee, effect of—Auction sale—Price paid at sale.*

Held, that the effect of the purchase by a mortgagee of a portion of the mortgaged property at an auction sale held in execution of his decree for money at which his prior lien was notified is to extinguish the mortgage only to an amount proportional to the extent of the property purchased—the question of the price paid at the sale is quite immaterial. *Shamshad Ali Khan v. Mahammad Ali Khan*, 21 O.C. 172—47 Ind. Cas. 200.

KANHAIYA LAL and DANIELS, J. Cs.

References :—4 O C. 341, overruled; 7 O. 648 (P.C.), R.; 22 A. 284 (F.B.); 12 C.W.N. 745; 2 O.L.J. 73, Rel. on.

(3) *Mortgagee in possession—Death of the mortgagor—Mortgagee asserting his title as heir to the mortgagor—Revenue entry at mutation to the same effect—Right of the rightful heir barred after 12 years from the existence of such an entry—Adverse possession of the mortgagee—Proprietary body as ultimate heir—Mortgagee, though generally speaking cannot set up adverse possession, yet, in certain circumstances, can.*

Held, that, if the mortgagor dies without leaving any issue or reversioner in a definite degree of relationship and land has been claimed by the proprietary body as the ultimate heirs to the property, and they omit to sue within 12 years from the death of the last person in possession or within 12 years when the mortgage could have been redeemed under the terms of the original contract, their right to sue becomes barred by time.

Held, also, that, though, generally speaking a mortgagee cannot set up an adverse possession, yet he can do so, if, on the death of the mortgagor, he claims to be the heir of the mortgagor and the mutations have been effected in his favour as such, and no person brings a suit against him for more than 12 years. *Ram Singh v. Basti*, 89 P.W.R. 1918.

SHAH DIN, J.

(3-a) *Mortgage by guardian without consent of Court—Subsequent sale by guardian with sanction of Court—Purchaser, Rights of, if affected by rights of mortgagee.* See *GUARDIAN AND WARD*, No. 3, 46 Ind. Cas. 665.

(4) *Proprietary right, Decision as to, against mortgagee alone, if binding on mortgagor.* See *LANDLORD AND TENANT*, No. 43, 45 Ind. Cas. 849—5 O.L.J. 121.

Mortgagor and Mortgagee—(Concluded).

(5) Acceptance of fresh *kanom* by assignee of *kanom* mortgage—Assignee not let into possession—Assignee if estopped from denying mortgagor's title. See MALABAR LAW, No. 11, 24 M.L.T. 472.

(6) Liability to pay debt on simple mortgage lies on whom as between mortgagor and, his subsequent mortgagee or lessee—Payment of debt by mortgagor or his heir, if entitles mortgagor to contribution from his mortgagee or lessee—Position of heir of mortgagor. See MORTGAGE (GENERAL), No. 15, 21 O.C. 360.

(7) Mortgagee when can purchase equity of redemption—Mortgagee if holds equity of redemption as trustee for mortgagor. See MORTGAGE (REDEMPTION), No. 5, 27 O.L.J. 431.

(8) Mortgage with possession—Mortgagor allowed to continue in possession as tenant—Covenant that rent in default of payment was to be charge recoverable on redemption—Mortgage obtaining decree for possession and rent—Execution of decree barred—Right of mortgagee to claim decree amount on redemption. See MORTGAGE (REDEMPTION), No. 16, 35 M.L.J. 414.

(9) Agreement between, as to nominees of mortgagee being appointed manager—Accounts to be furnished to mortgagee not as owner but to safeguard security—Mortgagor, contemporaneous agreement by, mortgagee not party to—To appoint manager—Manager if agent of mortgagor. See PARDANASHIN LADY, 22 C.W.N. 226.

(10) Mortgage of premises, good will and stock-in-trade of business—Floating charge—Mortgagor given option of remaining in possession of property on giving security—Receiver, Appointment of. See RECEIVER, No. 3, 46 Ind. Cas. 389.

(11) Suit to enforce mortgage—Person claiming title paramount to, not necessary party to suit—Question of title paramount not to be litigated in suit. See RES JUDICATA, No. 4, 16 A.L.J. 639.

Motor Vehicles.

See MAD. ACT L OF 1907.

Moveable Property.

Hypothecation of—Validity. See HYPOTHECATION, No. 1, 35 M.L.J. 450.

Muafidar.

Muafidar when acquires status of under-proprietor—Declaration under Oudh Rent Act. See PRE-EMPTION, No. 18, 21 O.C. 124.

Muafi Land.

Of rent free grant—Suit therefor to be instituted in Revenue Courts only. See JURISDICTION (OF REVENUE COURTS), No. 1, 16 A.L.J. 881.

Mulgeni Tenure.

Right to improvement of mulgeni tenant, if liable to be attached and sold in execution. See ATTACHMENT, No. 3, (1918) M.W.N. 887.

Municipal Act.

See BEN. ACT III OF 1899.

See MAD. ACT IV OF 1884.

See PUN. ACT III OF 1911.

See U.P. ACT II OF 1916.

Munsiff.

Whether Munsiff's Court a Small Cause Court for the purpose of trial of a suit valued more than the small cause jurisdiction of the Munsiff. See CIV. PRO. CODE (1908), No. 3, 44 Ind. Cas. 881.

Mussalman Wakf Validating Act.

See ACT VI OF 1913.

Mutation.

Absentee—Parties owning land in two villages—Absence of 45 years—Issue of Revenue Circular No. 2 of 1903—Mutual settlement evidenced by mutation entry binding on parties although more advantageous to one of them—Onus of proving mistake, &c., in the mutation.

A and B owned land in two villages, C and D. Since 45 years A was absentee from C and B was absentee from D. On issue of the Revenue Circular No. 2 of 1903, A and B agreed that A would get $\frac{1}{2}$ of the land in possession of B at C and that B would get $\frac{1}{2}$ of the land possessed by A at D and mutation was accordingly effected in the Revenue papers relating to both the villages, and the arrangement was subsequently acted upon by the parties at least on one occasion.

Held, that the settlement as evidenced by the mutation entries was binding upon the parties notwithstanding that it was much more advantageous to one party than to the other; the fact that one of them got considerable quantity of land without any right was no ground for cancelling the contract.

It was not necessary to determine whether the agreement required registration.

Held, also, that the onus of proving that a mistake was made and the intention of one of the parties was not correctly expressed in recording the mutation entries lies very heavily upon the party seeking to impugn the entries on that ground specially where it appears that the—

(a) parties were present at the time of mutation;

(b) Revenue officers made every effort to ascertain what they wished to be done; and

(c) mutation entries themselves are quite clear. *Wadhawa Singh v. Balwant Singh*, 163 P.L.R. 1917—2 P.W.R. 1918—44 Ind. Cas. 277.

RATTIGAN and CHEVIS, JJ.

Mutation Proceedings.

(1) *Revenue Officer, Power of, to eject third party in legal possession—Punjab Land Revenue Act (XVII of 1887), S. 36 (2), Applicability of—Revenue Officer, Power of, to order entry as to ownership under S. 36 (1)—Such order is order of competent Court under Crim. Pro. Code (1898), S. 146 (1).*

In a mutation proceeding, a Revenue Officer has no power, under S. 36 (2), Punjab Land Revenue Act, to eject a third party who is at the time actually in legal possession of the land in dispute. It is only (1) when the legal or constructive possession could not be proved to exist in favour of either of the parties and (2) also when a third party has no such possession, that the section can be applied. Such an entry as regards ownership as is thought proper may be ordered by a Revenue Officer under S. 36 (1) of the Act, without at the same time disturbing the possession of a third party. Such an order as regards ownership is not an order of a competent Court under S. 146 (1) of the Crim. Pro. Code (1898). *Anup Kuar v. Abdul Aziz*, 43 Ind. Cas. 216 = 4 P.W.R. 1917 (Rev.).

FAGAN, F.C.

(2) *Compromise entered into on minor's behalf without obtaining leave of Court, constituted under Land Revenue Act—Validity of compromise. See COMPROMISE, No. 6, 21 O.C. 920.*

Mutharfa.

Suit to recover—Jurisdiction of Small Cause Court. See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), No. 1-a, 44 Ind. Cas. 897.

Mutwalli.

His right to appoint successor by tauliatnama. See MAHOMEDAN LAW (WAQF), No. 7, 45 Ind. Cas. 591.

Nankar.

Dahyak or daswant, Relation of, to nankar—Charge upon property. See DAHYAK, No. 1, 21 O.C. 327.

Natural Justice.

Used with reference to foreign judgment, meaning of. See BURDEN OF PROOF, No. 6, 34 M.L.J. 295.

Navigable River.

Test of. See ILLUVION AND DILUVION, No. 1, 22 O.W.N. 872.

Negligence.

(1) *Willful, whether question of fact or of law. See APPEAL (SECOND APPEAL), No. 7, 45 Ind. Cas. 197.*

(2) *Mooring vessel by wharf—Loss of goods by fire from neighbouring vessel—Burden of proving negligence on plaintiff—Extreme peril—Issue of wrong order—Want of nerve and skill if necessarily implied. See CONTRACT ACT, No. 71, 8 L.W. 4 (F.C.).*

Negligence—(Concluded).

(3) *Liability of Railway Company for mis-delivery of parcel. See RAILWAYS ACT (1890), No. 3, 30 Bom. L.R. 591.*

(4) *Injuries incapacitating plaintiff for life—Measure of damages. See TORT, No. 4, 7 L.W. 415.*

(5) *Municipality, how far liable for injuries caused to persons using road under repair. See TORT, No. 1, 41 M. 538.*

Negotiable Instrument.

(1) *Essential condition for negotiability of instrument. See SHARE CERTIFICATES, No. 1, 22 C.W.N. 1026.*

(2) *Share certificate with blank transfer deeds, whether negotiable. See SHARE CERTIFICATES, No. 2, 22 C.W.N. 1042.*

Negotiable Instruments Act (XXVI of 1881).

(1) *Ss. 26, 27 and 28—Pro-note by manager (hakkdar) of charity—Drawer, personal liability of.*

The manager (hakkdar) of a charity who executes a pro note on behalf of the charity, is personally liable on the note. *Palaniappa Chettiar v. Shanmugam Chettiar*, 35 M.L.J. 90 = 24 M.L.T. 51 = 8 L.W. 317 = 41 M. 815.

WALLIS, C.J. and SPENCER, J.

References:— 17 M.L.J. 615; (1911) M.W.N. 143; 26 Ind. Cas. 356; 39 M. 915, F.; 2 L.W. 188, Diss.; 22 M.L.T. 391, R.; 35 M. 692, Diss.

(2) *S. 27—Mark-man—Signature under his authority without any mark by himself—Validity of—Contract Act, S. 26—Agency—Applicability of, to Negotiable Instruments. Challa Balayya v. Kanuparthi Subbaya*, 40 M. 1171 = 44 Ind. Cas. 813. See Final Part, 1917, Col. 704.

(2 a) *S. 28. See No. 1, supra.*

(3) *S. 56, Object of—Promissory notes, Amount payable under, Portion only of, Transfer for, prevented—Not transfer of whole of balance payable. See PROMISSORY NOTE, No. 4, 150 P.L.R. 1917.*

(4) *Ss. 64, 76—Non presentment by holder—Liability of drawer—Onus of proof. See HUNDI, No. 1, 16 A.L.J. 899.*

(4 a) *S. 76. See No. 4, supra.*

(5) *S. 83—Bills of exchange, Applicability of, to Hundis payable at sight—Hundi, Holder of, for valuable consideration, when entitled to return of money. See HUNDI, No. 2, 47 Ind. Cas. 683.*

(6) *S. 118—Presumption in regard to the order of endorsements.*

S. 118 of the Negotiable Instruments Act provides that the presumption is that the endorsements were made in the same order as

Negotiable Instruments Act (XXVI of 1881) —(Concluded).

the names appear on the back of the bill, unless there is sufficient evidence to rebut the presumption that the endorsements were made in the order in which they occur. **P. V. Kothandaramaswamy Naidu v. P. M. A. Muthia Chetty**, 45 Ind. Cas. 186.

WALLIS, C.J. and SADASIVA AIYAR, J.

Reference:—*Vagliano Case*, (1891) A. C. 107, R.

Noabad Taluq.

Whether a permanently-settled taluq.

A Noabad taluq may or may not be a permanently-settled taluq (a). **Ashraf Ali v. Karam Ali**, 22 C.W.N. 1025 = 46 Ind. Cas. 947.

FLETCHER and SHAMSUL HUDA, JJ.

References:—(a) 18 C.W.N. 531; 8 C.L.J. 470, R; 26 C. 792, *Not F.*

Non-joinder of Parties.

Revision, Objection on ground of non-joinder if can be taken for the first time in. See **SUCCESSION CERTIFICATE**, No. 2, 46 Ind. Cas. 648.

North-West Provinces and Assam Civil Courts.

See **BEN. ACT XII OF 1897**.

Notice.

(1) **U P. Municipalities Act (II of 1916)**, S. 326 (4)—*Suit for establishment of title and injunction—Notice—Suit not maintainable.*

A *chabutra* belonging to the plaintiff projected on to a public road. The plaintiff applied to the Municipal Board of Benares for leave to re-build that *chabutra* which was refused. The Municipal Board then caused a notice to be served on the plaintiff in June, 1916, requiring him to remove the *chabutra*. The plaintiff then served a notice of action on the Municipal Board on 14th July, 1916, but commenced the present action on 4th August, 1916 i.e., before the expiration of the two months provided for in S. 326 of the Municipalities Act as being necessary for a suit to be instituted. The reliefs originally sought were—(1) the establishment of the plaintiff's title; (2) injunction. The Municipal Board contended *inter alia* that the suit could not be maintained as no legal notice had been served by the plaintiff. The plaint was then amended in respect of that relief only. Even after the amendment the relief was for a declaration that the platform and the *saiban* were ancestral property of the plaintiff, that he and his ancestors had been in possession thereof for a long time and that the Municipal Board had no right to get the same demolished and he also asked for an injunction. The first Court held that the suit could not be instituted as no valid and legal notice has been given and the lower appellate Court held that the notice was not necessary and remanded the suit:—**Held** that the injunction not being the

Notice—(Continued).

only relief claimed, service of notice, as provided in S. 326 of the Municipalities Act, was necessary and the suit, having been commenced before the expiration of two months of the notice, could not be maintained. **Municipal Board of Benares v. Gajadhar**, 16 A.L.J. 798 = 47 Ind. Cas. 848.

RICHARDS, C.J. and TUDBALL, J.

(2) Statutory notice, manner of service of, if can be restricted by contract—Notice essential. See **ACT III OF 1865 (CARRIERS)**, No. 3, 27 C. L.J. 294.

(3) **Bengal Cess Act**—Failure by plaintiff to publish notice required under S. 54—Whether plaintiff can recover cesses. See **BEN. ACT IX OF 1880 (CESS)**, No. 3, 44 Ind. Cas. 32.

(4) Service of notice of tender—Proposed agreement in respect of enhancement necessary under Act. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 16, 22 C.W.N. 559.

(5) Entry in order sheet, if sufficient proof of service of notice. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 84, 22 C.W.N. 788.

(6) **Bengal Tenancy Act**, S. 155—Notice regarding misuse—Sufficiency of notice for the suit to proceed with. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 74, 43 Ind. Cas. 801.

(7) **Calcutta Municipal Act**, Ss. 299, 593—Service of notice upon one co-owner effectual against others. See **BEN. ACT III OF 1899 (CALCUTTA MUNICIPAL)**, No. 7, 44 Ind. Cas. 413.

(8) Sale without notice to defaulter and purchased from him—Collector, if deprived of jurisdiction to effect sale. See **MAD. ACT II OF 1864 (REVENUE RECOVERY)**, No. 4, 23 M.L.T. 231.

(9) Ejectment by notice is inadmissible where rent is deliberately favourable under provisions of Oudh Rent Act. See **ODH ACT XXII OF 1886 (RENT)**, No. 3, 44 Ind. Cas. 644.

(10) Written notice to defendant, absence of—Arbitration if invalid. See **AWARD**, No. 2, 27 C.L.J. 101.

(11) Effect of notice under Ss. 78 and 79 of the **Berar Land Revenue Code**. See **BERAR LAND REVENUE CODE**, No. 3, 44 Ind. Cas. 723.

(12) Suit for specific performance of unregistered contract of sale—Sale of same property by vendor to another by registered sale-deed—Burden of proving want of notice of prior contract lay on subsequent vendee. See **BURDEN OF PROOF**, No. 8, 14 N.L.R. 27.

(13) Transfer of case from one Court to another—Necessity of communicating the transfer to parties or their pleaders—Effect of failure to give such notice. See **CIV. PROC. CODE (1908)**, No. 425, 43 Ind. Cas. 925.

Notice—(Continued).

(14) Failure to give notice to judgment-debtor, under O. XXI, r. 66, Civ. Pro. Code.—Effect. See CIV. PRO. CODE (1908), No. 339, 44 Ind. Cas. 252.

(15) Public officer acting *mala fide* in discharge of his duties—Suit against such officer—Previous notice if necessary. See CIV. PRO. CODE (1908), No. 116, 34 M.L.J. 491.

(16) Omission to serve, under r. 22, O. XXI, Civ. Pro. Code—Execution sale, Liability of, to be set aside for such omission—Notice is foundation of jurisdiction to order sale—Suppression of processes to be issued to judgment-debtor, Effect of. See EXECUTION SALE, No. 1, 27 O.L.J. 528.

(16-a) Execution case, Striking off of—Notice to parties, Necessity of. See EXECUTION OF DECREE, No. 21 b, 46 Ind. Cas. 711.

(17) Licensee not entitled to notice in ejectment suit. See LICENSEE, No. 1, 45 Ind. Cas. 817.

(18) Under S. 80, Civ. Pro. Code, given prior to institution of suit under S. 104 H. Bengal Tenancy Act—Period of such notice if can be added to six months' period provided for institution of such suits. See LIMITATION ACT, No. 61, 45 C. 934.

(19) Whether person is entitled to exclude time during currency of, to Secretary of State. See LIMITATION ACT, No. 59, 28 C.L.J. 537.

(20) By mortgagee of his right to enforce terms of mortgage for defaults of mortgagor—Intention to enforce same for subsequent defaults—Previous notice to mortgagor necessary. See MORTGAGE (GENERAL), No. 17, 30 P.R. 1918.

(21) Provincial Insolvency Act (III of 1907), S. 36—Annulment of transfer—Notice to transferee necessary. See PROVINCIAL INSOLVENCY ACT (1907), No. 28, 41 Ind. Cas. 168.

(22) Notice of claim against Railway Company to be given in what cases. See RAILWAYS ACT (1890), No. 5, 35 M.L.J. 35.

(23) For innocuous defects in notices of foreclosure. See REG. XVII of 1806 (MORTGAGE BY CONDITIONAL SALE), No. 2, 80 P.L.R. 1918.

(24) Representative suit to establish public right—Payment into Court of amount necessary for service of notice—Notice not served—Adjudication on merits. See REPRESENTATIVE SUIT, No. 1, 42 Ind. Cas. 543.

(25) Serving notice of the date of hearing on counsel—Sufficiency. See REVISION, No. 16, 43 Ind. Cas. 481.

(26) Persons holding orders for rateable distribution not served with notice of application by auction-purchaser to set aside sale—Order

Notice—(Concluded).

passed cancelling sale—Court holding that order cancelling sale not binding on persons having no notice—Revision if lies against such order. See REVISION, No. 17, 35 M.L.J. 604.

(27) Factum of notice on part of subsequent transferee, if question of law or fact—Question if contract is unconscionable if question of fact or law. See SPECIFIC PERFORMANCE, No. 6, 137 P.W.R. 1918.

(28) Transfer of decree without, to judgment-debtor, Effect of. See TRANSFER OF DECREE, 43 Ind. Cas. 186.

Notice to Quit.

(1) Transfer of Property Act (IV of 1882), S. 106—Landlord and tenant—Notice to quit—Requisites of a valid notice—Test of its sufficiency—Service of notice to quit—Service on one joint tenant raises presumption of notice reaching others—Delivery of notice to quit by post—Presumption in favour of its reaching addressee—Effect of registering the letter containing the notice.

The principles governing the sufficiency of notices to quit served by landlords upon their tenants are the same in India as in England. Such notices may be good and effective in law, even though not strictly accurate or consistent. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with such facts and circumstances. Such notices are to be construed so as to effectuate the intention of the parties, "*ut res magis valeat quam pereat*."

S. 106 of the Transfer of Property Act, 1882, only requires that a notice to quit should be tendered or delivered to the party intended to be bound by it, either personally or to one of his family or servants at his residence, or, if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere; the vicarious tender or delivery must be made at the residence of the person intended to be bound.

In the case of joint tenants, service of a notice to quit upon one is *prima facie* evidence that it has reached the others.

There is a presumption that a notice to quit posted in a letter properly addressed to the person, intended to be bound, reaches that person. Such presumption applies with still greater force to letters which are registered and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by somebody else. *Harhar Banerji v. Ramsashi Roy*, 16 A.L.J. 969=35 M.L.J. 707=23 O.W.N. 77 (P.C.).

LORD ATKINSON, SIR JOHN EDGE, MR. AMBER ALI and SIR WALTER PHILLIMORE.

References:—*Doe & Huntingtower v. Culliford*, 4 Dow. and Ry. 248; *Doe & Williams v. Smith*, 5 Ad. & E. 350; *Wride v. Dyer*.

Notice to Quit—(Concluded).

(1900) 1 Q.B. 23; *Macartney v. Crick*, 5 Esp. 196; *Doe d Bradford v. Watkins*, 7 East. 551; *Pollock v. Kelly*, 61 C.L.R. 367; *Tanham v. Nicholson*, L.R. 5 E. & I. App. 561, R.; *Doe v. Archer*, 14 East. 245, F; *The Gresham House Estate Co. v. Rossa Grane Gold Mining Co.*, (1870) W.N. 119, Appl.

(2) *Ejectment, Suit for—Licensee, if entitled to a notice to quit.*

A licensee in possession of lands is not entitled to a notice to quit. *Gobinda v. Nanda*, 27 C.L.J. 523.

RICHARDSON and WALMSLEY, JJ.

Reference:—*Doe Ex. d. Knight v. Quigley*, (1810) 1 Camp. Rep. 505, F.

(3) *Bengal Tenancy Act (VIII of 1885), S. 49 (b)—Suit to eject under-raspat—Notice to quit signed by one co sharer landlord—Validity.*

When a notice to quit under S. 49 (b), Bengal Tenancy Act, is signed by one co-sharer landlord, the question whether he signed it on behalf of himself and the other landlords cannot be in issue in a suit for ejectment; under that section *Jakher Mahmud Mandal v. Khatir Mahmud Sheikh*, 23 C.W.N. 76=46 Ind. Cas. 264.

FLETCHER and SHAMSUL HUDA, JJ.

(3-a) *Lease—Provision as to, in Transfer of Property Act (1882), S. 106, Scope of—Provision for re-entry at any time on payment of full compensation, Necessity of notice in case of.*

The provisions for a notice to quit were inserted in the Transfer of Property Act to provide for cases where the parties are not regulated by their contracts. To entitle the landlord to get back *khas* possession of the land, no notice to quit under S. 106 of the Transfer of Property Act is at all necessary where there is a provision in the lease itself enabling the landlord to resume possession of the land at any time on payment to the lessee of full compensation for the buildings he may have erected. *Monindra Nath Chowdhuri v Radha Prosanna Gon*, 47 Ind. Cas. 19.

FLETCHER and SHAMSUL HUDA, JJ.

(4) Service of notice under S. 49 (b) of Bengal Tenancy Act upon under-rajyat in possession—Tenancy if can be relied upon in suit for ejectment. See BEN. ACT VIII OF 1885 (TENANCY), No. 22, 42 Ind. Cas. 621.

(5) Service of, Proof of, Evidence necessary for—Ejectment, Suit for, in. See EJECTMENT, No. 3, 45 Ind. Cas. 917.

(6) Sub-lease by occupancy tenant from year to year—Termination of such tenancy requires previous. See LANDLORD AND TENANT, No. 63, 14 N.L.R. 3.

(7) Tenancy for one year—Notice if necessary to determine. See LANDLORD AND TENANT, No. 67, 14 N.L.R. 129.

Novation.

Company in liquidation—Pro-note taken by Liquidator for money due towards shares—Suit on pro-note, Dismissal of, on merits—Liquidator's right to fall back on original cause of action—Incompetency of Liquidation Court to reconsider question—Merger of original contract into pro-note and novation of contract. See RES JUDICATA, No. 42, 87 P.W.R. 1918.

Nuisance.

Tort—Nuisance—Innocent occupation—Whether justifies annoyance—Nuisance in law—Measure of—Action for nuisance—Circumstances to be considered—Working a country oil-mill near a dwelling house—Condition of surroundings rendered unhealthy—Action for abatement, if lies.

A nuisance is not justified by showing that the trade or occupation causing the annoyance is apart from the annoyance, an innocent or laudable one.

What amount of annoyance or inconvenience will amount to a nuisance in point of law cannot be defined in precise terms. There should be a material interference with the ordinary comfort and convenience of life, the physical comfort of human existence by an ordinary and reasonable standard.

The locality, the question whether the nuisance has been long in existence, whether the trade which causes the nuisance is commonly carried on in that locality and other questions of a like nature have no doubt to be considered in deciding whether a particular business carried on by a neighbour is an actionable nuisance.

Where a country oil-mill was worked inside a house in a street far removed from the suburb where other oil-mills were located and caused much annoyance by the noise of the machine, the droppings of the bullocks drawing it, by the black dirty foul-smelling water, breeding mosquitoes and worms collected by the washing of the nuts and cow-dung stored inside the house and by the working of the machine both day and night and much disturbance was thereby caused to the occupant of the neighbouring house in attending to his photographic work.

Held that the working of the machine in the place and under the circumstances amounted to a nuisance and entitled the neighbour to sue for its abatement. *Sadasiva Chetty v. Rangappa Rajoo*, 7 L.W. 505=(1918) M.W.N. 293=24 M.L.T. 17=45 Ind. Cas. 428.

WALLIS, C.J. and SADASIVA AIYAR, J.

Oaths Act (X of 1873).

S. 11—Decision based thereon—Conclusive against the person who offered to be bound by it—When binding on other persons—Settlement of suit by compromise—Remedy by way of appeal against recording or refusing to record compromise—Oiv. Pro. Code (Act V of 1908), O. XXIII. r. 8 (=S. 375. Civ. Pro. Code, 1882), cl. 1 (m).

Oaths Act (X of 1873)—(Concluded).

of O. XLIII (=S. 588, Civ. Pro. Code, 1889).

Held, that 'that part of S. 375, Civ. Pro. Code of 1882 which declared that the decree should be final is not embodied in r. 3 of O. XXIII of the present Civ. Pro. Code, Act V of 1908; on the contrary new cl. 1 (m) has been introduced in its O. XLIII (=S. 588, Civ. Pro. Code, 1889) allowing an appeal against the order passed under the said r. 3 of O. XXIII, recording or refusing to record an agreement, compromise or satisfaction (a).

Held, also, that under S. 11 of the Indian Oaths Act X of 1873, the oath is conclusive only as against the person who offered to be bound by it, that as against others it can become conclusive only where it is proved that they joined the challenge, either personally or by agent duly authorized in their behalf or that they agreed personally or by agent as aforesaid to the decision of the suit in that way. *Talawand v. Fateh Din*, 60 P.W.R. 1918=83 P.R. 1918=115 P.L.R. 1918=45 Ind. Cas. 290.

• CHEVIS and BROADWAY, J.J. •

Reference :—(a) 48 P.R. 1895, obsolete.

Occupancy Holding.

- (1) *Mortgage by occupancy tenant—Tenant dies without heirs—Whether mortgage subsists—Transfer of Property Act, S. 115—Equity.*

Where an occupancy tenant dies without heirs, having previously mortgaged their holding, **held** that what was mortgaged to the mortgagee was a subsisting tenancy and when that tenancy determined, the mortgage, granted upon it, necessarily determined also.

The principle embodied in S. 115, Transfer of Property Act that it would be clearly inequitable to allow the tenant to derogate from his own grant by surrendering his interest has no application in a case where the tenant dies without heirs. *Rani Bahu Parwar v. Sobha Ram*, 43 Ind. Cas. 912.

• DRAKE-BROCKMAN, J.C. •

- (2) *House of agriculturist—Whether appurtenance to holding or not—Question of fact—Hindu Law—Antecedent debt incurred by brother—Its binding character.*

The house of an agriculturist is liable to sale in execution of decree on foot of a mortgage made by him, when such house is not an appurtenance of his holding which he is forbidden by law to transfer. It is a question of fact whether or not a house is appurtenant to the holding.

In a joint Hindu family an antecedent debt incurred by a brother in the position of a manager is not binding upon his co-parceners unless it can be shown to have been incurred for family necessity. *Nirbhay Lal v. Kallan*, 45 Ind. Cas. 546.

• TUDBALL, J. •

References :—38 A. 186; 34 A. 25, *Appr.*

Occupancy Holding—(Concluded).

(3) *Applicability of S. 92 (3), Act VIII of 1885, to transferable occupancy holding. See BEN. ACT VIII OF 1885 (TENANCY), No. 7, 43 Ind. Cas. 467.*

(4) *Non-transferable, Sale of, in execution of money-decree—Co-sharer raiyat, Right of, to object. See EXECUTION SALE, No. 3-a, 46 Ind. Cas. 791.*

(5) *Splitting up of occupancy holding by several transferees—Landlord's right in regard to the holding as a whole. See LANDLORD AND TENANT, No. 26, 43 Ind. Cas. 377.*

Occupancy Rights.

(1) *Occupancy holding held under joint family not transferable without landlord's consent—Power of Karta to recognise transfer. Golapdi Meah v. Forno Chandra Dutta*, 21 C.W.N. 774=27 O.L.J. 129=11 Ind. Cas. 37. See *Final Part*, 1917, Col. 707.

(2) *Service tenure, Acquisition of, in—Surrender of tenure on cessation of service, Zamindar's right in case of.*

A right of occupancy cannot be acquired in a land held under a service tenure.

When an ordinary Kotwali Jagir was surrendered or given up, the Zemindar was entitled to have the land that was given to the Kotwal for the purpose of performing his duty returned to him in the same condition as was given to the Kotwal apart from the rights of any other person. *Jafaruddin Laha v. Jamini Bailey Sen*, 46 Ind. Cas. 341.

• FLETCHER and SHAMSUL HUDA, J.J. •

(3) *Nature of, personal—Transferability of—Bengal Rent Act (X of 1859).*

A right of occupancy under the Bengal Rent Act (1859) was a personal right and was not transferable beyond the life of each tenant. *Ramprasad v. Kishori Lal*, 46 Ind. Cas. 667.

• STANYON, A.J.C. •

(4) *Acquisition of, by tenure-holder in lands comprised in his ijara or farm—Co-proprietor is can acquire occupancy or non-occupancy right. See BEN. ACT VIII OF 1885 (TENANCY), No. 6, 45 Ind. Cas. 706.*

(5) *Acquisition of—Tenant, Power of, to contract preventing himself the right of—Nij chas land, Occupancy rights, Acquisition of, in—Orissa Tenancy Act (B. and O. II of 1913), Ss. 154, 232—Tenant can contract himself out of provisions of Ss. 20 and 21 of Bengal Tenancy Act (1885). See LANDLORD AND TENANT, No. 73 a, 3 Pat. L.J. 475.*

Occupancy Tenancy.

Devolution of occupancy tenant right from a widowed mother, in the Central Provinces, See C. P. ACT XI OF 1893 (TENANCY), No. 10, 44 Ind. Cas. 1001.

Occupancy Tenure.

- (1) *Khoti village*—Transfer of occupancy holding—Khot's permission not taken—Khot's right to re-enter—Mortgages from Khot purchasing occupancy rights without Khot's permission—Improvements by mortgagees—Mortgages cannot recover cost of improvements from the mortgagor Khot—Transfer of Property Act (IV of 1882), S. 63.

A Khoti tenant in the Kholaba District cannot transfer his occupancy holding without the permission of the Khot, and, if he does so, the Khot is entitled to re-enter.

The decision in 18 Bom. L.R. 446 applies to the Kholaba District as a whole and is not to be restricted to the particular village in Pen Taluka from which the litigation came.

When a mortgagee of a Khoti village purchases, while he is in possession, the rights of occupancy tenants without the permission of the Khot and makes accretions to the mortgaged property, he is not entitled to rely upon S. 63 of the Transfer of Property Act and to call upon the mortgagor Khot to re-imburse him for the moneys spent in making purchases of occupancy holdings without the Khot's permission. *Gopal v. Bhagirthi*, 20 Bom. L.R. 681=46 Ind. Cas. 669.

BATCHELOR, A.C.J. and KEMP, J.

Reference:—18 Bom. L.R. 446, F.

- (2) *Ejectment—Under-riyat—Interest, if heritable—'Kayemi' 'Sihayee Karsha'—Decree, Form of—Riyat at fixed rate, if can create permanent heritable interest.*

The interest of an under-riyat is not heritable (a).

Where a suit was instituted before the expiry of the agricultural year current at the time when the original under-riyat died, the proper form of the decree would be one for ejectment against his representatives, to be executed only on the expiry of that particular agricultural year.

An occupancy riyat is not competent to create a permanent heritable under-riyati interest.

The use of the word '*Kayemi*' imports not fixity of rent, but only permanence of occupation of the land (b).

A description of the *kabuliat* as '*Sihayee Karsha*' *kabuliat* does not necessarily imply that the grantee was intended to have a permanent heritable interest.

Obiter.—A riyat holding at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee, although the latter was an under-riyat (c). *Mohar Ali v. Kalai Khalsi*, 27 C.L.J. 579.

MOOKERJEE and RICHARDSON, JJ.

References:—(a) 31 C. 757 (F.B.)=8 C.W.N. 479=11 C.W.N. 579, F. (b) 6 C.W.N. 916; 1 W.R. 5; 12 C.W.N. 175, R. (c) 23 Ind. Cas. 925, R.

Occupancy Tenure—(Continue)

- (3) *Service tenure—Jagir land.*

A right of occupancy cannot be acquired in a land held under a service tenure. *Jafaruddin Saha v. Kumar Jamini-Buila Sen*, 38 C.L.J. 249.

FLETCHER and SHAMSUL HUDA, JJ.

- (4) *Non-transferable occupancy holding—Part of holding, bequest of, if valid—Principle of estoppel and waiver or acquiescence if applies.*

The testamentary disposition of a part of a non-transferable occupancy holding like that of the whole holding is invalid, and it was so held in a suit by the devisee against the riyat's heir-at-law (a). *Umesh Chandra Dutta v. Joy Nath Das*, 22 C.W.N. 474=42 Ind. Cas. 779.

FLETCHER and N.R. CHATTERJEE, JJ.

References:—(a) 18 C.W.N. 1290; 18 C.W.N. 1294; 12 C.W.N. 1886, R; 18 C.W.N. 971, Dist.

- (5) *Ghatwali land, tenants of—Acquisition of right of occupancy—Bengal Tenancy Act (VIII of 1855), S. 181—Act X of 1859, S. 6 and Act VIII (B.C.) of 1869, S. 6.*

Tenants in occupation of Ghatwali land could acquire occupancy right therein under S. 6 of Act X of 1859 and S. 6 of Act VIII (B.C.) of 1869 and such right acquired between 1859 and 1885 has not been taken away by S. 181 of the Bengal Tenancy Act. *Sitkanta Roy v. Ipra Das Charan*, 24 C.W.N. 763=27 C.L.J. 56=46 Ind. Cas. 485.

RICHARDSON and BRACHOCROFT, JJ.

References:—1 C.L.J. 138; 33 C. 630; 2 C.L.J. 379; 10 C.L.J. 502; 31 C. 1021; 5 C.L.J. 3, R.

- (6) *Occupancy holding—of payment of nazar to landlord.*

In order to establish a custom of transferability subject to the payment of a customary *nazar*, the evidence must show that the landlord is bound to recognise, when *nazar* of the mount, or at the rate determined by custom is tendered to him.

A practice or course of business in a zamindari office, according to which a transferee is recognised, provided that the amount of the *nazar* is satisfactory to the landlord is not sufficient.

The payment of *nazar* without more is an indication that the *joles* are not transferable without the landlord's consent given on receipt of the *nazar*.

A custom, which leaves the amount or rate of *nazar* indefinite, must be void for uncertainty. *Rani Mica Kumari Saheba v. Ichhamoyee Chaudhuran*, 22 C.W.N. 929.

RICHARDSON and WALMSLEY, JJ.

References:—8 C.W.N. 314 and 285, R.

- (7) *Bengal Tenancy Act (VIII of 1855, S. 181—Service tenure—Kotwali jagir—*

Occupancy Tenure—(Continued).

Occupancy right, if can be acquired in kotwali jagir land.

A right of occupancy cannot be acquired in kotwali jagir land. *Tafarruddin Shaha v. Brindarani Chaudhary*, 23 O.W.N. 196.

FLETCHER and SHAMSUL HUDA, JJ.

- (8) *Transfer of occupancy holding—Duty of transferee to deposit registration fee—Default—Right of landlord to recover same by suit—Second appeal—Bihar and Orissa Tenancy Act, 1913, Ss. 31 and 260.*

The plaintiff sued the defendant, his tenant, as transferee of an occupancy holding for recovery of the registration fee which the plaintiff alleged was payable to him under S. 31, Orissa Tenancy Act. The defence put forward by the defendant is that there is no obligation upon a tenant as transferee to register his transfer or to pay the fee prescribed by S. 31, Orissa Tenancy Act. It appeared that the landlord had voluntarily consented to a transfer of the tenancy to the defendant. *Held* that a second appeal lay to the High Court under the Orissa Tenancy Act and that this action was maintainable. *Mritunjoy Praharaj v. Sri Jagannath Jew*, 3 Pat. L.J. 351 = 47 Ind. Cas. 34.

MULLICK and ATKINSON, JJ.

- (9) *Promise not to eject if gives rise to occupancy status—Promise may be implied from conduct of parties—Facts constituting evidence of intentions of parties vary according to facts in question—Punjab Tenancy Act, 1887, S. 8.*

A promise not to eject, which is one of the grounds on which a claim to occupancy rights under S. 8 of the Punjab Tenancy Act may properly be decreed, may also be implied and may be proved by facts indicative of the intentions of the parties; but such a promise does not mean a promise not to eject under all circumstances whatsoever, but only not to eject till commission of a fault by the tenant against his tenure. Facts constituting evidence of the intentions of the parties in one tract may differ widely from those evidencing similar intentions in another. In the circumstances of the *Dehrā Tabāi* of the Kangara District continuous cultivation by the tenant's family for three generations and fifty-four years at a favourable cash rent, having originally provided its own implements for the cultivation and having settled on the land some time after the commencement of the tenancy, but not less than twenty-six years ago constituted proof of such a promise. *Kirpa v. Tirhur*, 5 P.R. 1918 (Rev.) = 4 P.W.R. 1918 (Rev.) = 46 Ind. Cas. 571.

MAGUARD, F.C.

References :—*Choudhri v. Jhassa*, Rev. No. 204 of 1911-1912; 6 P.R. 1900 (Rev.); 6 P.R. 1914 (Rev.), R.

- (10) *Tenant holding tenure with incidents of opahu basiku tenure—Long possession also enjoyed by such tenant—Tenant entitled to*

Occupancy Tenure—(Continued).

status of occupancy—Punjab Tenancy Act, 1887, S. 8.

A tenant whose tenure includes the incidents constituting the distinguishing features of the *opahu basiku* tenure—as where he was induced to settle down on the holding by the landlord and was required to live on or near the land building the farm houses thereon, differing in this respect from *opahu* who lived in the village and was not a *basiku* and where though no deed or express verbal agreement existed, there was an implied contract that the tenant should hold so long as he farmed well and paid the rent, “or in other words,” to *gaseau*, that is, “till commission of a fault against his tenure”—and whose position is further fortified by length of possession is entitled to be regarded as an occupancy tenant under S. 8, Punjab Tenancy Act, 1887. *Chowdhri v. Jassa*, 5 P.R. 1918 (Rev.) App. (Revision No. 204 of 1911-12).

SIR MICHAEL FENTON, F.C.

Reference :—6 P.R. 1900 (Rev.), R.

- (11) *Punjab Tenancy Act (XVI of 1887), S. 59—Occupancy tenancy—Joint tenants—Survivorship—Right of—Tenants recorded as having defined shares, Effect of.*

Held that the right of a landlord to claim the extinction of an occupancy right when there are joint tenants, does not arise on the death of one of them, as they collectively constitute a single tenant and the right continues to exist in the survivor or survivors (a).

The fact that the occupancy tenants are recorded as having defined shares in the tenancy does not make any difference and does not effect the right of survivorship (b). *Udmi v. Munshi*, 95 P.W.R. 1918 = 45 Ind. Cas. 574.

SCOTT-SMITH, J.

References :—(a) 6 P.R. 1909, F. (b) 6 P.R. 1917 = 5 P.W.R. 1917 = 42 Ind. Cas. 87, F.; 89 P.R. 1909 = 55 P.W.R. 1909, R.; 109 P.R. 1894; 46 P.W.R. 1907 = 100 P.R. 1908, Dist.

- (12) *Punjab Tenancy Act (XVI of 1887), S. 59—Occupancy rights, succession to—Burden of proof—Settlement record, entry in—Presumption of correctness.*

M., son of K., claimed possession of certain occupancy land on the ground that he was the heir of one, S. It appeared that, in the Summary Settlement of 1853, one K. was entered as an *asami* of certain land in the same village, but K.'s name did not appear in the Regular Settlement of 1860, and S., the uncle of the plaintiff, was found to be in possession of certain land which he stated he had reclaimed from *banjar* within the previous 15 years and was granted occupancy rights therein. On the death of S., the land was mutated in the name of his widow, the landlord allowing her to remain in possession for her lifetime.

Held (1) that, inasmuch as it was not proved that the land entered in the name of S., was the same as that entered in the name of K., it could not be presumed to be the same;

(2) that a presumption of correctness attached to the entry in the Regular Settlement of

Occupancy Tenure—(Continued).

1860 and that S., having at that time been declared as having personally acquired occupancy rights in the land in suit, K., having had no part or share in bringing the land under cultivation, the plaintiff's suit was not maintainable (a);

(3) that presumption could not take the place of positive proof (b). *Hayat Muhammad v. Mahmud*, 107 P.W.R. 1918=45 Ind. Cas. 938.

SCOTT-SMITH, J.

References:—(a) 3 P.R. 1875, R. (b) 128 P.W.R. 1908=42 P.R. 1910 (P.C.), R.

- (13) *Landlord and tenant—Occupancy rights—Takiadar, cannot build pacca mosque on takia land without consent of proprietors—Suit by proprietors for injunction—Death of some plaintiffs-appellants pending appeal—Appeal, whether abates in toto—Civ. Pro. Code (Act V of 1908), O. XXII, r. 3 (2).*

Held, that a takiadar is not entitled to build a pacca mosque on any part of the takia land in his possession as an occupancy tenant without the consent of the proprietors.

A suit was brought by several proprietors of a village against the defendant for a perpetual injunction restraining him from building a mosque on certain takia land, of which he was in possession as an occupancy tenant. On the hearing of the second appeal in the Chief Court, it appeared that some of the plaintiffs-appellants had died and no application had been made to bring on the record their legal representatives within limitation.

Held, (1) that inasmuch as the suit could in the first instance have been brought without the deceased plaintiffs having been joined at all, the appeal did not abate as a whole but only so far as the deceased plaintiffs-appellants were concerned;

(2) that as the building of a mosque was inconsistent with the purpose for which the land was originally given, the defendant was not competent to build a pacca mosque on the takia land;

(3) that takia is an abode of a fakir. *Sawan v. Mehr Din*, 108 P.W.R. 1918=45 Ind. Cas. 963.

SCOTT-SMITH, J.

References:—19 P.R. 1904; 8 Ind. Cas. 732; 27 A. 356=2 A.L.J. 27=A.W.N. (1904) 267, R. and Appr.

(14) *Occupancy ryot obtaining grant of fixed rent—Occupancy ryot at fixed rent under old law. See BEN. ACT XI OF 1859 (LAND REVENUE SALES)*, No. 8, 27 C.L.J. 284.

(15) *Acquisition of occupancy right by under-riyat—Ejectment of such riyat. See BEN. ACT VIII OF 1885 (TENANCY)*, No. 18, 22 C.W.N. 618.

(16) *Mortgage of share of non-transferable occupancy holding if an incumbrance—Purchaser of holding at rent sale how far bound by mortgage—Suit to enforce mortgage against tenants and purchaser—Landlord not essential*

Occupancy Tenure—(Continued).

party. *See BEN. ACT VIII OF 1885 (TENANCY)*, No. 78, 22 C.W.N. 662.

(17) *Suit for declaration of sub-letting by tenant—Inference as to status of tenant—Riyat or tenure-holder—Proof. See BEN. ACT VIII OF 1885 (TENANCY)*, No. 6, 27 C.L.J. 334.

(18) *Lease for term of years of chur land—Rent payable for such land as is capable of cultivation—Law governing parties—Lessee not ryot holding under custom of utbandi—Lessee a non-occupancy riyat. See BEN. ACT VIII OF 1885 (TENANCY)*, No. 90, 42 Ind. Cas. 546.

(19) *Union of Kudivaram interest with melwaram right of inamdar it effects extinction of occupancy right—If any occupancy right exists in favour of inamdar where tenant has none. See MAD ACT I OF 1903 (ESTATES LAND)*, No. 8, (1918) M.W.N. 643

(20) *Question of succession to—Findings based on conjectures not conclusive in second appeal. See APPEAL (SECOND APPEAL)*, No. 24, 102 P.W.R. 1918.

(21) *Succession to occupancy holding—Burden of proof. See APPEAL (SECOND APPEAL)*, No. 19, 33 P.L.R. 1918.

(22) *Suit for declaration of—Court-fee. See COURT FEES ACT (1870)*, No. 30, 16 A.L.J. 167.

(23) *Creation of, in Punjab—Right of collateral heirs to question such creation. See CUSTOMS PUNJAB—ALIENATION*, No. 7, 125 P.R. 1918.

(24) *Enhancement of rent claimed by landlord—Denial by tenants of occupancy status and claim of proprietary right—Ejectment suit based on denial of occupancy tenure—Admission by tenants of occupancy tenure before judgment—Occupancy tenure if liable to forfeiture. See EJECTMENT*, No. 6, 32 P.R. 1918.

(24-a) *Occupancy riyat, Acquisition of portion of proprietary right in estate by, if causes merger of the two interests. See HINDU LAW (REVERSIONERS)*, No. 6-a, 3 Pat. L. J. 426.

(25) *Grant of village by or on behalf of Crown under British rule—Grant to be presumed to be subject to existing occupancy rights. See INAM*, No. 7, (1918) M.W.N. 859 (P.O.).

(26) *Question whether tenant has right of occupancy—Court having jurisdiction to hear and determine question—Duty of Civil Court in suit in which such question raised to return plaint to proper Court. See JURISDICTION (OF REVENUE COURTS)*, No. 11, 147 P.W.R. 1918.

(27) *Effect of sale of portion of—Surrender of same subsequently if possible—Eviction of transferee of, on acceptance of surrender by landlord. See LANDLORD AND TENANT*, No. 13, 22 C.W.N. 965.

Occupancy Tenure—(Concluded).

(28) Effect of sale of portion of—Surrender of same subsequently if possible—Ejection of transferee of, on acceptance of surrender by landlord. See **LANDLORD AND TENANT**, No. 15, 22 C.W.N. 972.

(29) Purchaser of tenure in execution of money decrees not recognised by landlord—Suit by such purchaser for possession from another purchaser recognised by landlord—Settlement with whom made. See **LANDLORD AND TENANT**, No. 19, 40 Ind. Cas. 498.

(30) Transfer of portions of, whether constitutes abandonment of whole holding—Landlord's right of reentry. See **LANDLORD AND TENANT**, No. 21, 41 Ind. Cas. 704.

(31) Government ryotwari lands once unoccupied—Cultivating tenants if can claim. See **LANDLORD AND TENANT**, No. 51, 7 L.W. 194.

(32) Inamdar owning Kudivaram—Estates Land Act, if applicable to case—Occupancy rights, presumption against. See **LANDLORD AND TENANT**, No. 58, 28 M.L.T. 161.

(33) Sale of portion of non-transferable occupancy tenure—Surrender by vendor of same and re-settlement taken by him of rest—Implied surrender—Landlord if may evict purchaser. See **LANDLORD AND TENANT**, No. 14, 22 C.W.N. 967.

(34) Unregistered mortgage of—Subsequent valid lease of same—Compulsory registration of mortgage after transaction of lease—Lease if takes effect as against mortgage. See **LEASE**, No. 2, 16 A.L.J. 197.

(35) Mortgage of—Suit for redemption of such mortgage, if maintainable. See **MORTGAGE (REDEMPTION)**, No. 2, 16 A.L.J. 747.

(36) Unrestricted power of alienation by occupancy tenants by agreement in wajib-ul-arz. See **MORTGAGE (REDEMPTION)**, No. 22, 26 P.L.R. 1918.

(37) Sale of occupancy rights to mortgagees with possession of proprietary rights—Vendor's collateral whether can pre-empt—Landlord includes mortgagee in possession. See **PRE-EMPTION**, No. 29, 149 P.W.R. 1918.

Offerings.

Abandonment of right to share in, of shrine—Retraffer of share to descendant of person who abandoned it, validity of. See **SHRINE**, 49 P.L.R. 1918.

Official Receiver.

(1) Judgment-debtor declared insolvent—Execution proceedings, Decision in, as to fraudulent concealment of property by judgment-debtor—Appeal against—Official Receiver and not judgment-debtor. See **APPEAL (GENERAL)**, No. 23-b, 47 Ind. Cas. 152.

(2) Annulment of insolvency—Suit before annulment by Receiver if maintainable after annulment. See **INSOLVENCY**, No. 2, 16 A.L.J. 938.

Official Receiver—(Concluded).

(3) Schedule of creditors framed by—Power of, to apply for removal of creditor's name from schedule. See **PROVINCIAL INSOLVENCY ACT** (1907), No. 25, 41 M. 80.

Opahu Basiku Tenure.

Characteristics of. See **OCCUPANCY TENURE**, No. 10, 5 P.R. 1918 (Rev.) and App.

Oral Agreement.

Oral agreement to forego interest accrued on a registered mortgage-debt, if principal money should be paid—Suit on mortgage—Whether oral agreement is admissible in evidence. See **EVIDENCE ACT**, No. 44, 43 Ind. Cas. 913.

Oral Evidence.

(1) To contradict terms of written instrument—Plea of fraud—Sale or mortgage—S. 92 applies only to parties or their representatives. See **EVIDENCE ACT**, No. 36, 20 Bom. L.R. 684.

(2) Document containing acceptance of written proposal for lease—Lease for more than a year—Paper containing list of bids with endorsement signed by the successful bidder to take lease—Endorsement by lessor confirming sale—Document not registered—Oral evidence of its terms if admissible. See **REGISTRATION ACT** (1909), No. 14, 42 Ind. Cas. 629.

(3) Admissibility of, to explain document, a sale or mortgage—Evidence Act, S. 92. See **TRANSFER OF PROPERTY ACT**, No. 1, 45 Ind. Cas. 860.

Ordination.

Right of pongyi or ratan to inherit after ordination—Acquired status of heir if continues after ordination. See **BUDDHIST LAW (INHERITANCE)**, No. 4, U B.R. (1918) 2nd Qr. 91.

Orissa Tenancy.

See **BEN. ACT II OF 1913**.

Oudh Civil Digest.

Plunder's certificate—Necessity to file. See **ACT II OF 1912 (CO-OPERATIVE SOCIETIES)**, No. 2, 44 Ind. Cas. 353.

Oudh Estates.

See **OUDH ACT I OF 1869**.

Oudh Laws.

See **OUDH ACT XVIII OF 1876**.

Oudh Rent.

See **OUDH ACT XIX OF 1869**.

See **OUDH ACT XXII OF 1886**.

Oudh Taluqdari Estate.

Primogeniture sanad—Property purchased or inherited by taluqdar—Accretion—Village transferred in exchange—Right of succession to estate. See **CROWN GRANT**, No. 1, 24 M.L.T. 282 (P.G.).

Ownership.

(1) Revenue Officer, Power of, to order ent y as to, under S. 36 (1) of the Punjab Land Revenue Act—Such order as to, if order of competent Court under Crim. Pro. Code, S. 146 (1). See MUTATION PROCEEDING, 43 Ind. Cas. 216.

(2) Property if can be without owner. See WILL, No. 14, 21 O.C. 374.

Pakki Adat.

Nature of dealings. See WAGERING CONTRACT, No. 1, 23 M.L.T. 203 (P.C.).

Paper Currency Act.

See ACT II OF 1910.

Pardanashin Lady.

(1) Document executed by—Witness—Gift by—Burden of proof as to its *bona fides* and validity. See MORTGAGE (GENERAL), No. 7, 45 Ind. Cas. 691.

(2) See PARDANASHIN LADY.

Pardanashin Woman.

(1) *Examination on commission—Previous appearance in criminal case—Civ. Pro. Code (Act V of 1908), S. 132. Balakeshwari Dabe v. Jnanananda Banerjee, 26 C.L.J. 319=2 C.W.N. 197=41 Ind. Cas. 610=45 C. 697 See Final Part, 1917, Col. 714.*

(2) *Hindu lady appearing in public, right to be examined on commission—Civ. Pro. Code (Act V of 1908), Ss. 132, 133—Privilege—Custom and usage—Costs of the commission. S. 132 of the Civ. Pro. Code, 1908, cover the case of a Hindu lady of the class and position in society of the defendants who has abandoned entirely the protection of the purda. Such lady claiming the privilege ought not to be made to pay the costs of the commission, but the costs of the commission will be the costs in the cause. Ellas Joseph Solomon v. Jyotsna Ghoshal, 22 C.W.N. 147=45 C. 492=44 Ind. Cas. 157.*

GREAVES, J.

(3) *Pardanashin lady—Execution of decree—Fraudulent conduct.*

The mere fact that a pardanashin lady, who is judgment-debtor, keeps her door closed is *per se* no evidence at all of fraudulent conduct, especially when there is nothing at all to show that she deliberately closed her door or attempted to keep it closed against the executing officer. Sughra Begam v. Lachhmi Narain, 40 Ind. Cas. 399.

LINDSAY, J.C.

(4) *Deed executed by—Circumstances to be considered to uphold or repudiate. See MAHOMEDAN LAW (GIFT), No. 1, 28 O.L.J. 306.*

(5) *Mortgage-deed executed by pardanashin—Signature appended behind pardah and behind witnesses—Attestation by witnesses on subsequent acknowledgment of her signature by her son—Mortgage if valid. See MORTGAGE (GENERAL), No. 10, 34 M.L.J. 545 (P.C.).*

Parol Evidence.

See ORAL EVIDENCE.

Parol Marriage and Divorce.

See ACT XV OF 1865.

Parties to Suit.

(1) *Civ. Pro. Code (Act V of 1908), O. XXII, rr. 3, 5—Death of a party—Legal representative made a party—Dispute by the other side as to the right of the legal representative—Determination of the dispute by the Court.*

One of several plaintiffs in a suit having died, a person claiming to be her adopted son was on his application brought on the record as her heir and legal representative. The daughters of the deceased plaintiff thereupon applied to the Court disputing the alleged adoption and praying that they should be brought upon the record as her legal representatives. The trial Judge dismissed the application, holding that he could not alter his previous order as O. XXII, r. 8, provided that after the record had been amended by adding the representative of deceased plaintiff as a party the Court should proceed with the suit. The defendants having applied to the High Court:

Held, that a question having arisen as to whether the person, who had been brought on the record, was the legal representative of deceased plaintiff, it should be determined by the Court. *Yatsalal v. Sambhaji*, 20 Bom. L.R. 902=47 Ind. Cas. 757.

SCOTT, C.J. and SHAH, J.

(1-a) *Rights of, Determination of.*

The rights of the parties to a suit must be adjudicated upon as they existed at the time when the action was brought. *Madho Rao v. Govindbhat* 46 Ind. Cas. 794.

DRAKE-BROCKMAN, J.C.

(1-b) *Mortgage suit—Party impleaded on his own motion or without objection—Error in impleading, if can complain of, after decision of suit.*

A party who has been impleaded on his own motion or being impleaded does not object cannot, after being cast in the suit, change front and complain of the error in impleading him. Having taken the chance of a favourable verdict, he cannot be permitted to undo the effect of an adverse verdict by being permitted to retire from the suit. The adverse verdict must be one which is correct in point of law. *Adam Khan v. Dattaram*, 47 Ind. Cas. 586.

MITTRA, A.J.C.

(1-c) *Head of endowment to which legacy bequeathed by will—Application for probate by executor—Legatee not made party to probate proceedings—Appeal from order granting probate—Right of such legatee to intervene as respondent in appeal—Appellate Court, Powers of, to add parties—Civ. Pro. Code, 1908, S. 107.*

Held, that the head of an endowment which under a will was entitled to a legacy, had a

Parties to Suit—(Continued).

right to intervene and be added as a party respondent in an appeal against the order granting probate, even though he was no party to the original probate proceedings.

Even the possibility of an interest is sufficient to entitle a person to become a party to the proceedings (a). Where a person is entitled to intervene as a party to prove the will in the lower Court, he is equally entitled to support the will as a respondent in the appellate Court (b).

Under S. 107, Civ. Pro. Code, 1908, and under its inherent powers, an appellate Court has power to add the intervenor although he was not a party to the original suit (c). *Srimati Hemangini Debi v. Haridas Banerjee*, 3 Pat. L.J. 409—46 Ind. Cas. 398.

MULLICK and THORNHILL, JJ.

References:—(a) *Crespin v. Dolgion*, (1860) 2 S.W. and Tr. 17, R. (b) 19 C. 48, R.; 8 C.W. N. 404, F. (c) 4 C.W.N. 58, Dist.

(2 & 3) Mortgage of share of non-transferable occupancy holding if an incumbrance—Purchaser of holding a rent sale how far bound by mortgage—Suit to enforce mortgage against tenants and purchaser—Landlord not essential party. See BEN. ACT VIII OF 1885 (TENANCY), No. 78, 22 C.W.N. 662.

(4) Administration suit—Dispute as to original plaintiff's right to share—No dispute as to right of a defendant to such share—Right of such defendant to be made plaintiff. See ADMINISTRATION SUIT, No. 1, (1918) M.W.N. 929.

(5) Suit by landlords for settlement of fair rents and for enhancement—Death of one landlord after decision of lower appellate Court leaving him, surviving major and minor sons—Appeal against minor son caused to be dismissed for non-prosecution—Appeal by tenants incompetent for want of necessary party. See APPEAL (GENERAL), No. 10, 28 C.L.J. 201.

(6) Suit by persons named as proprietors or firm—Appeal by defendants—Death of one plaintiff-respondent during appeal—No legal representatives substituted—Failure of appeal for defect of parties. See APPEAL (GENERAL), No. 11, 28 C.L.J. 263.

(7) Rent suit by landlord against one of the heirs of original tenant—Whether addition of other heirs as parties is proper. See CIV. PRO. CODE (1908), No. 209, 44 Ind. Cas. 465.

(8) Addition of parties—Power of High Court to interfere with orders of the lower Courts—When parties can be added. See CIV. PRO. CODE (1908), No. 169, 44 Ind. Cas. 564.

(9) Suit in the name of a firm—A partner dying during pendency of suit—Whether addition of legal representatives necessary for passing full decrees. See CIV. PRO. CODE (1908), No. 409, 44 Ind. Cas. 211.

Parties to Suit—(Continued).

(10) Assignment pending suit—Disposal of suit—No appeal by assignor—Application by assignee to be made party—Assignee if can appeal—Devolution of interest. See CIV. PRO. CODE (1908), No. 190, 8 L.W. 21.

(11) Party setting up title adverse to mortgagor and mortgagee—Order exonerating him from the suit—If he still remains a party to the suit. See CIV. PRO. CODE (1908), No. 64, 28 M.L.T. 206.

(11-a) Hindu joint family—Debt due to family—Bond in favour of one member—Suit by that member, Competency of—Other members of family if necessary parties to. See HINDU LAW (DEBTS), No. 13-a, 8 P.L.R. 1918.

(12) Hindu joint family—Partition suit by sons—Transferees from father of some family properties, if proper and necessary parties to. See HINDU LAW (PARTITION), No. 7, 46 Ind. Cas. 281.

(13) Suit for ejectment—Numerous parties—Frame of suit—Reprehensible practice. See HINDU LAW (REVERSIONERS), No. 5, 24 M.L.T. 429 (P.C.).

(14) Suit for rent—Persons acquiring interests in tenancy prior to suit—Effect of non-joinder of such persons as parties in rent suit. See LANDLORD AND TENANT, No. 22, 41 Ind. Cas. 733.

(15) Declaratory suit by one daily worshipper to set aside alienation if lies. See MAHOMEDAN LAW (WAKF), No. 4, 23 C.W.N. 115.

(16) Partition effected with consent of joint owners—Mortgagee's right to be impleaded as party—Partition if bad by reason of absence of mortgagee's consent. See PARTITION, No. 4, 2 P.R. 1918 (Rev.).

(17) Resolution by Beragi Sadsus of unfitness of present incumbent to mahantship and election of another—Suit with leave of Collector to remove incumbent, to eject him from property to appoint the elect as the new mahant and to deliver property to him—Mahant elected if party plaintiff to suit. See PUBLIC CHARITIES, No. 3, 97 P.R. 1918.

(18) Rent, Arrears of, Suit for—Insolvent tenant's estate, Receiver of, if necessary party to. See RECEIVER, No. 4, 46 Ind. Cas. 395.

(19) Addition of parties without amendment of plaint—Nature of claim if altered. See RELIGIOUS ENDOWMENTS, No. 9, 11 P.W.R. 1918.

(20) Disputes relating to private watercourse—Government if necessary party. See RE-MAND, No. 5, 177 P.W.R. 1918.

(21) Rent, Suit for arrears of—Maintainability of, against one of several heirs of a deceased tenant without joining others. See RENT, No. 1, 45 Ind. Cas. 732.

Parties to Suit—(Concluded).

(22) Suit to enforce mortgage—Person claiming title paramount to mortgagor and mortgage, if necessary party to suit. See *RES JUDICATA*, No. 4, 16 A.L.J. 639.

(23) Civ. Pro. Code (1908), S. 144 — "Parties," Meaning of—Representative, Meaning of—Assignee if entitled to benefit of S. 144. See *RESTITUTION*, No. 4, 46 Ind. Cas. 465.

(23-a) Person not interested in the relief prayed for by plaintiff, not a necessary party. See *SPECIFIC RELIEF ACT*, No. 23-a, 45 Ind. Cas. 665.

(24) Purchaser of trust property, if can be joined as party to proceedings under S. 92, Civ. Pro. Code. See *TRUST*, No. 1, 28 C.L.J. 4.

(25) Vendor and purchaser—Suit for possession of land by vendee on declaration of title by purchaser or for specific performance of contract of sale—Default by vendor to register conveyance and deliver possession and transfer of property to third party—Such third party if necessary defendant in purchaser's suit. See *VENDOR AND PURCHASER*, No. 2, 27 C.L.J. 538.

Partition.

(1) *Suit for — Plaintiff to prove what—Joint owner and joint possession.*

In a suit for partition, the plaintiff should establish that he and the defendant are not only joint owners but are also entitled to joint possession, as the object of the suit is to transfer the joint possession into possession in severalty. *Durga Charan v. Khundkar Enamel*, 27 C.L.J. 441=45 Ind. Cas. 705.

MOOKERJEE and BEACHCROFT, JJ.

*References:—*22 C.L.J. 259=43 C. 504; 15 C.W.N. 677; 23 C.L.J. 231; 10 M.L.T. 313, R.

(2) *Partition between persons having interests, not of the same degree—If allowable.*

Where a suit for partition was dismissed on the ground that the interests of parties are not of the same degree, one being an occupancy raiyat and the other a permanent tenureholder, held that the reason for dismissal is not good. *Shelk Roshan v. Shelk Atabali*, 43 Ind. Cas. 341.

FLETCHER and CHATTERJEE, JJ.

*Reference:—*37 C. 918, F.

(2-a) *Bengal Estates Partition Act (VIII B.C. 1876), Under, after Bengal Estates Partition Act (V B.C. of 1897), came into force—Burden of proof—Occupancy holding, Title to—Declaration of, Suit for, by tenant—Maintainability of, under S. 119 of Act of 1897—Record of Rights, Entry in, correctness of, Presumption as to.*

That a partition, concluded after the Estates Partition Act of 1897 came into operation, was actually made under the Act of 1876, should be proved by the party alleging it.

In a suit by a tenant for declaration of his title to an occupancy holding, allotted to the defendant on partition commenced

Partition—(Continued).

under the old Estates Partition Act of 1876 but concluded after the new Act came into force, the entry in the Record of Rights prepared subsequently under the Bengal Tenancy Act being in his favour; the partition was held to have been effected under the old Act, since the tenant was not debarred under S. 149 of the Act of 1876, from impugning the entries in the partition papers and since there was also a presumption as to an order having been made under S. 62 prior to 8th December 1897. It was also held, under S. 119 of the Act of 1897, such a suit was maintainable. There is only a presumption as to the correctness of an entry in a Record of Rights. *Baldeo Sahai v. Brajmandan Sahay*, 43 Ind. Cas. 359=3 Pat. L.W. 266.

MULLICK and ATKINSON, JJ.

(2-b) *Assam Land and Revenue Regulation (I of 1886), S. 97, Of estate under—Revenue authority, Manner in which partition to be carried out, Questions as to, to be raised before—Imperfect partition, when can be obtained—Co-shares, Consent of, if necessary—Bengal Estates Partition Act (VIII of 1876), S. 112.*

In an application under the Assam Land and Revenue Regulation, which is one for partition of a whole estate, questions as to the manner in which the partition is to be carried out must be raised before the Revenue Authority.

Taluk A and five other taluks had specific shares in a mouzah D. All the taluks had lands or shares in other mouzahs but in no other mouzah was the said taluk A, a co-sharer with the other five estates or taluks or any one of them. In a suit for partition.

Held, that, S. 97 of the Assam Land and Revenue Regulation, 1886, claim did not preclude the owner of more than 8 annas share in taluk A from claiming from the Revenue Authorities an imperfect partition of Taluk A as between himself and his co-sharers and incidentally to that partition and in order to complete the same he was entitled to obtain from the Revenue Authorities the separation and allotment to his estate of its proportionate share in lands common to that estate and five other estates. The consent of the recorded co-sharers holding in the aggregate more than one-half share in the six estates or at least in the common lands found in Mouzah D, was not necessary for a division of the common lands in question. *Brojendra Kishore Roy Chowdhury v. Kali Kumar Chowdhury*, 46 Ind. Cas. 967.

TEUNON and RICHARDSON, JJ.

(2-c) *Instrument of partition—Compromise—Registration of compromise referring to a separate agreement—Evidence—Admissibility of unregistered compromise—Stamp, sufficiency of.*

A document the object of which is not to evidence a partition but only to give information to

Partition—(Continued).

the Court as to the method in which a partition had been effected out of Court, in order that the matter in controversy may be decided in accordance therewith is not an instrument of partition.

A compromise was filed in a certain mutation proceeding. It stated that the villages entered in list A. appended to the compromise were to be recorded in the name of K, those mentioned in list B in the name of S, and that the property mentioned in list C should be entered jointly in equal shares in the names of K and S both; it further stated that under a separate agreement executed by the parties, K. had undertaken to pay certain debts charged against some of the villages in respect of which mutation had been sought for and that in case of his failing to do so within a month S would be entitled to recover the same from him. Subsequently S brought a suit alleging that K had failed to pay the debts according to the agreement and prayed for the recovery of the same. It was objected that the deed of compromise was illegal and inadmissible in evidence for want of registration and necessary stamp.

Held, that, as the compromise was sufficiently stamped as a petition to the Court in which the mutation proceeding was pending, the objection on the ground of the insufficiency of the stamp failed.

Held further, that the compromise not being in itself an instrument which purported to create or declare any right which did not exist before and mere recital of the manner in which the partition had been effected it was not an instrument of partition and consequently not compulsorily registrable. *Shankar Singh v. Kalika Bakhsh Singh*, 21 O.C. 346.

STUART and KANHAIYA LAL, JJ.

- (3) *Ben. Act V of 1891 (Estates Partition)*, Ss. 25, 29, Scope of—S. 25, if bars suit for declaration that order for Revenue partition is bad by reason of former private partition—Private partition, existence of, if bars its re-partition by Revenue proceedings.

In a suit for declaration that, by reason of a former private partition of an estate, an order of the Board of Revenue directing a Revenue partition of the same to proceed and an injunction restraining further proceedings on the strength of such order: *held* that S. 25, Estates Partition Act, was no bar to the present proceedings the existence of a private partition being a bar to the re-partition of the property. The fact that the original partition proceedings have been lost in antiquity is not by itself a reason for disturbing divisions which have existed for a very long period; where it is shown that the parties have from time immemorial acquiesced in the result of a partition, it must be presumed that they or their predecessors in interest were parties to the original partition. It is further to be presumed that such new interests as might have been created since the original division of the estate amount merely to devolutions of the interests of the parties who made the original partition and

Partition—(Continued).

that the holders of these new interests are representatives in interest of the original partitioners, who are therefore bound by the acts of such original partitioners. *Manno Chaudhry v. Munshi Chaudhry*, 3 Pat. L.J. 188—43 Ind. Cas. 393.

ROE and IMAM, JJ.

- (4) *Partition effected with consent of joint owners of land not in accordance with sanctioned mode—Partition if vitiated by reason of lack of consent of mortgagee with possession—Right of mortgagee to intervene in partition proceedings—Remedy by Civil suit—Punjab Land Revenue Act (XVII of 1897)*, Ss. 3, 110, 111, 126.

It does not appear to be the intention of the framers of the Act to recognise the claim of a mortgagee with possession, as such, to intervene in partition proceedings or to be a party to them, except when the property to be partitioned is a tenancy of which he is technically the "landlord," that is to say, the person under whom the tenants hold land and to whom the tenants are, or would be but for a special contract, liable to pay rent.

Where a mortgagee with possession of an undivided share objected to a partition effected with the consent of the joint owners of the land on the ground that the mortgagors colluding with the other co-sharers to injure him, had accepted as their share land having inferior irrigation facilities without however, alleging that the share of the mortgagors was of less value than the amount of the mortgage debts, *held* that the mortgagee could seek his remedy by regular suit in the Civil Courts as a dispute of this nature did not come within the functions of a Revenue Officer dealing with a partition under the Land Revenue Act. *Held*, also, that the partition effected in this case was not invalidated by reason of the lack of the mortgagee's consent and the mortgagee had no claim to be made a party to the partition proceedings. *Chowdhri Thakar Das v. Sultan Bakhsh*, 2 P.R. 1918 (Rev.)=3 P.W.R. 1917 (Rev.)=45 Ind. Cas. 405.

MAYNARD, F.C.

- (5) *Application for partition of joint khata—Applicant not in possession—Question of title raised by respondents in partition proceedings—Objectors not to be referred to Civil Court—Title to be determined by Revenue Court—Onus of proof that applicant has no title to share claimed by him on respondents.*

An applicant for partition was recorded as a co-sharing owner along with certain other parties in the land in dispute, but was not in actual physical possession or occupation of any part of the land. The applicant joined the other recorded parties in a suit for pre-emption of a portion of that land and paid up his share of the price. The other parties-respondents in the partition proceedings denied the applicant's title. *Held* that the officer seized of the partition proceedings should, under para. 8 of Standing Order 27, himself proceed to decide

Partition—(Continued).

the question of title without referring the objectors to a Civil Court and that the burden of proving that the applicant had no title to the share in respect of which he claimed partition or to obtain such partition lay on the objecting respondents. *Kirpa v. Nasib Singh*, 6 P.R. 1918 (Rev.).

FAGAN, F.C.

- (6) *Decree for partition, effect of—Rights of co-sharers—Mode of partition—Remand for fresh enquiry "so far as appellants are concerned"—Suit, whether can be dismissed in toto.*

The property in suit belonged to three brothers, one of whom, N, alienated part of it and in 1903 another brother T brought a suit against his co-sharers for his one-third share and joined the alienees also as defendants. This suit was decreed even against the alienees, two of whom preferred appeals which having been accepted, the case was remanded for fresh enquiry "so far as the appellants were concerned." After remand a final decree was passed by which the whole suit was dismissed. An application for execution of the first decree having been made, the widow of the third brother demanded her share of the property and sought relief against the alienees:

Held, (1) that the original decree stood as between the plaintiffs and those defendants who did not appeal and could not be treated as having been set aside as a whole;

(2) that inasmuch as every co-sharer is entitled to obtain possession of the share allotted to him under a decree for partition whether he be the plaintiff or the defendant, the widow of the third brother in this case being herself a defendant was entitled to take advantage of the decree passed in favour of the plaintiff and to claim a one-third share under it.

Held, also, that in execution of a partition decree it is not necessary that a share in each and every item should be allotted to every co-sharer. It frequently happens that long possession of a co-sharer is to be maintained. If it is found that one co-sharer has alienated portions of the joint property, those portions should be taken into consideration in the allotment of shares and the shares of other co-sharers should be made up out of those portions of the property which have not been alienated. *Debi Sahai v. Tara Chand*, 22 P.L.R. 1918=44 P.W.R. 1918=44 Ind. Cas. 135.

SHAH DIN and SCOTT-SMITH, JJ.

Reference:—23 P.R. 1905=31 P.W.R. 1905, F.

- (7) *Revenue-paying Estate, Of—Decree for partition by Civil Court—Partition if can be re-opened.* See BEN. ACT V OF 1897 (ESTATES PARTITION), No. 1, 45 Ind. Cas. 895.

(8) *Collector effecting partition under Civ. Pro. Code in execution of decree—Jurisdiction of Civil Court to hear application for re-opening partition.* See CIV. PRO. CODE (1908), No. 96, 20 Bom. L.R. 411.

Partition—(Concluded).

- (9) *Revenue Court, By—Sharers of a village. Relationship of, inter se—Effect of, on.* See CO-SHARERS, No. 1, 46 Ind. Cas. 399.

(10) *Partition proceedings under O. P. Land Revenue Act when become contentious.* See LAMBARDER, No. 1, 14 N.L.R. 18.

(11) *Made in settlement of disputed or doubtful claim, how far binding on parties thereto.* See MINOR, No. 3, 23 U.W.N. 118.

(12) *Writing, if necessary to be in—Possession of land allotted under, Receipt for, if compulsorily registrable.* See REGISTRATION ACT (1909), No. 15, 45 Ind. Cas. 854.

(13) *Preliminary decree for partition set aside on appeal—Value of final decree passed during pendency of appeal from preliminary decree—Realisation of money in execution of such final decree—Restitution of such money, right to.* See RESTITUTION, No. 2, 27 C.L.J. 451.

Partition Act (IV of 1893).

- (1) *Ss. 2 and 3—Construction—Principles not to issue on the question that a dwelling-house could not be reasonably or conveniently partitioned—Application for withdrawal of suit—Application rejected as having been made at a late stage—Discretion of Court—Civ. Pro. Code (Act V of 1908), O. XXIII, r. 1.*

Plaintiffs and defendants were co-owners of a certain dwelling-house, the plaintiffs having 8/9ths share and the defendants 1/9th share. Plaintiffs sued for partition and stated that, as the house could not be reasonably or conveniently divided, the house might be sold by auction and, in the alternative, offered to purchase it. The defendants contended that the house might be partitioned without inconvenience to either party; but, in the alternative, they also offered to purchase the plaintiffs' share at a valuation, should the Court be of opinion that the partition could not be effected. The defendants subsequently withdrew their contention that the house might be conveniently partitioned. The Court, thereupon, appointed Commissioners, who valued the plaintiffs' share, and the defendants were allowed to purchase it. The Court also disallowed the plaintiffs' application for permission to withdraw the suit:—*Held* (1) that the Court had acted in accordance with Ss. 2 and 3 of the Partition Act, when the parties were not at issue on the point that a division could not be reasonably or conveniently made; (2) that the Court had exercised a sound discretion in disallowing the application for withdrawal of the suit inasmuch as it had been made at a stage at which the defendants had become entitled to the benefit of S. 3 of the Partition Act and because the application did not satisfy the requirements of O. XXIII, r. 1 of the Civ. Pro. Code. *Umrao Singh v. Umrao Singh*, 16 A.L.J. 584=47 Ind. Cas. 905.

PIGGOTT and WALSH, JJ.

- (2) S. 3. See No. 1, *supra*.

Partition Act (IV of 1932)—(Concluded).

(3) S. 4—"Court" includes appellate Court—"Dwelling-house," meaning of The word "Court" in S. 4 is not confined to the trial Court, but includes the appellate Court and the appellate Court like the trial Court is bound, upon any member of the family who is a share-holder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section may be taken either in the one Court or in the other.

In connection with a conveyance of a partition of a "dwelling house," the word generally means not only the house itself but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. *Pran Krishna Bandari v. Surath Chandra Roy*, 22 C.W.N. 515=45 Ind. Cas. 604=45 C. 873.

RICHARDSON and WALMSLEY, JJ.

Reference :—12 C.L.J. 525 (529), R.

Partition of Revenue-paying Estates.

See BEN. REG. XIX OF 1814.

Partition Suit.

(1) Possession of one co-owner is possession of other co-owners—Adverse possession—Evidence—Court-fee payable.

In a partition suit, the possession of one co-owner is *prima facie* the possession of the other co-owners and that in order to make the possession adverse there must have been ouster of plaintiff. Where the possession of the defendant has been long and uninterrupted for a large number of years, the Court has come to the conclusion that, without any express evidence of the fact of ouster, plaintiff's ouster, cannot be inferred.

In a partition suit ordinarily it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in India where a person who sues for partition is out of possession, he must ask, first of all, to be restored to possession of his share and pay additional *ad valorem* fee upon his plaint, whereas in the case where the plaintiff is in possession, he simply sues for partition and separation of his share and he can maintain such a suit on a plaint bearing a stamp of Rs. 10 only. *Ahamuddin Tamijuddin v. Amiruddin*, 44 Ind. Cas. 216.

FLETCHER and SHAMSUL HUDA, JJ.

Reference :—(1912) A. C. 280, F.

(2) Disposal of part of the subject-matter of the suit—Whether Court can subsequently deal with the part remaining undisposed of—Powers of Court.

In a partition suit a preliminary decree was passed by the trial Court and during the pendency of appeal against the preliminary decree, the High Court made an order staying proceedings upon the preliminary decree in so far as it related to joint *karbar*, but no further. The trial Court passed final decree in regard that part of the suit which is not concerned

Partition Suit—(Concluded).

with the *karbar*. Subsequently after the disposal of the appeal by the High Court, the plaintiff applied to the trial Court for partition of the joint *karbar* and the application was rejected by the Court. Held, that the rejection amounted to a refusal to exercise a jurisdiction vested in the Court, and the Court was quite competent to deal with so much of the suit as had not already been dealt with. *Jashoda Dassee v. Upendra Nath Hazra*, 44 Ind. Cas. 671.

RICHARDSON and WALMSLEY, JJ.

Reference :—19 A. 155, Appr.

(3) Civ. Pro. Code (1909), O. XX, r. 12—Profits prior to plaint and after it—Decree regarding such profits—Notice regarding enquiry—Essentials. See CIV. PRO. CODE (1909), No. 170, 43 Ind. Cas. 458.

(4) Whether decree-holder can apply to be put into actual possession of properties allotted to his share. See CIV. PRO. CODE (1909), No. 318, 45 Ind. Cas. 7.

(5) Hindu Law—Mithila school—Partition between father and son—Grandmother entitled to share—Grandmother's share liable to partition after her death—Birth of new member after filing partition suit—Plaintiff's share not diminished. See HINDU LAW (PARTITION), No. 3, 44 Ind. Cas. 146.

(6) Analogy between suit for his share of properly alienated by Hindu widow against alienee and co reversioners and See HINDU LAW (REVERSIONERS), No. 3, 35 M.L.J. 153.

Partner.

Suit against firm—Plaintiff's right to know members thereof—Appearance of partner in person, if enforceable—Effect of partner's appearance. See FIRM, No. 1, 78 P.R. 1918.

Partnership.

(1) Suit for dissolution of—Decree—Civ. Pro. Code (Act V of 1903), O. XX, r. 15—Discretion of Court. Nature of—Time from which partnership to be declared dissolved—Date of judgment, if dissolution can commence from.

The discretion given to a Court by O. XX, r. 15, Civ. Pro. Code, to fix a date from which a partnership shall stand dissolved is a judicial discretion, and not an arbitrary one.

Ordinarily the Court should direct dissolution from the date of any notice 'given' in the behalf by one of the partners or from the date of the plaint. Where the parties have been a long length since the filing of the plaint, the Court should not declare that the partnership should stand dissolved as from the date of the judgment. *Sambasiva Iyer v. Ganapathi Iyer*, 45 Ind. Cas. 727.

AYLING and SESHAGIRI Aiyar, JJ.

(2) Money borrowed by two sole partners—Decree against both—Payment

Partnership—(Continued).

Right of partner so paying to contribution—Suit by partner against another when allowed during partnership—Revision—S. 25, Provincial Small Cause Courts Act, 1887. Damodara Shanabha v. Subraya Pal, 33 M.L.J. 509 = 6 L.W. 742 = 48 Ind. Cas. 217. See Final Part, 1917, Col. 720.

- (8) *Suit against partners—One partner absent from British India for part of limitation period—Plaintiff whether entitled to deduct such period against all defendants or whether absentee defendant only—English Law—Legal representative of deceased partner, if partner—Dissolution of partnership by death of one partner—Release of debt due to firm by surviving partners—Release if binds legal representative of deceased partner—Contract Act, Ss. 45, 241, 263—Limitation Act, Ss. 13, 19, 20.*

D, the father of the plaintiff, was a partner with the defendants, A, B and C in a firm, which may be called the Epoch Creditor Firm. Defendants A, B and C were also partners with E, the first defendant, in another firm, which may be called the Singapore Debtor Firm. The plaintiff's father died in 1903. During the course of the winding-up of the Epoch Creditor Firm, the defendants A, B and C lend to the Singapore Debtor Firm a certain sum of money. In a suit brought in 1909 to recover the plaintiff's share of that loan, it was found that the Singapore Debtor Firm had entered into a deed of composition with the outside creditors of that firm, the main provisions of which were that E, the first defendant, should pay a certain sum of money to pay off these outside creditors and that he should be released from liability to his partners for any moneys advanced by them. And that E, the first defendant, was not residing in British India between the end of 1903 and December 1908. *Held*, that the fact of one of the defendants, *viz.*, E, being absent from British India did not entitle the plaintiff to deduct the time as against all the defendants, but that he was entitled to deduct it under S. 13, Limitation Act, as against the particular absentee defendant only, and that the fact that the plaintiff could have sued A, B and C, the co-obligors of E, who were within British India during the absence of E, was not a ground for holding that the claim against E, the first defendant, was barred by limitation (a).

Held also that the release of E, was binding also on the plaintiff, who, if damaged by the conduct of A, B and C was at liberty to sue them for damages.

Entries in the debtor's account books not signed cannot be treated as payments of interest within the meaning of S. 20 (b); nor as acknowledgment under S. 19, Limitation Act.

Indian Law in relation to S. 13, Limitation Act, compared with the corresponding English Law.

After the dissolution of a partnership by the death of one of the partners, the surviving partners still have the right of releasing a

Partnership—(Continued).

partnership claim—see S. 368, Contract Act (c). The legal representative of a deceased partner is not by implication under S. 368, Contract Act; a partner.

If a release by one of the partners is fraudulent, the other partners can avoid it and seek to recover their share of the released debt and the legal representative is not entitled to such a right which is personal to the partners (d). *Palanappa Chettiar v. Yeerappa Chettiar*, 34 M.L.J. 41 = 41 M. 446 = 44 Ind. Cas. 466.

AYLING and SESHAGIRI Aiyar, JJ.

References:—(a) 38 M. 419, R. (b) 13 B. 338; 24 B. 498, R. (c) 17 B. 6 (13), R. (d) 19 M.L.J. 22; 13 C.L.J. 234 and *Piercy v. Finney*, (1871) 12 Eq. C. 69, *Rel. on*.

- (4) *Partnership constituted by defendant and plaintiffs—Trade carried on by plaintiff on his sole account as another firm—Money advanced by plaintiff in latter capacity to former partnership—Suit by plaintiff against himself and defendant—Suit to be for accounts—Civ. Pro. Code (1908), O. XXX, r. 9, scope of.*

The plaintiff and the father of the defendants were partners in a firm N.R., carrying on business at Boomangai and Kyato. The plaintiff had also a firm L, of his own at Rangoon. The case of the plaintiff was that his Rangoon firm L, had on various occasions advanced moneys to the defendant's firm, N.R., of which he himself was a partner, that the latter firm had been dissolved long before the institution of the suit, that, on taking accounts as between firms, L and N.R., a balance of Rs. 25,000 and odd was found due to the plaintiff's firm and that, as the defendant's share in the partnership was $\frac{1}{2}$, they were liable to pay him one-fourth of the amount so found due. The defendants denied that, upon the taking of the entire account, the amount claimed would be actually due. *Held* that a suit of this character where the plaintiff was suing himself and his partner would not be entertained as the plaintiff had not asked for accounts (a).

O XXX, r. 9, Civ. Pro. Code, does not profess to lay down when, and under what circumstances suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common, would be entertained and it would not ordinarily be within the scope of the code to lay down any such proposition. The rule in question lays down that if such suits are entertained, the procedure to be followed is that set out in the order. *Lakshmana Chetty v. Nagappa Chetty*, 34 M.L.J. 408 = 45 Ind. Cas. 86.

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 26 B. 739; 1 O.L.R. 545, F.

- (5) *Ownership of ship in common if creates tenancy in common or partnership—Principles governing such cases.*

Though co-owners of a ship are only tenants in common of their ship, and not partners, yet, if they employ it in earning freight, or otherwise as a money making machine, they

Partnership—(Continued).

become partners in respect of such earnings. *Yanamati Sattiraju v. Balla Pragada*, 35 M. L.J. 87=8 L.W. 683=41 M. 939=47 Ind. Cas. 640.

AYLING and COUTTS-TROTTER, JJ.

References:—(1848) 17 L.J. Ch. 32; (1828) 8 B. and C. 612; (1815) 1 Madd. 61; (1813) 2 V. and B. 242, R.

(6) *Good-will—Right of every partner to an interest therein—Ejman type of partnership—Working partner—No interest in good-will.* *Ramachandra Naidu v. Malang Hyath Batcher Salb*, 22 M.L.T. 225=43 Ind. Cas. 661. See Final Part, 1917, Col. 719.

(7) *Sub-partners, liability of, for debts of firm—Submission to arbitration, power of one partner to bind another by—Registered Company, debtor of, becoming shareholder—Share, charge on, for debt.* *Chundoor Puniah v. Sree Venugopala Rice Factory Co., Ltd.*, 22 M.L.T. 520=(1918) M.W.N. 51=7 L.W. 114=43 Ind. Cas. 508. See Final Part, 1917, Col. 720.

(7-a) *Partnership suit, Character of—Payment into Court, Effect of—Surety-bond executed in partnership suit, Nature of—Rateable distribution—Civ. Pro. Code (Act V of 1908), S. 73.*

Held, that:—

(1) A partnership suit is a suit of a peculiar character and the parties to such a suit do not stand to each other precisely in the same relation as parties to suits generally. Each of the parties to such a suit is really in turn plaintiff and defendant and in both capacities comes before the Court for the adjudication of his rights relating to the other partners which the Court endeavours to determine by its decree (a).

(2) Money paid into Court by reason of a prohibitory order does not become the property of the creditor at whose instance the prohibitory order was issued without a further order directing payment to him (b).

(3) A surety-bond executed in a partnership suit should be considered to ensure for the benefit of all those who may eventually get a decree.

(4) L brought a partnership suit against P and added K another partner as a formal defendant. K asked the Court to decree to him any sum that might be found due to him. Eventually L was given a decree against P for Rs. 2,301-10-3 and K one for Rs. 488. One L.N. had executed a surety-bond reciting that if a decree was given in the case he would pay the sum of Rs. 1,000 into Court. L having realised the whole sum of Rs. 1,000 from L.N. plaintiff, the widow of K sued for her share.

Held, that inasmuch as K would have been entitled under S. 73 of the Civ. Pro. Code, 1908, to a proportionate share of the sum of Rs. 1,000 had it been paid into Court the

Partnership—(Continued).

plaintiff was, as K's representative, entitled to compensation for the action of L in appropriating the whole sum to himself. *Musst. Amba v. Balj Nath*, 167 P.W.R. 1917=85 P.R. 1917=5 P.L.R. 1918.

SCOTT-SMITH, J.

References:—(a) 7 B. 167, F. (b) 19 M. 72, F.

(7-b) *Gumashta—Sharing profits and losses makes him a partner—Immaterial misdescription of plaintiff's name not sufficient for dismissing suit—Common practice of firms to be known by the names of father and son.*

Held that:—

(1) It is illegal to dismiss a suit in case of immaterial misdescription of plaintiff's name.

(2) It is a common practice in India for a firm to be known by the name of father and son even after both are dead and the business is carried on by the son's son. So if the name of son's son is sometimes added to the name of the firm its omission in the plaint is no misdescription of plaintiff's name.

(3) In India a Gumashta sharing losses as well as profits of a partnership is a partner of the firm. *Firm of Chela Ram Sant Ram v. Kishan Chand & Sons*, 155 P.L.R. 1917=3 P.W.R. 1918=44 Ind. Cas. 283.

CHEVIS and SHADI LAL, JJ.

(8) *Suit for dissolution of partnership and settlement of accounts—Plea of previous settlement—Burden of proof—Death of one partner—Dissolution by operation of law.*

In a suit for settlement of partnership accounts and for appointment of a Receiver, the defendant pleaded that the partnership had been dissolved with the consent of all the partners on the 31st January, 1913, when the accounts were gone into and that he was no longer liable to render accounts. It appeared that one of the partners died on the 23rd of June, 1913:

Held, (1) that the onus of proving that the partners had consented to dissolution of partnership on the 31st January, 1913, when the accounts had been settled, rested on the defendant, who, on the evidence, had failed to discharge it;

(2) that the partnership between the parties was dissolved by operation of law on the 23rd of June, 1913, the date of the death of one of the partners. *Sundar Singh v. Dalif Singh*, 118 P.W.R. 1918=46 Ind. Cas. 467.

SHADI LAL and WILBERFORCE, JJ.

(9) *Death of one partner, who was manager and had account books in his keeping—Suit for accounts against his minor legal representative.* See ACCOUNTS, No. 1, 16 A.L.J. 305.

(10) *Acknowledgment by partner if binds co-partner—Proof of specific authority if necessary.*

Partnership—(Concluded).

See ACKNOWLEDGMENT OF DEBT, No. 2, 34 M.L.J. 373 (F.B.).

10-a) Joint decree in favour of four partners—(Release by two of their interest in partnership in favour of other two—Assignment by latter—Assignee, Rights of—Consideration for assignment, Absence of, Value of—Certificate of payment by two who released their interest, Effect of. See CIV PRO. CODE (1908), No. 296-a, (1918) M.W.N. 507.

(11) Right to dissolution—Terms of partnership contract how far effect—Court if can decree dissolution. See CONTRACT ACT, No. 103, 16 A.L.J. 513.

(12) Separate estate of deceased partner—Liability for debts incurred after partner's death. See CONTRACT ACT, No. 102, 24 M.L.T. 392.

(13) Combination of money and skill by persons for carrying on business—Agreement to equally share profits and losses—Agreement in partnership. See FRAUD, No. 2, U.B.R. (1918), 1st Cr., 69.

(14) Property of joint Hindu family if asset of. See HINDU LAW (DEBT), No. 7, (1918) M.W.N. 44.

(15) Minor member of firm—Whether such member can act as agent—Firm's liability. See MINOR, No. 6, 17 P.L.R. 1918.

Pasture.

Shamilat or village common land—Right of cultivating tenants to graze cattle on shamilat land—Tenants not parties to Wajib-ul-arz—Tenants if thereby disentitled to grazing rights.

Tenants cultivating land in a village, found to have the right of grazing cattle in the *shamilat* by custom, are apparently members of the village community entitled to grazing rights under the *Wajib-ul-arz* though they were not parties to it. *Munshi Ram v. Maya*, 122 P.R. 1918.

SCOTT-SMITH and MARTINEAU, JJ.

Reference:—95 P.R. 1914, Dist.

Patent and Designs Act.

See ACT II OF 1911.

Patni.

See BEN. REG. VII OF 1819.

Patnidars.

Right reserved to patnidar by S. 51, Village Chakuridari Act—Transfer of Chakuridari Chakurid lands—Enforcement of such right if by suit for possession or specific performance. See LIMITATION ACT (1908), No. 155, 18 A.L.J. 364 (P.G.).

Patni Tenure.

(1) *Putni—Deposit of putni rent by darpatnidar—Possession given to darpatnidar—Putni Regulation (VIII of 1819), S. 18—Putni rent, Payment of, by darpatnidar—Rent, if can be added to demand.*

Under S. 13 of the Putni Regulation, the defaulter can recover his tenure on re-payment of the advances made with interest, or, on proof that the advance has been realised from the usufruct. But the person making the advance is not entitled to add to his demand the rent paid to the superior landlord for the years during which he has been in possession. *Behari v. Nasimannessa Bibi*, 27 O.L.J. 490.

BEACHCROFT and WALMSLEY, JJ.

References:—12 C. 185; 15 C.W.N. 404; 7 C.L.J. 604, F.

(2) *Successive rent decrees—Sale in execution of last decree—Zamindar if has a charge on surplus sale-proceeds for amounts of previous decrees—Putni Reg. (VIII of 1819), Ss. 8 (3), 17 (3)—Bengal Tenancy Act (VIII of 1885), Ss. 65, 165, 195 (c)—Transfer of Property Act (IV of 1882), Ss. 73, 109—Nature of charge, for arrears of rent. Satya Sankar Ghoshal v. Monomohan Guha, 22 C.W.N. 131=43 Ind. Cas. 996. See Final Part, 1917, Col. 762.*

(3) *Resumption by Government of Chakuridari Chakurid lands—Subsequent transfer thereof to zamindar—Title acquired by zamindar—Liability of putnidars to take fresh settlement from zamindar after resumption. See BEN. ACT VI OF 1870 (VILLAGE CHOWKIDARS), No. 3, 22 C.W.N. 660.*

(4) *Resumption of Chowkidari Chakurid lands situate within ambit of Patni granted by plaintiff to defendant's predecessor in interest and transfer thereof to plaintiff as Zamindar—Suit by Zamindar to have rent assessed on such lands and to recover arrears with cesses and interest from putnidars entitled to possession under Patni lease—Principle on which amount of additional rent should be determined. See CHOWKIDARI CHAKURID LAND, No. 1, 27 C.L.J. 532.*

(5) *Right of patnidar to impose restriction on darpatnidar—Condition in darpatni lease stipulating that subordinate interests created by darpatnidar should become extinct, on sale for arrears, is void. See LESSOR AND LESSEE, No. 1, 45 C. 940.*

Pauper Appeal.

(1) *Civ. Pro. Code (1908), Ss. 109 to 112, O. XLIV, r. 1—Application for leave to appeal in forma pauperis to the Privy Council—High Court's power to grant leave.*

The High Court has no jurisdiction to grant an application praying for permission to prosecute an appeal in *forma pauperis* to the Privy Council.

O. XLIV, r. 1, Civ. Pro. Code, is not intended to apply to appeals to His Majesty in Council. That rule clearly contemplates an

Pauper Appeal—(Concluded).

appellate Court perusing the judgment of a Subordinate Court, and not the Court whose judgment is appealed from perusing its own judgment (a). *Ramakrishna Lal v. Manna Kumari*, 8 Pat. L.J. 179=44 Ind. Cas. 731.

MILLER, C.J. and CHAPMAN, J.

Reference:—(a) 17 Q.L.J. 381, *Appr.*

(2) Appeal to Privy Council in *forma pauperis*—High Court whether will give permission. See APPEAL (TO PRIVY COUNCIL), No. 6, 35 M.L.J. 268.

(3) Rejection of application to file—Refusal of permission to pay Court-fees on appeal—Failure to exercise jurisdiction. See REVISION, No. 1, 16 A.L.J. 309.

Pauper Suit.

(1) Application for leave to sue in *forma pauperis*—Question of limitation presenting conflict of judicial opinion if can be determined at stage of granting leave—Civ. Pro. Code, 1908, O. XXXIII, r. 5 (d).

A Court is not justified in determining a question of limitation as to which there has been considerable difference of judicial opinion upon an application for leave to sue in *forma pauperis*. Civ. Pro. Code, O. XXXIII, r. 5 (d), applies only where the allegations of the petitioner do not show a cause of action and this should appear clearly upon the face of the petition. *Govindasamy Pillai v. Municipal Council, Kumbakonam*, 41 M. 620.

BAKEWELL and KUMARASWAMI SASTRI, JJ.

(2) Civ. Pro. Code, 1908, O. XXXIII, rr. 1, 3—Company—Suit for recovery of debt due to it by its liquidator—Liquidator if can sue in *forma pauperis*—Person—Financial standing of liquidator immaterial—Liquidator's right to commission if makes him interested in subject-matter of suit within cl. (e), r. 5, O. XXXIII, Civ. Pro. Code.

A company or other association being a "person" within the meaning of the definition of General Clauses Act, which applies to the Civ. Pro. Code of 1908, can, through its official liquidator, apply for leave to sue in *forma pauperis*, if it is a pauper, and there is nothing in r. 3 of O. XXXIII, Civ. Pro. Code, to prevent the official liquidator from appearing and presenting the petition (a). For the purpose of O. XXXIII, the real question is who is the actual plaintiff and is he a pauper within the meaning of explanation to r. 1 in this case, the suit is really by the company and as the liquidator only acts for the company being so to say its agent, his financial standing is immaterial (b).

Where a Court or company appoints a liquidator, he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections does not bring him within the mischief of cl. (e) of O. XXXIII, r. 5; as the provision only applies to agreements between the pauper and a third person with

Pauper Suit—(Concluded).

reference to the subject-matter of the suit. *Perumal Koundan v. Thirumalarayapuram Jananukoola Nidhi, Ltd.*, 34 M.L.J. 421=41 M. 624=45 Ind. Cas. 164.

BAKEWELL and KUMARASWAMI SASTRI, JJ.

References:—(a) *Cortis v. The Kent Water Works Co.*, (1827) 7 B. & C. 314, R. (b) 3 M. 3, F.; 18 B. 237; 36 B. 279, *Dist.*

(3) Civ. Pro. Code, 1908, O. XXXIII, r. 1—Application by woman to sue as pauper—Possession of property by husband if renders application untenable.

An application for leave to sue in *forma pauperis* cannot be refused merely on the ground that the applicant's husband is a person of means. The real point in issue in such cases is whether or not the applicant herself is a pauper within the meaning of the Act. *Sharf-unissa v. Nazni Khanum*, 3 Pat. L.J. 178=44 Ind. Cas. 743.

ROE and IMAM, JJ.

(4) Application for leave to file—Questions of limitation or complicated questions of law if may be decided by Court at stage of application. See CIV. PRO. CODE (1908), No. 450, 34 M.L.J. 339.

(5) Permission to sue in *forma pauperis*—Subsequent insolvency of plaintiff—Receiver in insolvency if can continue suit under said permission. See RECEIVER, No. 1, 16 A.L.J. 440.

Pawnor and Pawnee.

Default by pawnor in repaying money advanced—Notice of sale by pawnee, requisites of—Actual date, time and place of sale if should be specified in notice. See CONTRACT ACT, No. 79, 16 A.L.J. 390.

Payment into Court.

(1) By reason of prohibitory order, not the property of creditor without further order of Court, directing payment. See PARTNERSHIP, No. 7-a, 167 P.W.R. 1917.

(2) Deposit of money due to mortgagee into Court by mortgagor—Deposit after institution of, but before notice of, suit—Deposit if valid. See TRANSFER OF PROPERTY ACT, No. 63, 35 M.L.J. 605.

Payment out of Court.

(1) Civ. Pro. Code (Act V of 1908), O. XXI, r. 2—Certification of payments by the decree-holder—Locus standi of judgment-debtor to question—Time within which payment must be certified—Duty of Court. Held, that O. XXI, r. 2 of the Civ. Pro. Code does not contemplate an inquiry being made into the truth of the statements made by the decree-holder, where he comes to Court to certify a payment and the judgment-debtor has no locus standi to question the right of the decree-holder when he makes an application under that provision of law.

Payment out of Court—(Concluded).

No particular time is fixed during which the decree-holder is bound to give this information to the Court.

When the decree-holder comes and informs the Court that certain payments have been made, all that the Court has to do is to make a note of the statements made by the decree-holder and no notice need issue to the judgment-debtor, even if the decree-holder asks this to be done :

Held, further, that these certificates are not conclusive in any way, and the judgment-debtor is entitled to show either that no such payments were in reality made, or, that, if they were, they do not operate to extend the period of limitation for the execution of the decrees. *Halder Mirza v. Kallash Narain Dar*, 21 O.C. 161=47 Ind. Cas. 177.

LINDSAY, J.C.

Reference :—21 B. 122, F.

(2) Prevention of, Section *re.* Object of—Civ. Pro. Code (1908), O. XXI, r. 2. See CIV. PRO. CODE (1908), No. 296-a, (1918) M.W.N. 507.

(3) Towards amount of decree it can be recognised for saving limitation—Payment by brother, during mother's lifetime if payment by lawful guardian under S. 21, Limitation Act. See EXECUTION OF DECREE, No. 2, 45 C. 630.

Pedigree.

(1) Question of—Plaintiff and his witnesses, not directly cross examined on the case raised by defendant—Court if should accept such case—Plaintiff's case believed by trial Court—Reversal by High Court on such basis if correct. *Muhammad Abdul Aziz v. Mir Tasaddug Husein*, 21 C.W.N. 873=(1917) M.W.N. 529=7 L.W. 66 (P.C.). See Final Part, 1917, Col. 723.

(2) Presumption—Pedigree filed by the general agent of a deceased person, Admissibility of, in subsequent litigation.

It is valid to presume after the death of the person that a pedigree filed by his general agent in a suit to which the deceased was a party was filed under his instructions, and such pedigree, if other conditions be satisfied, would be admissible in evidence in subsequent litigation. *Balbhadar Singh v. Sripal Singh*, 21 O.C. 251.

KANHAIYA LAL, J.C.

Reference :—23 A. 37, R.

(3) Various degrees of relationship to be set out in, in fixed systematic order. See OUDH ACT I OF 1869 (ESTATES), No. 1, 21 O.C. 1.

Penal Code.

(1) S. 20—"Court of Justice," In—Court in S. 195, Crim. Pro. Code—Difference between. See SANCTION TO PROSECUTE, No. 1, 45 C. 585.

Penal Code—(Concluded).

(1-a) S. 198—Perjury—Crim. Pro. Code, S. 195—Sanction for prosecution—Statements not altogether irreconcilable.

Sanction to prosecute ought not to be given when the intended prosecution is based on a series of statements, which were made in the course of cross examination which continued for more than a day, which were not absolutely irreconcilable and for which the accused has supplied explanations which go for to reconcile them. *Baldeo Das Jansak Das v. Mahamad Inamul Husein*, 19 Cr. L.J. 234=48 Ind. Cas. 826.

TEUNON and RICHARDSON, JJ.

(2) S. 193—Crim. Pro. Code, O. XVIII, r. 5—Deposition not read out in presence and hearing of Judge, admissibility of—Evidence Act, Ss. 80, 91.

The provisions of O. XVIII, r. 5 of the Civ. Pro. Code would be adequately complied with, if the deposition were read over in a place within the sight of the presiding Judge and from which the witness could draw the attention of the Judge to any mistakes or omissions discovered by him.

Where the deposition was read over to the witness by a clerk in a room next to the Court room at a distance of 30 feet from the Munsiff's seat.

Held, that the requirements of O. XVIII, r. 5, have been satisfied.

Any irregularity in recording a deposition may be considered in determining the value of the document as evidence, but that is not sufficient ground for shutting it out altogether. *Meango v. Baylah*, 19 Cr. L.J. 603=45 Ind. Cas. 507=7 L.W. 435=24 M.L.T. 242=(1918) M.W.N. 239.

AYLING and PHILLIPS, JJ.

Reference :—28 M. 308, F.

(3) Ss. 213, 214—Offences under, Proof of—Commission of offence screened essential for. See AGREEMENT, 45 Ind. Cas. 424.

(4) S. 214. See No. 3, *supra*.

(5) S. 299.

Per Chief Justice.—At common law suicide is a form of homicide and S. 299 of the Indian Penal Code is wide enough to cover the case of suicide. *Chikkam Ammiraju v. Chikkam Sesamma*, 32 M.L.J. 494=5 L.W. 785=(1917) M.W.N. 423=41 M. 33. See Final Part, 1917, Col. 723.

Penalty.

(1) See CONTRACT ACT (1872), S. 74.

(2) Agreement to pay larger sum in return for loan of smaller sum—Legality—Meaning of terms penal and penalty. See CONTRACT ACT, No. 52, 24 M.L.T. 420.

(3) Plea of stipulation being in part a penalty—Plea one of fact—Plea not to be raised for first time in appeal. See HINDU LAW (DEFTS), No. 8, 14 N.L.B. 41.

Penalty—(Concluded).

(4) Arrears of rent—Interest at $6\frac{1}{2}$ per cent. per mensem on arrears. Stipulation as to—Stipulation. If penalty. See LANDLORD AND TENANT, No. 24, 42 Ind. Cas. 614.

(5) Sum of money agreed to be forfeited by lessee in case of breach—Sum if a deposit or penalty. See LANDLORD AND TENANT, No. 61, (1918) M.W.N. 197.

(6) Questions whether bargain is unconscionable and whether stipulation is penalty if questions of law or fact. See UNCONSCIONABLE BARGAIN, No. 2, 14 N.L.R. 21.

Pensions Act.

See ACT XXIII OF 1871.

Permanent Settlement.

Effect of, on succession and alienability. See HINDU LAW (IMPARTIBLE ESTATES), 7 L.W. 36.

Permanent Settlement Regulation.

See MAD. REG. XXV OF 1802.

Permanent Tenure.

Land Law in Bengal—Zamindar—Mokuridar—Permanent tenure—Minerals—Rights to minerals—Mokurars pottah—Effect of pottah with all rights (maihuk hakuk) and power to cut and sell trees. Rajkumar Thakur Giridhari Singh v. Megh Lal Pandey, 22 M.L.T. 358 = 38 M.L.J. 687 = 15 A.L.J. 851 = 3 Pat. L.W. 169 = 26 C.L.J. 584 = 7 L.W. 90 = 20 Bom. L.R. 64 = 22 O.W.N. 201 = 45 C. 87 (P.C.). See Final Part, 1917, Col. 725.

Perpetual Lease.

(1) Whether confers rights of transfer. See CONSTRUCTION OF DEED, No. 1, 45 Ind. Cas. 208.

(2) Ryot, Planting of trees by, without permission—Perpetual lessee, Right of, to maintain suit. See LANDLORD AND TENANT, No. 61, 46 Ind. Cas. 357.

Perpetuities.

Rule against, charitable bequests if subject to—English Law, Applicability of, to India—Remoteness—Succession Act (X of 1885), ss. 101, 105. See BEQUESTS, 47 Ind. Cas. 383.

Peekshah.

Contribution towards. expense of repairing embankment and payment of which comes out of land if abwab. See ABWAB, No. 1, 28 C.L.J. 285.

Plaint.

(1) Signature of, authorized by a man in jail—Validity of signature. See CIV. PRO. CODE (1908), No. 288, 16 A.L.J. 64.

(2) Suit under S. 106, Bengal Tenancy Act—Transfer of suit to Civil Court—Plaint inartistically drawn up—Nature of suit—Court-fee how payable. See DECLARATORY SUIT, No. 2, 38 C.L.J. 301.

Plaint—(Concluded).

(3) Small Cause Court; Jurisdiction of, Test to determine, Plaint not written statement. See SMALL CAUSE COURT, JURISDICTION OF, No. 2, 48 Ind. Cas. 755.

Pleader.

(1) Pleader's certificate—Necessity to file under Oudh Civil Digest. See ACT II OF 1912 (CO-OPERATIVE SOCIETIES), No. 2, 44 Ind. Cas. 353.

(2) Writing letter personally attacking Judge—Whether constitutes misconduct. See BOM. ACT XII OF 1866 (SINDH COURTS), No. 1, 19 Cr. L.J. 322.

(3) Pleader's position and origin of his power. See CIV. PRO. CODE (1908), No. 7, 45 Ind. Cas. 321.

(4) Sitting in Court-room with only instructions to ask for time, if an appearance. See CIV. PRO. CODE (1908), No. 262-a, 3 Pat. L.J. 481.

(5) Negligence of, in filing memo. of appeal with deficit Court-fees, if sufficient cause under Limitation Act (1908), S. 5. See COURT FEES ACT, No. 2-b, 3 Pat. L.J. 484.

(6) Conviction of, for keeping common gaming house—Unfitness to be member of legal profession. See LEGAL PRACTITIONERS ACT (1879), No. 1, (1918) M.W.N. 847.

Pleader and Client.

(1) *Legal practitioner—Impropriety of counsel who appeared for one party appearing in subsequent proceedings for the other—Professional honour.* Mary Lillian Hira Devi v. Kunwar Digbijal Singh, 21 C.W.N. 1137 = (1917) M.W.N. 636 = 7 L.W. 133 (P.C.). See Final Part, 1917, Col. 727.

(2) *Admission by pleader, binding on the client.*

An admission of fact by a pleader of a party is binding on his party and the opposing party cannot be deprived of the benefit of the admission. *Shelkh Jahadali v. Srimati Ajimanessa Bibi*, 44 Ind. Cas. 18.

RICHARDSON and BEACHCROFT, JJ.

Reference :—21 W.R. 332, Appr.

(3) Decree assigned to pleader of judgment-debtor—Liability and position of pleader. See ASSIGNMENT OF DECREE, No. 2, 23 C.W.N. 491.

(4) Erroneous admission by Counsel on point of law—Effect on party's rights. See LEASE, No. 7, 27 C.L.J. 447.

(5) Acceptance by pleader of Vakalatnamah from, and acting for, both sides—Conduct of pleader, if proper. See LEGAL PRACTITIONERS ACT, No. 2, 3 Pat. L.J. 390.

(6) Communication made to vakil in the course of his employment, admissibility of. See PRIVILEGED COMMUNICATION, No. 1, 16 A.L.J. 987.

Pleader's Fees.

- (1) *Rules of Subordinate Court, rr. 21, 25*
—Pleader's fee calculated at 5 per cent.—
Plaint returned for presentation to proper Court—Question of jurisdiction raised by defence—Question decided in favour of defendant—Costs awarded to defendant.

A suit was brought in the Court of the Subordinate Judge. The defendant raised the plea that the Court had no jurisdiction to entertain the suit. An issue being raised, it was decided first at the instance of the plaintiff. The plaintiff was ordered to be returned for presentation to the proper Court, and the Subordinate Judge gave the defendant costs, calculating the pleader's fee at 5 per cent: *Held*, on appeal to the High Court, that the pleader's fee had been properly calculated under Rule 21 of the Rules for the Subordinate Courts, the decision having been given after contest, and on the merits of that contest, *Gauri Sahai v. A. C. Bahree*, 16 A.L.J. 426 = 40 A. 515 = 45 Ind. Cas. 985.

TUDBALL and ABDUL RAOOF, JJ.

- (2) *Legal Practitioners' Act (IX of 1894), Rules framed by High Court under, r. 41 of—*
Vakil's fees for two Vakils for respondent.
Grant of. See TRANSFER OF PROPERTY ACT (1882), No. 66-a, 8 L.W. 416.

Pleadings.

- (1) *Inconsistent position, if maintainable.*

Litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents. *Girja Chandra Blt v. Bipin Behary Khan*, 27 C.L.J. 535 = 44 Ind. Cas. 159.

MOOKERJEE and BEACHORFT, JJ.

Reference:—15 A. 399, R.

- (1-a) *Civ. Pro. Code, O. VI, r. 16—Pleadings—Amendment of plaint—Inconsistent allegations—Power of Court.*

The rule is that the Court is not to dictate to the parties how they should frame their case, and this rule ought always to be preserved sacred, subject to this limitation that the parties must not offend against the rules of pleading, which have been laid down by the law and introduce what is unnecessary or tends to prejudice embarrass and delay the trial of suit.

Where, in a suit for possession, the plaintiff denied the execution of a deed of *wakf* alleged to have been executed by her in respect of this property and also stated that the deed was taken from her by the defendants, who were related to her and deceived her, suggesting thereby that it was taken from her through fraud and undue influence.

Held that there was nothing in these allegations necessarily inconsistent and so as to justify the Court in interfering under O. VI, r. 16, Civ. Pro. Code. *Farid-un-nissa v. Mukhtar Ahmad*, 40 Ind. Cas. 488.

KANHAIYA LAL, A.J.C.

Pleadings—(Continued).

- (2) *Civ. Pro. Code, (Act V of 1908), O. VI, r. 17—Amendment of pleadings—Suit against a dead person.*

A suit filed against a dead person is really no suit at all and the Court has no power to allow it to be amended even under the new Code. *Rasa Goundan v. Pichaimuthu Pillai*, 42 Ind. Cas. 539.

SRINIVASA AYYANGAR, J.

Reference:—31 M. 86, P.

- (3) *Mortgage—Purchaser in execution of mortgage decree—Suit for possession—Tenancy rights set up by some of the defendants—Court bound to give a decision thereon.*

Where in a suit for *khas* possession by a purchaser in execution of a mortgage decree, certain of the defendants set up tenancy rights disentitling the plaintiff to *khas* possession as against them, *held* that the Court was wrong in refusing to adjudicate on the rights so set up and that they should be decided in that suit itself. *Ishan Chandra Banerjee v. Hrishikish Biswas*, 42 Ind. Cas. 550.

WALMSLEY and GREAVES, JJ.

- (4) *Plaint, allegation of title in—Written statement, No denial as to title in—Effect of—Civ. Pro. Code (1908), O. VIII, r. 5.*

In this country, one cannot expect a very high standard of pleadings.

Where, in a suit for possession of land, there was an allegation of title in a plaint and the defendant did not in his written statement specifically deny that allegation, and the Munsif, holding that there was a constructive admission by the defendant of the plaintiff's title, decreed the suit without considering the evidence of the both sides on the question of title.

Held, that the lower appellate Court was right in having reversed the decision of the Munsif on the ground of there being no such admission on the part of the defendant as would warrant a decision in favour of the plaintiff's title, especially when the trial Court has required proof of the plaintiff's title in spite of the so-called admission. *Naja Mia v. Abdul Kadar*, 45 Ind. Cas. 878.

FLETCHER and SHAMSUL HUDA, JJ.

- (5) *Amendment of, after case closed for judgment—Civ Pro Code (Act V of 1908), O. VI, r. 17—Public path—Encroachment of, Suit for removal of, by private person—Special damage, Proof of, Necessity of.*

A suit for possession of a site was brought by the plaintiff on the ground of his being the owner of the same and the case was closed for judgment for 30th November 1916. On 25th November 1916, the plaintiff appeared before the Court praying that, if his possession over the site and hut were not proved, a right of way six cubits broad should be given to him. The trial Court, while of opinion that the plaintiff was not the owner of the site, decreed that the defendant should remove his hut

Pleadings—(Continued).

so as to allow a right of way as claimed by the plaintiff.

Held, that the plaintiff should not have been allowed to amend the plaint asking for further relief after the case had been closed for judgment.

Special damages for obstruction of a highway have to be established in a suit for removal of an encroachment on the highway. **Chalnu v Manbodh**, 45 Ind Cas 894

PRIDEAUX A J C

Reference:—7 C P L R, 97, F

(6) *Fresh plea—Suit, progress of—If can be raised during.*

A fresh plea can be raised by a party to a suit during the course of its progress, when it arises out of facts not within his knowledge till the institution of the suit but revealed to him subsequently. **Sheddarshan Lal v Assessor Singh**, 46 Ind Cas 52

(7) *Civ Pro Code (1908), O VIII r 5, Scope of—Suit on mortgage against minors represented by guardian—No question raised in written statement re execution of mortgage—No issue—No objection raised at trial effect—Question as to execution of deed and its attestation if may be raised in appeal—Waiver of objections, if to be inferred—Questions of fact, issues as to, if to be raised by Court*

The scope of Civ Pro Code, 1908, O VIII, r. 5, is only this, that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants and the rule has nothing to do with the conduct of the suit afterwards.

In a suit to recover a certain sum of money under a mortgage deed against a minor represented in the suit by his guardian, the written statement did not raise any question as to the execution of the mortgage, there was no issue framed with reference to this point, no objection on that score was taken at the time of the trial, and the issues that were raised related to questions of limitation and *res judicata*, those being the points argued at the trial **Held** that any question as to the execution of the document was waived at the time of the framing of issues and the trial of the suit **Nagappa v Siddalingappa**, 35 M L J 372=47 Ind Cas 589.

ABDUR RAHIM and BAKWELL, JJ

References:—7 M T T 107, Appr 26 B 360, Dist.

(8) *Amendment of—Civ Pro Code (Act V of 1908), O VI r 17—Power of Court to allow amendment after the case is adjourned simply for arguments—Family residential house—Possession of widowed mother against the will of her sons for over 12 years—Not adverse against sons.*

Held, that,—

(1) O VI, r. 17 of the Code of Civil Procedure, 1908, confers a wide discretion upon the Courts to allow the alteration or amendment

Pleadings—(Continued).

of pleadings, and that a Court is not unjustified where it allows the amendments of the pleadings after the issues have been struck, the evidence of the parties has been taken and their case has been adjourned for argument, particularly where the pleader of the party seeking the amendment has made a wrong statement, as the result of misinformation, and the opposite party accepts the order allowing the amendment, &c., on receiving, without demur, heavy costs of adjournment (a).

(2) **Held** that possession of a widowed mother does not become adverse to her sons, even if she alone occupies the family residential house against their will for more than 12 years after her husband's death (b) **Chuhar Bai v. Rama Nand**, 113 P W R 1918=46 Ind. Cas. 471.

SCOTT-SMITH and SHADI LAL, JJ

References:—(a) 37 Ind Cas. 804, F (b) 29 C. 664=29 I A 132=6 C W N 657=4 Bom. I. R. 547=8 Sar. 280 (P C) and 3 P R. 1904, Dist.

(9) *Court deciding case on a point not raised by either party—Procedure—Benami*

In a suit for possession by partition of a 1/4th share in a house, it appeared that the house in question was sold by the maternal grandmother of the plaintiff and the deed of sale mentioned the defendant as the purchaser. Plaintiff alleged that the sale was a *benami* transaction, while the defendant contended that he was the real purchaser. The District Judge, without adjudicating upon the contentions of the parties, held that the house had been gifted to the defendant and dismissed the suit **Held**, that the District Judge was wrong in ignoring the allegations of the parties and deciding the case on a point, which found no place in the pleadings.

Held, as the money was supplied by the father, the purchase in his son's name is *benami*. **Kanhaya Lal v Mithu Lal**, 196 P. W R 1918=46 Ind Cas 646

SHADI LAL and WILBERFORCE JJ

(10) *Allegation of two or more inconsistent sets of material facts and claiming alternatively thereunder if prohibited by rules as to—Such pleading if embarrassing—Party not to decide if pleading is embarrassing or confusing—Duty of Court See OUDH ACT OF 1869 (ESTATES), No 1, 21 O C I.*

(11) *Case not specifically raised in, but put forward in cross examination—Appeal, new case if can be set up in See APPEAL (GENERAL), No 20 a, 46 Ind Cas 184*

(12) *Not guides where cases of opposing parties found false—Findings more important. See APPEAL (SECOND APPEAL), No. 4, 22 C.W N. 149.*

(13) *Points not arising out of—Appellate Court, Power of, to base its decision on, though neither urged nor covered by any issue. See APPELLATE COURT, No. 1, 46 Ind. Cas. 12.*

Pleadings—(Concluded).

(13-a) Written statement, Special rule of limitation not pleaded in—Appellate Court if can dismiss suit as barred by limitation even when. See APPELLATE COURT (JURISDICTION OF), 46 Ind. Cas. 787.

(14) Court's power to consider new point not raised in pleadings. See AWARD, No. 10, (1918) M.W.N. 595.

(14-a) Amendments to pleadings—Principles governing the grant of amendments. See CIV. PRO. CODE (1908), No. 239-b, 45 Ind. Cas. 649.

(15) Defamatory statements made in—No privilege—Suit for damages—Maintainability. See DEFAMATION, No. 2, 21 O.C. 321.

(16) Registered mortgage—Subsequent oral agreement to accept less, Plea of—Admission of such agreement in pleadings if binds party making it. See DOCUMENTARY EVIDENCE, No. 2, (1918) M.W.N. 680.

(17) Admission in pleadings of oral agreement to receive less than what is due under registered mortgage—Admissibility in evidence of such oral agreement. See EVIDENCE ACT, No. 18, 35 M.L.J. 555.

(18) Success of party on particular plea—Right of such party to set up another plea inconsistent with plea previously set up by him. See EXECUTION OF DECREE, No. 24, 21 O.C. 188.

(19) Legality of grant in a decree of a lesser relief of the same kind as the plaintiff has asked for. See SPECIFIC RELIEF ACT, No. 5, 44 Ind. Cas. 557.

Pledge.

Promissory note, of, Validity of. See PROMISSORY NOTES, No. 2, 46 Ind. Cas. 609.

Political Pension.

Grant for maintenance to a person and after his death to his heirs—Estate if political pension free from attachment in heir's hands. See MAINTENANCE GRANT, No. 1, (1918) M.W.N. 394 (P.C.).

Possession.

(1) Value of possession—Trespasser—Possession as title—Sufficiency.

Possession has a two-fold value: it is evidence of ownership and is itself the foundation of a right to possession. As against a trespasser, possession is a good and sufficient title to enable the persons in possession to resist the claim of the trespasser. *Shalkh Mirza v. Shaikh Abdul Gani*, 43 Ind. Cas. 393=4 Pat. L.W. 130.

MULLICK and ATKINSON, JJ.

References:—8 Bom. L.R. 96; 2 Pat. L.J. 230, F.; 10 Bom. L.R. 571; *Perry v. Chesold*, (1907) A.O. 78, Appr.; 41 C. 894, R.

Possession—(Continued).

(3) Suit for confirmation of possession, when can be treated as suit for recovery of possession—Limitation.

Though a suit was framed as one for confirmation of possession, the Court may treat it as one for recovery of possession and give plaintiffs the approximate relief, if the suit had not been barred by limitation.

Where a plaintiff alleges facts which show that he was out of possession, his suit, even though framed as one for confirmation of possession, may be treated as one for recovery of possession, but where he makes a case that he is in possession and fails to prove his possession, the Court will not give him recovery of possession even though he proves his title. *Mahammad Jalle v. The Secretary of State for India in Council*, 44 Ind. Cas. 996.

RICHARDSON and BEACHCROFT, JJ.

References:—16 W.R. 27; 14 C.W.N. 866; 11 C.W.N. 186, Appr.

(3) Presumption—Value of, as evidence—Co-owner's possession whether adverse—Entry in revenue records, correctness of.

The person in possession of property is presumed to be the owner.

The possession of one co-owner even over the whole co-parcenary, is not *prima facie* adverse to the other co-owners.

The Revenue authorities in Berar took reasonable steps to secure that their records were correct as to facts, and an entry in the revenue records weakens the presumption in favour of a plaintiff who does not explain the entry and who is unable to state the origin of the possession by virtue of which he claims an adverse title to the recorded holder. *Raghoba v. Palhoba*, 45 Ind. Cas. 217.

STANYON, A J.C.

References:—*Augustain v. Challis*, (1847) 1 Ex. 279; 24 W.R. 425, Appr.

(4) Suit for possession of land—Burden of proof—Local investigation—Powers of appellate Court

Where, in a suit for recovery of possession of land, the defendant, even where the question is a question of boundaries clearly shown, is found to have been in actual possession of the disputed area, the burden will come on the plaintiff to establish his title.

When an appellate Court is dissatisfied with the local investigation and the report, it is not bound to direct a fresh investigation; if the appellate Judge chooses to decide on the evidence before him, whether he was right or wrong in the decision to which he came is not a question into which a High Court can enter in a second appeal. *Mauldra Chandra Nandi v. Sarabindu Ray*, 45 Ind. Cas. 408.

RICHARDSON and WALMSLEY, JJ.

References:—21 C. 504, R.; 29 C. 187; 30 C. 291, Appr.

Possession—(Continued).

(5) *Suit for, of immovable property—Benamidar, if can maintain a.*

A Benamidar is not competent to maintain a suit for possession of immovable property. *Guyan Dhangar v. Gondar*, 45 Ind. Cas. 794.

ALI IMAM, J.

Reference :—48 C. 504, Rel. on.

(6) *Formal possession, effect of, against stranger to decree—Civ. Pro. Code, O. XXI, r. 96.*

Held, that formal possession, the nature of which is described in O. XXI, r. 96, Civ. Pro. Code, is no possession at all against any party, whose rights are not affected by the decree. *Tasaddug Hussain v. Asghar Hussain and Jagannath*, 31 O.O. 70=45 Ind. Cas. 606.

LINDSAY, J. C.

Reference :—10 C. 993, R.

(7) *Suit for, by plaintiff ousted from possession two years before suit—Symbolical possession of bare site if equivalent to actual possession—Limitation Act, 1908, Arts. 137, 138, 142—Defendants to show more than twelve years' adverse possession.*

On the following facts alleged by the plaintiff in a suit for possession brought in March 1916, viz., that he purchased the suit site in July 1902 and took possession in October 1904 and that the defendants had ousted him two years before suit, held that, in 1904, the plaintiff obtained symbolical possession which, as the property was a bare site, was equivalent to actual possession, that the article of *prima facie* application to the suit was Art. 142, Limitation Act, and not Art. 137 or 138 and that the defendants could defeat his claim only by showing an adverse possession for more than twelve years. *Kaman v. Umra*, 76 P.R. 1918=106 P.L.R. 1918=156 P.W.R. 1918=47 Ind. Cas. 411.

LE-ROSSIGNOL, J.

(8) *Suit for—Title, proof of, by plaintiff—Limitation for suit—Burden of proof. See ADVERSE POSSESSION, No. 2, 40 Ind. Cas. 420.*

(9) *Whether there can be joint possession by landlord and tenant. See LANDLORD AND TENANT, No. 39, 45 Ind. Cas. 496.*

(10) *Enforcement of right reserved to patnidar on transfer of Chaukidari Chakran lands—Suit for possession, not for specific performance is remedy—Limitation. See LIMITATION ACT (1908), No. 155, 16 A.L.J. 964 (P.C.).*

(11) *Suit for—Limitation—Burden of proving prior possession—Acquiescence and laches—Difference between. See LIMITATION ACT (1908), No. 186, 41 Ind. Cas. 722.*

(12) *Mortgage decree for sale—Sale in execution of money decrees against same property—Subsequent sale under mortgage decree—*

Possession—(Concluded).

Purchaser under money decree if entitled to possession against purchaser in mortgage sale. See MORTGAGE (SALE), No. 5, 42 Ind. Cas. 624.

(13) *Suit for partition—Joint possession and joint ownership both to be proved by plaintiff. See PARTITION, No. 1, 27 O.L.J. 441.*

(14) *Mortgage—Purchaser in execution of mortgage decree—Suit for possession—Tenancy rights set up by some of the defendants—Court's duty to give decision on rights so set up. See PLEADINGS, No. 3, 42 Ind. Cas. 550.*

(15) *Execution of sale deed on certain date—Actual possession taken for sake of convenience two months before execution of sale—Pre-emption suit—Date of actual possession to be ignored—Legal possession to be referred to date of sale. See PRE-EMPTION, No. 21, 80 P.R. 1918.*

(16) *Dispossession by defendant of plaintiff—Subsequent order of Criminal Court attaching property—Right of plaintiff to possessory relief. See SPECIFIC RELIEF ACT, No. 3, 22 C.W.N. 931.*

(17) *Facts which go to form physical possession of Thakur Bari which deserve protection under S. 9, Specific Relief Act. See SPECIFIC RELIEF ACT, No. 4, 44 Ind. Cas. 497.*

(18) *Transferee from Hindu father under deed set aside on condition of son's paying him some amount—Transferee if in unlawful possession and liable to mesne profits. See WITNESSES, No. 2, 21 O.C. 228.*

Possession, Suit for.

(1) *Land as contiguous accretion, Of—Accretion, Nature of, Proof as to, Necessity of.*

The nature of the accretion must be established before a plaintiff can succeed in a suit for khas possession of certain plots of land as being contiguous accretion to his other plots. *Mohamed Ashraf v. Umed Ali Sarkar*, 46 Ind. Cas. 555.

FLETCHER and SHAMSUL HUDA, JJ.

(2) *Husband of Burmese woman, if guardian of his wife's minor sisters living with them—Sale by him of their property as their guardian validity of—Grant of Letters of Administration for estate of father of minors to the sisters and the brother-in-law, if valid—Sale by brother-in-law as Administrator, Right of minors to avoid—Limitation to avoid Administrator's sale—Limitation Act, Arts. 91, 114, 120, 141, 142, 144—Suit for possession by vendees from minors on sale by them after attaining majority—Contract Act, S. 68.*

A Burmese landowner died leaving him surviving three daughters, one of whom was married, with whom the other two being minors lived and the husband of the eldest.

Possession, Suit for—(Continued).

managed the property? He took out Letters of Administration to their father's estate, the Letters being granted in the name of all four. In 1903, the Administrators sold the land to a third person from whom it finally came into the defendant's hands by successive sales. In 1913, the sisters 9 and 5 years respectively after they had attained majority, sold their two-thirds share to the plaintiff, who brought a suit for possession and mesne profits of the share of his vendors against the defendants. *Held* that the sale in 1903 by the Administrators, if considered as a sale on behalf of the minors by their brother-in-law as guardian, would be void, as the brother-in-law was in no sense the guardian of his two minor sisters-in-law, and being, altogether void, could not be ratified by the minors. S. 68 of the Contract Act could not make such sale good.

Held, also, that the sale of 1903 being a nullity, the subsequent sales by the vendees successively to other vendees, of which the minors knew nothing, did not create any estoppel against the sisters.

Held, further, that the grant of the Letters was a nullity so far as the minors were concerned and that the sale of 1903 being made by the brother-in-law as Administrator without the leave of the Court, was good only until avoided by the minor sisters, the plaintiff's vendors; that the minors, not having affirmed the sale by the Administrator, had the right of treating it as void; that they exercised their right—which was not extinguished under Art. 120 by the lapse of six years—by selling their share to the plaintiff in 1913; and that the suit for possession was not barred by limitation, Art 141 applying to the suit. *Held*, further, that the plaintiff's title rested on the avoidance by the minors of the sale by the Administrator, but that the minors could not avoid the sale without restoring the benefits they received from such sale. *Ma Nyl Ma v. Aung Myat*, 9 L. B.R. 186.

TWOMEY, C.J. and ORMOND, J.

References:—34 I.A. 87=34 C. 329, F.; 20 C. 487, Dist.; 3 A. 846, R.

(3) *Suit for possession of land and house thereon—Allegation of title and possession by plaintiff and denial thereof by defendant—Duty of plaintiff to prove title and statutory possession also if title be based on possession—S. 110, Evidence Act—Right of defendant to rely on possession without proving title—Amendment of plaint.*

In a suit for possession of certain land with houses situated thereon, alleging title and dispossession by the defendant, the defendant denied both, and the evidence on the record also showed that the defendant proved title by purchase at Court-auction in virtue of which he had been in possession of the land. Both the Courts below appeared to have given the plaintiff a decree upon the weakness of the defendant's case. *Held* that it was the duty of the plaintiff to prove title which, if based only on

Possession, Suit for—(Concluded).

possession for twelve years and that this burden was thrown on a person failing to resort to the remedy provided by S. 9 of the Specific Relief Act. The defendant being in possession was protected by S. 110 of the Evidence Act and was not bound to show any title. *Held*, also that where the plaint did not give the position and area of the land sued for and was extremely vague, it should not be admitted without amendment. *Nga Tha Zan v. Sunder Singh*, U. B. R. (1918), 4th Qr., 125.

SAUNDERS, J.C.

References:—U B.R. (1892—1896), 2nd Qr., 375; U. B. R. (1904—1906), 2nd Qr., 7; 26 C. 579, R.

(4) *Adverse possession, Criterion as to—Possession by defendant for over 20 years as of right—Finding as to—Title established by. See ADVERSE POSSESSION, No. 5-a, 46 Ind. Cas. 964.*

(5) *Mesne profits, Suit for, and—Cause of action for, different—Specific Relief Act (I of 1877), S. 9, under—Mesne profits, Subsequent suit for, Maintainability of. See JURISDICTION (CIVIL COURTS), No. 7, 46 Ind. Cas. 885.*

(6) *Confirmation or restoration of, and for declaration as to invalidity of a revenue sale—Court-fee payable in respect of—Court Fees Act (1870), S. 7 (4) (c). See REVENUE SALE, No. 7, 3 Pat. L.J. 448.*

Possessory Suit.

(1) *Decree for land and crops thereon—Removal by defendants of crops—Subsequent suit for price of crops—Denial by defendant of plaintiff's title to land—Remand by lower appellate Court for trial of question of title if proper. See SPECIFIC RELIEF ACT, No. 1. 16 A.L.J. 924.*

(2) *Dispossession by defendant of plaintiff—Subsequent order of Criminal Court attaching property—Right of plaintiff to possessory relief. See SPECIFIC RELIEF ACT, No. 5, 22 C.W.N. 931.*

Pottah.

Its nature and construction. See BEN. ACT VIII OF 1885 (TENANCY), No. 2, 43 Ind. Cas. 941.

Power-of-Attorney.

(1) *By two members of joint Hindu trading family—Death of one, effect of, on power. See ASSIGNMENT OF DECREE, No. 8, (1918) M.W.N. 194.*

(2) *Construction of—Power relating only to management of jagir of minor if authorises also defence of title of minor to jagir. See MINOR, No. 5-a, 47 Ind. Cas. 528.*

(3) *Mortgage by agent on behalf of principal—Whether power by registered document required. See PRINCIPAL AND AGENT, No. 8, 48 Ind. Cas. 586.*

Power of Attorney—(Concluded).

(4) General—Copy of, produced in Court for verification—Court-fee—Court Fees Act, Sec. I, Art. 8—Copy of, if must be placed on record in case. See STAMP ACT (II OF 1899), No. 16, 186 P.W.R. 1917.

Practice and Procedure.

(1) Judge's knowledge of character of parties • or witnesses; whether can be relied upon in deciding case—*Procedure—Jurisdiction.*

A Judge is justified in using his knowledge about the character of the parties to a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them.

Where a District Judge declined to believe in the bona fides of a suit brought by the plaintiff, unless it was supported by evidence that left no doubt in the mind of the Judge about its credibility, on the ground that many of the suits launched by the plaintiff in his Court had been found to be false:

Held, that the Judge was justified in alluding to his experience of the plaintiff's litigation in his Court. *San Hia Baw v. Mi Khorow Nissa*, 45 Ind. Cas. 784.

RIGG, J.

(2) Judge—Issues, Finding as to, by a predecessor. Successor is bound to accept.

A Judge deciding a case on the conclusion of all the evidence is not bound by the previous decision of his predecessor on certain issues, and can decide them afresh. *The Official Assignee v. Haji Mahomed Hady*, 47 Ind. Cas. 555.

ROBINSON, J.

(3) High Court, Original side — Order—Minutes of—Modification.

A Judge sitting on the Original Side of the High Court has jurisdiction to modify the minutes of his order before the formal order is drawn up. *Mahabool Bi v. Sherifa Bi*, 24 M.L.T. 500—(1918) M.W.N. 928.

WALLIS, C.J. and NAPIER, J.

References:—*In re Suffield and Watts: Ex parte Brown*, (1898) 20 Q.B.D. 693; *Preston Banking Co. v. William Allsup and Sons*, (1895) 1 Ch. 141, R.

(4) Judgment—Relief not claimed in plaint—Competency of Court to grant—Legality of—Civ. Pro. Code (1908), O.XLI, r. 33. *Kheh-hani Ojha v. Gulab Ojha*, 2 Pat. L.J. 698—43. Ind. Cas. 463. See Final, Part, 1917, Col. 786.

(5) Point not raised in lower Court—Value of statements in judgment. See APPEAL (GENERAL), No. 27, 35 M.L.J. 169.

(6) Appeal. Admission of—Limitation, Question of, left open till hearing of appeal—Practice of Courts in India—Procedure to be followed—Final determination to be at the stage of admission. See LIMITATION ACT (1908), No. 7-a, 16 A.L.J. 57.

Practice and Procedure—(Concluded).

(7) Application to be appointed mutawalli rejected by District Judge—District Judge whether has powers of kazi—Petitioner whether to proceed by suit or by application. See MAHOMEDAN LAW (WAKF), No. 5, 28 C.W.N. 138.

(8) Accounts, Suit for, by principal against agent—Agent, Death of, during pendency of suit—Legal representatives of agents, Liability of—Procedure to be followed in suit. See PRINCIPAL AND AGENT, No. 5, 47 Ind. Cas. 371.

Pre-emption.

(1) Sale of property under the management of the Court of Wards by auction—Price insufficient—Plaintiff present—No bid by him—Sale cancelled—Second sale—Suit for pre-emption—Plaintiff's knowledge of sale—Invitation to purchase—Refusal—Suit not maintainable.

Certain property was under the management of the Court of Wards. It was sold and the sale was duly advertised. The highest bid was Rs. 1,000. The plaintiff was present but did not bid. The price was considered inadequate and the property was withdrawn from the sale. It was advertised for sale a second time and at the second sale it fetched Rs. 950. It was not clear whether plaintiff was present at the second sale. In a suit for pre-emption, *held* that the plaintiff having known that the property was being sold and having every opportunity to purchase, his absence of protest at the sale being made again and the delay in bringing the suit was tantamount to his refusal to purchase and the suit was not maintainable. *Chithru Singh v. Bhagwant Singh*, 16 A.L.J. 492—46 Ind. Cas. 106.

RICHARDS, C.J. and TUDBALL, J.

(2) Sale to a stranger—Re-sale to vendor subsequently to institution of suit—Vendor no co-sharer at date of re-sale.

Where after the institution of a suit for pre-emption the vendee (a stranger) re-sold the property sought to be pre-empted to the vendor who by selling all the rights he was possessed of had ceased to be a co-sharer at the date of re-sale, *held* that the pre-emptor was entitled to a decree for pre-emption. *Tota Ram v. Gopal Singh*, 16 A.L.J. 505—46 Ind. Cas. 76.

RICHARDS, C.J. and TUDBALL, J.

References:—23 A. 247; 3 A.L.J. 794, R.

(3) Suit for—Pre-emptor to be ready to pay when entitled to get possession—Extension of time.

In a pre-emption suit, a plaintiff is presumed to be ready and willing to pay the purchase-money, whenever he can get possession of the property. If, for any special reason, a plaintiff in a pre-emption suit wants to have a more extended time, he should instruct his pleader to ask the Court to make a special term in the decree and to give the Court good reasons for

Pre-emption—(Continued).

giving an extended time. *Chitan Singh v. Baldeo Singh*, 16 A.L.J. 506=46 Ind. Cas. 75.
 RICHARDS, C.J. and TUDBALL, J.

(4) *Mohammadan Law—Shias—Property owned by more than two co-sharers—Wajib ul-arz—Vague entry as to custom.*

Upon a sale of property by a Shiah Mohammadan no right of pre-emption arises when there are more than two co-sharers in such property (a).

Held, by Richards, C.J., that a plaintiff is not entitled to claim the right of pre-emption when he produces in proof of his right a vague entry in the *Wajib-ul-arz* to the effect that, in matters of pre-emption, the rights were according to faith. *Salyed Muhammad Razl-ud-din v. Raghubir Prasad*, 16 A.L.J. 507=46 Ind. Cas. 82.

RICHARDS, C.J. and TUDBALL, J.

Reference:—12 A. 229, F.

(5) *Custom admitted—Pre-emptor at the date of sale a co-sharer in the patti in which property sold was situate—Pre-emptor acquiring right by imperfect partition—Right not lost.*

By means of an imperfect partition of a village made in recent years a *patti* was formed and the plaintiff became the co-sharer therein. He claimed a right of pre-emption in respect of the sale of certain property situate in that *patti*. The custom of pre-emption was admitted. The *wajib ul-arz* gave the right to a *hissadar i-karibi*. The Courts below interpreted the expression to mean a co-sharer in the same subdivision as the vendor. The lower appellate Court dismissed the suit on the ground that the pre-emptor had become a co-sharer in the *patti* by reason of imperfect partition: *Held* that the custom being proved, if the plaintiff could prove that he came within the custom at the time of the sale, he was entitled to the benefit of the custom and the mere fact that he was not within the custom prior to partition would not bar him from subsequently acquiring the right (a). *Lalta Prasad Chaudhry v. Gokul Prasad*, 16 A.L.J. 509=40 A. 617=46 Ind. Cas. 125.

RICHARDS, C.J. and TUDBALL, J.

Reference:—8 Ind. Cas. 867, Not F.

(6) *Pre-emption—Consideration—Onus of proving—Whether vendee bound to prove every detail of the consideration.*

Prima facie the consideration stated in a sale-deed is to be taken as the true consideration in a suit for pre-emption. Where, however, the plaintiff shows that the price is a very excessive price, he can shift the onus on to the vendee of showing that the consideration stated in the deed was actually given.

A Court is not justified in treating a suit for pre-emption as if it were suit by a reversioner seeking to set aside a sale-deed made by a

Pre-emption—(Continued).

Hindu widow, by casting on the vendee the onus of proving every detail of the consideration. *Makhan Singh v. Jahan Kuar*, 16 A.L.J. 533=46 Ind. Cas. 97.

RICHARDS, C.J. and TUDBALL, J.

(7) *Transfer of Property Act (IV of 1882), Mortgage made after—Mortgage by conditional sale—Decree for foreclosure—Pre-emption—Wajib-ul-arz—Cause of action.*

In 1895, a mortgage was made. In 1906, a suit was instituted on this mortgage treating it as a mortgage by way of conditional sale. A decree for foreclosure was obtained, and, in 1911, the decree was made absolute. Shortly after possession was obtained under it. In 1914, a suit was brought claiming to get possession by virtue of a custom set forth in the *Wajib-ul-arz*. The clause relating to pre-emption was as follows:—"If a *pattidar* wishes to transfer his share by sale or mortgage, he should do so first, to another *pattidar* of the same *thok*, and in case of his refusal, to the *pattidar* of another *thok* of the village. If the *pattidar* wants to sell his share to a stranger by entering an excessive and fictitious price, the *pattidar* having the right of pre-emption shall be entitled to acquire the property on payment of the price awarded by the arbitrators." *Held* that, having regard to the whole context to the *Wajib-ul-arz*, the "sale" mentioned therein for the purpose of giving rise to a right of pre-emption according to custom meant a voluntary sale, and the *Wajib-ul-arz* did not give him a right of pre-emption under the circumstances under which the mortgagee became the owner of the property. *Held*, also, that, if the plaintiff intended to take advantage of the custom, then, he should have brought a suit to step into the shoes of the mortgagee as soon as the mortgage was made. *Sundar Kunwar v. Ramghulam*, 16 A.L.J. 561=40 A. 626=46 Ind. Cas. 900.

RICHARDS, C.J. and TUDBALL, J.

Reference:—3 A. 610, Dist.

(8) *Purchase made by vendee on different dates—Suit to pre-empt first sale—Vendee claiming to be co-sharer in virtue of second purchase—Suit not maintainable.*

Held that a vendee becomes a co-sharer of the property purchased by him from the date of his purchase. Consequently, where a vendee purchased shares in a village on two different dates, and a suit was brought to pre-empt the earlier sale and no suit was brought in respect of the second sale, *held* that the suit was not maintainable, even though limitation for a suit for pre-emption in respect of the second sale had not expired. *Chabraj Singh v. Mahesh Narain Singh*, 16 A.L.J. 627=40 A. 572=46 Ind. Cas. 976.

RICHARDS, C.J. and TUDBALL, J.

Reference:—28 A. 642, Comm. on.

Pre-emption—(Continued).**(9) Refusal to purchase, what is—Custom—Wajib-ul-arz—Property to be sold to co-sharer first—Sale to stranger.**

Where the custom of pre-emption as evidenced by the *Wajib-ul-arz* is to the effect that co-sharer wishing to sell his property must first offer it to a co-sharer, and if the co-sharer refuses then he may sell to a stranger, in such a case the fact that the co-sharer-vendor offered the property to another co-sharer and the latter declined to purchase on the ground that he had no money or for any other reason was unwilling to purchase would entitle the owner to go to a stranger and to sell it to him and that the owner would not be obliged after he has made a definite agreement with the stranger to return and offer the property a second time to the co-sharer on the other hand the going to a stranger and making a bargain with him before offering the property to a co-sharer would be acting contrary to the custom. *Shamsher Singh v. Pearce Datt*, 16 A.L.J. 683 = 40 A. 690 = 46 Ind. Cas. 761.

RICHARDS, C.J. and TUDBALL, J.

References:—5 A.L.J. 391; 27 A. 670; 14 A.L.J. 1189, R.

(10) Wajib-ul-arz—Custom or contract—Interpretation of document.

When considering the existence or non-existence of a custom of pre-emption, the language of the particular *wajib-ul-arz* ought to be taken into consideration.

Consequently, where the only evidence in proof of a custom of pre-emption was the *wajib-ul-arz* which recorded that when property was bought or mortgaged by a stranger, the co-sharers were entitled to take it in the event of sale at sixteen years' purchase and in that of a mortgage at eight, and it then recorded a statement that a person had a right to redeem a mortgage in which he had no interest:—Held that the entry in the *wajib-ul-arz* on the very face of it disproved the existence of a custom. *Sarajball Singh v. Mohammad Nasir*, 16 A. L.J. 879.

RICHARDS, C.J. and TUDBALL, J.

(11) Extension of time fixed for payment—Decree becoming final.

A decree in a pre-emption case in its very terms becomes a decree in favour of the defendant vendee, when the conditions imposed on the plaintiff have not been complied with, and no Court has any power to alter the terms of the decree, when it has become final, so as to extend the time allowed for payment. *Hirdey Narain v. Alam Slagh*, 16 A.L.J. 892.

RICHARDS, C.J. and TUDBALL, J.

References:—22 M. 179; 18 C. 331; 13 A.L.J. 793, R.

(11-a) Right of, under S. 205, Berar Land Revenue Code—Recognised division of a survey number, Occupant of, as defined in S. 4 (5)—Sub-division by agreement of**Pre-emption—(Continued).**

parties, Right how affected in case of Record of Rights, Officer in charge of, if officer authorised to recognise division of a survey number—Division of a survey number and distinct Survey number, no difference between, under S. 86 (3)—Survey number, Meaning of, in S. 87.

The right of pre-emption under S. 205 of the Code, cannot be claimed by an occupant of a recognised division of a survey number as defined in S. 4 (5) of the Berar Land Revenue Code, with reference to another recognised division of the same survey number. But the right is not affected in case of sub-division by agreement of parties, duly recorded, but not recognized within the meaning of the Code (a).

Under S. 4 (5), a division of a survey number cannot be recognised by the officer in charge of the Record of Rights, Berar, he being not an officer authorised to recognise.

For all practical purposes, the recognized division of a survey number and a distinct survey number stand on the same footing, as an effect of S. 86 (3) of the Code. It is only for purposes of separate liability to revenue, that a division of a survey number is recognised.

A recognized division of a survey number is also included in the expression "survey number" in S. 87 of the Code. *Surya Bhan v. Renai*, 42 Ind. Cas. 447 = 14 N.L.R. 51.

MITTRA, A.J.C.

Reference:—(a) 9 N.L.R. 16, D.

(12) Wajib-ul-arz—Custom as entered in.

Held that where the custom of a village is entered in the *Wajib-ul-arz*, the claim should be given effect to in accordance to it. *Gulzar Ali v. Sladat Husain*, 43 Ind. Cas. 2.

RICHARDS, C.J. and TUDBALL, J.

Reference:—11 Ind. Cas. 274, R.

(13) Operation of, may be defeated by legitimate means

Persons are entitled to defeat the operation of the law of pre-emption if they can do so by legitimate means, but it is not permissible to throw a transaction of transfer into a fraudulent form for the purpose of avoiding a claim for pre-emption. *Ram Dutt Singh v. Balkaran Singh*, 45 Ind. Cas. 231.

LINDSAY, J.C.

(14) Pre-emption, its origin—Acceptance by Hindus—When to perform the Muhammadan ceremonies to create right of pre-emption.

A right to pre-emption is based entirely upon the Muhammadan Law. It has been accepted by Hindus in certain districts in consequence of their close contact with Muhammadans in those districts. To create a right of pre-emption, it is necessary that the Muhammadan ceremonies be performed immediately upon hearing of the sale. *Jagan Bhagat v. Arjan Mandal*, 45 Ind. Cas. 255.

CHAPMAN and ROE, J.J.

Pre-emption—(Continued).

(14-a) *Suit for—Dismissal of, on loss of title to property qualifying for pre-emption—Revival of suit on getting back title—Inherent power of Court to revive—Civ. Pro. Code (Act V of 1908), S. 151—Application for revival, Limitation for—Limitation Act (IX of 1908), S. 1, Art. 181.*

After filing a pre-emption suit, the plaintiff lost, under a decree against him in another suit, his title to the property which qualified him for the right. Pending the appeal, the pre-emption suit was dismissed with the remark that an application for revival of the suit may be put in if the appeal was favourable. The plaintiff having won the appeal, applied within 3 years to the Court which decided the pre-emption suit for its revival under S. 151, Civ. Pro. Code (1908). The Court having allowed the application:

Held, (1) that under S. 151, Civ. Pro. Code (1908), the Courts have inherent power to revive suits;

(2) that the original order passed in the pre-emption suit was not the proper order to be passed in the circumstances, but in the interest of justice, the proper course was to stay the proceedings until the pre-emptor had an opportunity of getting the decision of the appellate Court on the question of title under which he was claiming pre-emption;

(3) that Art. 181, Sch. 1 of the Limitation Act was applicable to the case. *Rameshwar Deval v. Gur Sahai*, 47 Ind. Cas. 137.

LINDSAY, J.C.

(14-b) *Suit for possession of land by, Decree in—Value of trees standing on land and of all rights of easement included in—Trees and right of easement pass with land.*

The price of pre-emption decreed in a suit for possession of a piece of land by pre-emption, includes the value of the trees standing on the land and also of all rights of easement appertaining to the land and they therefore go with the land. *Balobrao Apparao v. Anad Rao*, 47 Ind. Cas. 654.

MITTRA, A.J.C.

(14 c) *Right of—Sale of house by person with rights of riyas, if arises in case—Oudh Laws Act (XVIII of 1876), Chap. II, S. 9, Essentials under, for right of.*

A right of pre-emption exercisable under the provisions of Chap. II of the Act does not arise and therefore in case of a sale of a house by a person with merely the ordinary rights of a *riyas* in it. Under S. 9 of Oudh Laws Act, unless the transferor is the proprietor of a proprietary or under proprietary tenure or a share of such a tenure, no right of pre-emption comes into being. *Abbar Bandi Bibi v. Abdul Ghaani*, 47 Ind. Cas. 673.

STUART and KANHAIYA LAL, A.J.CS.

References:—4 O.C. 26, F.

(15) *Malabar Law—Court sale—Ottidar mortgagee's right to enforce his right to pre-emption against purchaser at Court auction—Civ. Pro. Code, 1908, O. XXI, r. 88.*

Pre-emption—(Continued).

The right of pre-emption of an *ottidar* mortgagee does not, in the absence of statutory provision being made for its exercise, arise in the case of an involuntary sale. It is quite impossible to reconcile the provisions of the Civ. Pro. Code as to sale in execution of decrees with the Ottidar's right to enforce his claim to pre-emption against the purchaser in Court auction, and the omission in the Code to make express provision of the pre-emptor's right is deliberate (a). *Yasudevan v. Ittirarichan Nair*, 34 M.L.J. 412=23 M.L.T. 302=(1918) M.W.N. 318=7 L.W. 547=41 M. 582=45 Ind. Cas. 46 (F.B.).

WALLIS, C.J., SADASIVA AIXAR and SPENCER, JJ.

References:—(a) 13 A. 224; 27 A. 670, F.; 5 M. 198; 7 M. 309; 13 M. 490; 15 M. 480; 4 M.L.J. 46; 38 M. 67, R.

(16) *Occupant of recognised sub-division of survey number—Right to pre-emption of such occupant—Officer in charge of Record of Rights, Power of, re sub-divisions of survey number.*

The Officer-in-charge of the Record of Rights is not such an officer as is authorised to recognise a sub-division of a survey number or to form two recognised sub-divisions into one survey number. The recognised sub-division of a survey number is a holding which has a separate assessment fixed for it. *Gadadhar v. Chunnalal*, 14 N.L.R. 55=44 Ind. Cas. 541.

MITTRA, A.J.C.

References:—9 N.L.R. 16 and 14 N.L.R. 51, F.

(17) *Appeal, maintainability of—Payment of money adjudged by Court, effect of, on appeal. Lalita Bakhsh Singh v. Ganga Bakhsh Singh*, 20 O.C. 290=5 O.L.J. 135=43 Ind. Cas. 219. See Final Part, 1917, Col. 743.

(18) *Oudh Laws Act (XVIII of 1876), S. 9—Member of village community—Rent-free grantee—Muzfidar when acquires the status of under proprietor—Oudh Rent Act (XXII of 1886), S. 107-B.*

A mere rent-free grantee is not a member of a village community for the purposes of pre-emption.

A mere *muzfidar* or rent-free holder, however long he may have held the *muzfi* as such, does not thereby acquire the status of an under-proprietor, unless proceedings have been taken and the necessary declaration given by the Revenue Court under S. 107 H of the Oudh Rent Act (XXII of 1886). *Murli v. Gajraj Singh*, 21 O.C. 124=46 Ind. Cas. 443.

KANHAIYA LAL and DANIELS, J.CS.

References:—11 O.C. 187; 11 O.C. 225; 5 O. 226; 20 O.C. 171, B.; 1 O.C. 284; 7 O.C. 19; 12 O.C. 1; 13 O.C. 402, Dist.

(19) *Pre-emption suit—Set off, right to—Joinder of claims—Interest to which pre-emptor is entitled—Money left with the*

Pre-emption—(Continued).

vendee out of sale consideration—Vendee's failure to discharge encumbrances.

A pre-emptor cannot, in his suit for pre-emption, claim in reduction of the purchase money such interest to which he may become entitled or for which he may become liable by reason of the failure of the vendee to pay to him and to the other creditors of the vendor moneys which had been left with him out of the sale consideration for discharging encumbrances on the property sold. *Chhatarpal v. Hardeo Bakhsh Singh*, 21 O.C. 269.

KANHAIYA LAL, A.J.C.

References:—3 A. 663; 17 O.C. 379, *Dist.*

(20) *Conditional sale, Abandonment at time of execution of original intention to execute deed of—Execution of out and out sale—Subsequent execution of deed of agreement to reconvey property sold—Short interval between execution of the two deeds—Absolute sale for pre-emption purposes.*

Certain parties originally intended to execute a deed of conditional sale of certain property. But, at the time of execution, they abandoned this intention and clearly determined on the execution of an absolute, out and out, sale which was duly executed and registered. At this time there was in contemplation an agreement to reconvey which also was duly executed and registered within the period of two days immediately after the sale. *Held*, that, although, had the litigation lain solely between the vendor and the vendee the Courts might have held that the two transactions taken together amounted merely to a conditional sale, or, perhaps to an English mortgage, yet, as the first deed was an out and out sale in express terms, the right of pre-emption accrued as soon as that sale was completed. S. 92 of the Evidence Act barring any parol evidence of a contemporaneous oral agreement varying the sale-deed. *Muhammad Mir v. Faizul Hassan*, 74 P.R. 1918=163 P.W.R. 1918=47 Ind. Cas. 418.

SCOTT-SMITH and LE-ROSSIGNOL, JJ.

References:—22 Ind. Cas. 4; 12 A. 337; 3 A. 369; 22 A. 149, *Dist.*

(21) *Sale deed, Due execution and registration of—Proprietary rights in land, if pass until such execution—Possession of land taken prior to such execution under convenient arrangement—Legal possession taken only after execution for purposes of limitation for pre-emption suit—Limitation Act, 1908, Art. 10.*

Under a registered sale-deed, dated the 21st December, 1914, the suit land was sold to the vendees, one of whom had, however, previously taken actual possession of it on the 26th October, 1914. In a suit for pre-emption filed on the 20th December, 1915, *held* that the period of limitation, prescribed by Art. 10 of the Limitation Act, began to run against the pre-emptor from the subsequent date of the actual sale and the prior possession of one of the

Pre-emption—(Continued).

vendees must in law be referred to the subsequent date of the deed of sale sought to be impeached, and that the suit was within time. *Ram Pears v. Rup Lal*, 80 P.R. 1918=181 P.W.R. 1918.

SHAH DIN, J.

(22) *Waiver—General assent given by villagers to sale before contract of sale entered into, effect of—Pre-emptor having a share.*

In a pre-emption suit it appeared that prior to the sale the vendee went to the village in which the land in suit was situate and informed some of the villagers that he contemplated purchasing the land and a general assent was given to such purchase, but no agreement to purchase was at the time entered into between the vendor and the vendee and no offer was made to the pre-emptors after the sale.

Held, that what occurred did not amount to a complete legal waiver of the right of pre-emption by the plaintiffs and that they were not debarred from exercising their right (a).

Held, also, that a proprietor, even having a small holding in a village has a right of pre-emption (b). *Bindu Khan v. Indar Narain*, 19 P.L.R. 1918=50 P.R. 1918=40 P.W.R. 1918=43 Ind. Cas. 1006.

SHAH DIN and SCOTT-SMITH, JJ.

Reference:—(a) 27 A. 670 at p. 676=A.W.N. (1906) 149=2 A.L.J. 390, *Appr.*

(23) *Lands on the outskirts of town—Land within Municipal limits—Premgarh village near Hoshiarpur.*

Held, that the mere fact that the Local Government has seen fit to include a part of the Premgarh estate within Municipal limits of Hoshiarpur does not necessarily mean that the locality in dispute has become a part of the town for purposes of Pre-emption Act. Although the land is situate between Hoshiarpur City and the railway station and shops have been erected in the vicinity it cannot be said that the town itself has extended so far.

Held, also, that the plaintiff who had purchased a small plot of land assessed to revenue must be regarded as "owner" for purposes of pre-emption although he had walled the land and was using it to store iron thereon. *Salamat Rai v. Kanhi Ram*, 30 P.L.R. 1918=106 P.W.R. 1918=45 Ind. Cas. 687.

CHEVIS, J.

(24) *Sale or exchange—Court, duty of—Intention of parties—Burden of proof.*

Where in a suit for pre-emption it is alleged that a transaction which purports on the face of it to be an exchange is in reality a sale, it is the duty of the Court to determine what the real intention of the parties was as opposed to their apparent intention.

The right of pre-emption is a very peculiar right which trenches upon the common freedom of contract and the plaintiff in a suit for pre-emption must, therefore, definitely establish

Pre-emption—(Continued).

his connection with the vendor on the basis of which he claims to pre-empt. *Gul Muhammad v. Sabz Ali Khan*, 140 P.L.R. 1918=104 P.R. 1918.

BATTIGAN, O J. and LE-ROSSIGNOL, J.

(25) *Re-sale to vendor before suit, effect of—Right of pre-emption whether defeated.* *Imami v. Allah Diya*, 99 P.W.R. 1917=24 P.R. 1918=40 Ind. Cas. 767. See Final Part, 1917, Col. 743.

(26) *Benami suit—Plaintiff not suing for his own benefit alone—Suit, whether maintainable.*

Plaintiffs sued for possession of certain lands by pre-emption and obtained a decree conditional on the payment of a certain sum. At the time of the mutation, they made a request that mutation should be effected in the names of certain other persons as well as their own, on the ground that these persons were partners with them in the pre-emption case. The enquiry showed that two-thirds of the price was paid by persons other than the plaintiffs, who were non-agriculturists and who would have had no right to bring a suit for pre-emption.

Held, that, as the plaintiffs were not suing for themselves alone, but for themselves and other persons, they were not entitled to a decree for pre-emption. *Chhajju Ram v. Neki*, 17 P.W.R. 1918=43 Ind. Cas. 177.

SCOTT-SMITH and LESLIE-JONES, JJ.

References:—199 P.R. 1894; 19 P.R. 1896, *F.*

(27) *Pre-emptor entitled to deduct his costs from the pre-emption price and not obliged to apply for refund under S. 144, Civ. Pro. Code, Act V of 1908—S. 586 of Act XIV of 1882.*

Held, that, in a pre-emption decree, the pre-emptor decree holder is entitled to deduct the costs allowed to him from the pre-emption price, which he is required to pay into Court.

So, where costs were allowed to a successful vendee in the first Court, but its order was reversed in appeal, the pre-emptor is not obliged to apply under S. 144, Civ. Pro. Code, 1908, for refund of the amount realized by the vendee from the pre-emptive price paid by the pre-emptor in Court, but is entitled to get credit for it and the deposit is to be considered in fact. *Girdhari Lal v. Attar*, 96 P.W.R. 1918=47 Ind. Cas. 511.

WILBERFORCE, J.

(28) *Pre-emptor joining with him another person as partner to get share of the property in case of success and not forfeiting his right—Benami suit distinguished—Appellate Court receiving additional evidence—Effect of no objection by the opposite side—Happening of some event subsequent to decree under appeal—Proper remedy—Omission to comply with cl. 2 of r. 27 of O. XLI, Civ. Pro. Code, 1908—Its S. 114 and r. 1 of O. XLVII.*

Pre-emption—(Continued).

Held, on review, that the action of a pre-emptor in joining with him other persons as his partners to share the pre-empted property, even if they are not entitled either to purchase or pre-empt it, cannot be considered as defeating the principles on which the pre-emptive right is based.

Poor and rich alike are equally entitled to the privileges of pre-emption, and to hold that a poor man cannot seek the financial assistance of others in prosecuting his suit would be in many cases to disqualify him from the exercise of his rights (a).

Held also, that S. 114 and r. 1 of O. XLVII of Act V of 1908, do not authorise review of a decree which was right when it was made, on the ground of happening of some subsequent event. The proper course in such a case is to request the appellate Court in which the appeal is pending to accept additional evidence regarding the subsequent event (b).

Held, further, that when the appellate Court, allows the additional evidence to be put in, the mere omission to comply with cl. 2 of r. 27 of O. XLI, Civ. Pro. Code, 1908, does not render such evidence inadmissible especially where the opposite party raises no objection at the time of using it.

Names of plaintiffs wrongly joined are to be excluded (c). *Neki v. Chhajju Ram*, 111 P.W.R. 1918.

SCOTT-SMITH and WILBERFORCE, JJ.

References:—(a) 17 P.W.R. 1918, *overruled*; 129 P.R. 1894, *Dist.*; 19 P.R. 1898, *Expt.*; 67 P.R. 1896; 10 P.R. 1902, *Appr.*; 67 P.R. 1906=38 P.W.R. 1906; 155 P.W.R. 1911=7 P.R. 1912, *Appr.* (b) 24 M. 1=4 C.W.N. 725=21 I.A. 197 (P.C.), *F.*; 31 B. 381=9 Bom. L.R. 671=11 C.W.N. 721=6 C.L.J. 5=4 A.L.J. 461=34 I.A. 115=17 M.L.J. 347 (P.C.); 21 M. 114=3 M.L.T. 308; 42 C. 574=28 Ind. Cas. 865, *Dist.* (c) 83 P.R. 1883; 104 P.R. 1994; 94 P.R. 1895, *Ref. to.*

(29) *'Landlord,' meaning of—Sale of occupancy rights to mortgagees with possession of proprietary rights—Vendor's collateral whether can pre-empt—Punjab Tenancy Act (XVI of 1887), S. 4 (6).*

Held that the term 'landlord' as defined in S. 4 (6) of the Tenancy Act includes a mortgagee in possession.

Where, therefore, plaintiff sued for possession by pre-emption of certain land sold by defendant No. 1, an occupancy tenant, to the mortgagee with possession of the proprietary rights on the ground that he is a collateral of the vendor:

Held, that the plaintiff was not entitled to succeed, inasmuch as the sale must be held to have been made in favour of the landlord. *Nanak v. Bhagwan Singh*, 149 P.W.R. 1918=47 Ind. Cas. 3.

MARTINEAU, J.

References:—116 P.R. 1916=186 P.W.R. 1916=86 Ind. Cas. 712, *F.*

Pre-emption—(Concluded).

(80) See PUN. ACT I OF 1918 (PRE-EMPTION).

(81) Pre-emption—Custom—Pre-emptor and vendee co-sharers with vendor—Pre-emptor brother of vendor—Acquiescence—Issue not decided by lower appellate Court—High Court empowered to decide it. See APPEAL (SECOND APPEAL), No. 2, 16 A.L.J. 779.

(82) Pre-emptor failing to deposit extra sum of money ordered to be paid by appellate Court—Final decree dismissing suit—Second appeal against preliminary decree. See APPEAL (SECOND APPEAL); No. 22, 92 P.L.R. 1918.

(83) Suit for, Decree in—Right of, loss of, after passing of decree in, Effect of—Decree, Vendee acquiring fresh right after—Appellate Court, Powers of. See APPELLATE COURT, POWERS OF, No. 1, 46 Ind. Cas. 339.

(84) Right of, Existence of on date of decree of Court of first instance—Pre-emption, Property qualifying for, loss of, after passing of decree—Decree if could be reversed in appeal. See APPELLATE COURT, POWERS OF, No. 2, 46 Ind. Cas. 353.

(85) Property sold subject to mortgage—Money left with vendee to pay it off—Suit for pre-emption—Pre-emptor directed under decree to pay full price—Money withdrawn by vendee—Mortgage not discharged by him—Mortgagee's suit decreed against pre-emptor—Discharge of decree by pre-emptor to save property—Vendee if liable to refund money paid to him in excess. See CONTRACT ACT, No. 41, 16 A.L.J. 531.

(86) Wajib-ul-arz—*Prima facie* evidence—Whether can be rebuttable. See CUSTOM, No. 4, 43 Ind. Cas. 854.

(87) Suit for declaration that alienation of land was not binding on reversioners except to the extent of legal necessity—Pre-emptors if bound by such decree in favour of reversioners. See CUSTOMS (PUNJAB—ALIENATION), No. 4, 54 P.R. 1918.

(88) Claim to, of sister and her son. See CUSTOMS (PUNJAB—SUCCESSION), No. 2, 65 P.R. 1918.

(89) Sale of specific plots of land and share in village shamilat—Suit for pre-emption in, re such sale. See LIMITATION ACT (1908), No. 110, 68 P.R. 1918.

(40) Suit for—Starting point for limitation for. See LIMITATION ACT (1908), No. 109, 67 P.L.R. 1918.

(41) See, also, cases under MAHOMEDAN LAW (PRE-EMPTION).

(42) Suit for—Sub-divisions of a village, Existence of, a question of fact—Second appeal—Appeal from order of remand—Question of fact if can be gone into in. See QUESTION OF FACT, 109 P.R. 1918.

(43) Suit for—Value for purposes of jurisdiction. See SUITS VALUATION ACT (VII OF 1887), 84 M.L.J. 897.

Preliminary Decree.

(1) Civ. Pro. Code, 1909, S. 97—*Reversal or modification of preliminary decree on appeal—Effect of such reversal on final decree based thereon.*

If a preliminary decree is reversed on appeal, the final decree passed on the footing of that preliminary decree ceased to be operative and the same result would follow in cases of modifications of the preliminary decree which imperilled the original final decree. *Gunniah Mudaly v. Rangaswami Mudali*, 35 M.L.J. 361.

AYLING and SESHAGIRI AIYAR, JJ.

References:—37 M. 29, 455; 18 C.L.J. 214, 225; 20 C.W.N. 1174, F.; 42 C. 914, R.

(2) Appeal against, if competent, when filed after passing of final decree, but before its signature. See APPEAL (GENERAL), No. 15, 22 C.W.N. 931.

(3) Pre-emptor failing to deposit extra sum of money ordered to be paid by appellate Court—Final decree dismissing suit—Second appeal against preliminary decree. See APPEAL (SECOND APPEAL), No. 24, 92 P.L.R. 1918.

(4) Rent suit—Remand—Appeal if lies from remand order as from preliminary decree. See APPEAL (SECOND APPEAL), No. 1, 16 A.L.J. 711.

(5) Preliminary decree fixing time for redemption—Confirmation of such decree in appeal therefrom—Application for final decree, computation of time for making. See LIMITATION ACT (1908), No. 219, 35 M.L.J. 507.

(6) Preliminary decree for partition set aside on appeal—Value of final decree passed during pendency of appeal from preliminary decree—Realisation of money in execution of such final decree—Restitution of such money, right to. See RESTITUTION, No. 2, 27 C.L.J. 451.

Prescription.

(1) Uralan's rights if can be acquired by. See RELIGIOUS ENDOWMENTS, No. 7, 23 M.L.T. 187.

(2) Title by, based not on original right or morality but expediency. See ADVERSE POSSESSION, No. 5 a, 46 Ind. Cas. 964.

Prescriptive Rights.

Ordinary rights of lower and upper riparian owners—Prescriptive rights, its effect on riparian rights. See RIPARIAN RIGHTS, No. 1, 44 Ind. Cas. 19.

Preservation of Ancient Monuments Act.

See ACT VII OF 1904.

Presidency Small Causes Courts Act (XV of 1882).

(1) S. 31—Transfer of decrees of Presidency Small Causes Court to Munsif direct, if valid. See EXECUTION OF DECREE, No. 10, 28 C.L.J. 264.

Presidency Small Causes Courts Act (XY of 1882)—(Concluded).

(2) S. 38—*Full Court—Powers to reverse a decree on questions of fact—Jurisdiction—Practice.* *Sonoo Narayan v. Dinkar Jagannath Marathe*, 19 Bom. L.R. 944 = 42 B. 80 = 43 Ind. Cas. 486. See Final Part, 1917, Col. 14.

(3) S. 41—*Suit in ejectment 'Property whose annual value at rack-rent exceeds Rs. 1,000,' meaning of—Rental of portion of property in actual occupation of tenant less than Rs. 1,000—Jurisdiction of Small Cause Court to try suit—Question of title when can be gone into by Small Cause Court.* See EJECTMENT, No. 5, 7 L.W. 610.

Presidency Towns Insolvency Act (III of 1909).

(1) S. 9 (b). See No. 7, *infra*.

(2) Ss. 12, 49, Sch. II, cls. 9 to 16—*English mortgage—Rights of mortgagees.* See CROWN DEBTS, No. 1, 22 C.W.N. 793.

(3) S. 17—*Secured creditor, Suit by, to realise security—Official Assignee, Leave of, if necessary.* See MORTGAGE—EQUITABLE MORTGAGE, No. 2, 45 Ind. Cas. 918.

(4) Ss. 17, 22 and 51—*Adjudication in insolvency by two Courts in respect of one and the same person—Priority of adjudication if depends on date of actual adjudication or on date of commission of act of insolvency—Annulment of earlier adjudication necessary for allowing later to take effect.*

A firm was carrying on business at Madras and also at Rangoon. For acts of insolvency alleged to have been committed by the firm in or after March 1917, a petition, dated the 17th April 1917, was presented to the Madras High Court, for the adjudication of the firm as insolvent and on the 23rd April 1917 an order of adjudication was accordingly made. On the 10th May 1917, the same firm was again adjudicated by the Burma Chief Court for acts of insolvency committed in or about February 1917. Held that the Madras adjudication which was earlier in date, did vest all the properties of the insolvent in the Official Assignee of Madras, notwithstanding the fact that the act of insolvency complained of in the Madras petition for adjudication was committed on a date later than the act of insolvency with reference to which the Rangoon order of adjudication was passed; that no property could vest in the Rangoon Official Assignee unless the prior Madras adjudication be annulled under S. 22 of the Presidency Towns Insolvency Act; and that, it being convenient that the insolvent's estate should be administered in Rangoon, the Madras adjudication should be annulled and the Official Assignee of Rangoon should have the preference (a).

The priority of adjudications in insolvency depends on the date of the actual adjudication and not on the date of commission of the act of bankruptcy (b).

The provision in S. 51 of the Presidency Towns Insolvency Act is intended not to give

Presidency Towns Insolvency Act (III of 1909)—(Continued).

the rule of priority as between adjudications of different Courts by reference to the act of insolvency adjudicated upon but only to enable the Official Assignee to recover property in the hands of third parties, it has not the effect of divesting property which has been duly vested in an Official Assignee in accordance with law under a prior adjudication (c). *Official Assignee of Madras v. Official Assignee of Rangoon*, 35 M.L.J. 533 = 24 M.L.T. 455.

WALLIS, C.J. and SESHAGIRI Aiyar, J.

References:—(a) (1864) 15 C.B.N.S. 669; 21 B. 297, *Rel. on*; 31 C. 761, *Dist.* (b) (1824) 1 Gl. and J. 414, *F.* (c) (1879) 10 Ch. D. 8; (1893) 1 Q.B. 455; (1899) 1 Q.B. 612, *Dist.*

(5) S. 17. See No. 7, *infra*.

(6) S. 22. See No. 4, *supra*.

(7) Ss. 36, 9 (b), 17, 51, 55—*Insolvency Rules, Calcutta, 5 (d)—Jurisdiction of Insolvency Court to enquire into fraudulent transfer of property and declare same void, on application under S. 36—Suit for title for setting aside order under S. 36—S. 26, Insolvency. Act of 1848 (11 and 12 Vict., c. 21)—18 Ellis., c. 5, principle of—Evidence of insolvent, if admissible against transferee of property in view of insolvency—Burden of proof on person claiming by such transfer—Transfer by insolvent, when good—Transfer or assignment by insolvent, when fraudulent.*

Under the Presidency Towns Insolvency Act (III of 1909) the Insolvency Court has, on an application by the Official Assignee, jurisdiction under S. 36 to enquire as to whether any sale of property by an insolvent is fraudulent or void and, if so, to make an order for the delivery of such property to the Official Assignee (a).

Any one aggrieved by such an order might bring a regular suit to vindicate his title (b).

The examination of an insolvent is not admissible in evidence against persons against whom an order as above is passed under S. 36.

The burden of proof of supporting a purchase from the insolvent of the whole of his assets put prior to the insolvency falls on the person claiming that the purchase can stand.

An assignment by an insolvent on the eve of his insolvency can only stand if it can be shown that it was done for the purpose of helping him with funds to carry on the business and that the transaction is genuine.

Transactions of this kind will stand good when the properties of the insolvent have been transferred to creditors to secure an existing debt and also advances made to enable the insolvent to carry on the business.

One J by a partnership deed of 18th May 1916 became partner of S, in a half-share of the latter's hotel business and the deed amongst other things provided that after 12 months J would be entitled to purchase from S the

Presidency Towns Insolvency Act (III of 1909)—(Continued). **Presumption—(Continued).**

remaining half-share upon terms therein mentioned and a further covenant to pay S a monthly sum of Rs. 500 for a period therein specified.

On the 28th June 1916, that is 13 days before S filed his petition in insolvency, J entered into an agreement with S for the purchase of the said half-share but the agreement was not reduced to writing, although a draft was prepared and J alleged that the agreement was verbally given effect to, before he was aware that S had any intention of filing a petition in insolvency:

Held—That S committed an act of insolvency under S. 9 (b) by the assignment of his half-share to J on the 28th of June 1916 and under S. 17 the property of the insolvent vested in the Official Assignee and under S. 51 this related back to the 28th June 1916.

That although J agreed to and did in fact pay certain creditors these were in the nature of voluntary payments which the creditors could not compel and this in itself made the transaction bad since it removed the property of the insolvent from the insolvency jurisdiction of the Court.

That the provision in the agreement which gave the go-by to the provision in the partnership deed for the payment of Rs. 500 a month to the insolvent and in lieu provided for the supply of food to the insolvent and his family amounted to a fraud on the creditors.

That the assignment of 28th June 1916 must be set aside (c). *Re A. F. C. Seehase*, 22 C. W.N. 335—46 Ind. Cas. 196.

GREAVES, J.

References:—(a) 42 O. 109, commented on. (b) 6 C.W.N. 513, R. (c) 26 Ch. Div. 319 (1884), F.

(8) S. 49. See No. 2, *supra*.

(9) S. 51. See Nos. 4 and 7, *supra*.

(10) S. 55. See No. 7, *supra*.

(11) Sch. II, cls. 9 to 16. See No. 2, *supra*.

Presumption.

(1) *Court's proceedings, Legality of, as to, Rebuttal of—Evidence Act, 1872, S. 114.*

The presumption in favour of the legality of a Court's proceedings which is recognised in S. 114 of the Evidence Act is an exceedingly strong one and could only be over-turned by exceedingly strong evidence. *Sheodaran Lal v. Assessor Singh*, 46 Ind. Cas. 52.

(2) *Mortgage-bond, unregistered, Suit on—No demand for a long time—Presumption, as to amount having been forgiven or repaid—Onus of proof as to bond still remaining due—Evidence Act (I of 1872), S. 114.*

In a suit brought in 1909 by an assignee of an unregistered mortgage-bond which purported to have been executed on the 30th May 1879 by the father of the defendants in favour of one M.

and which stipulated for re-payment of the amount with interest at 18 per cent. per annum on the 1st June 1882, the defendants denied the bond and proclaimed it to be a forgery. A servant of the plaintiff was found to be at once the vendor of the stamp and the scribe of the deed sued upon, and the only literate attesting witness was a cousin and partner of the plaintiff and joint master of the scribe with the plaintiff.

Held, that the conclusion that the debt must have been forgiven by or paid to the original creditor was almost irrebuttable and that a heavy onus lay on the plaintiff to prove, under the circumstances, not only the execution and consideration of the bond, but also that on the date of the suit it was still unpaid. *Ramprasad v. Kishori Lal*, 46 Ind. Cas. 657.

STANYON, A.J.C.

(3) *Mortgage, Possessory—Long possession by mortgagee, presumption arising from—Mortgage, Satisfaction of—Evidence Act (1872), S. 114—Onus to rebut presumption.*

A possessory mortgage was executed in 1876 by P in favour of one C for Rs. 300 repayable in ten years with interest at 2 per cent. per month but possession remained with the mortgagor, and no payment was made against the bond nor was any demand or attempt to enforce it made during the lifetime of the mortgagee. The mortgagee died in 1908 and in the meanwhile P sold part of the property in 1905 and mortgaged the remainder to the defendants in 1908. Immediately on the death of the mortgagee, his heirs executed a deed purporting to assign the mortgage of 1876 to the plaintiff, the daughter-in-law of the mortgagor. In a suit to enforce the mortgage:

Held, that the circumstances, considered in the light of commonsense embodied in S. 114, Evidence Act, justified the Court in refusing to presume that the mortgage of 1876 was still undischarged and that the onus was on the plaintiff to prove that it was still unsatisfied. *Amritabal v. Jabbaubi*, 46 Ind. Cas. 676.

STANYON, A.J.C.

(4) *Mortgage—No demand or payment made towards satisfaction of, for 36 years—Presumption as to genuineness of transaction, if arises—Evidence Act (I of 1872), S. 114—Genuineness of transaction, Burden of proof as to.*

A suit was instituted on the 17th December 1903 to enforce a deed of mortgage, dated 21st October, 1872. The consideration stated in the deed was Rs. 3,838-4-0 on account of money due on past dealings and a certain amount of wheat, the money was to carry interest at 12 per cent. per annum and the grain at 25 per cent. and the mortgaged property was the agricultural estate, moveable and immoveable of the mortgagors. No time was fixed for payment and nothing had been demanded nor paid towards the satisfaction of this bond. The defence was that the mortgage was fictitious and without consideration.

Presumption—(Concluded).

Held, (1) that the circumstances were sufficient to dislodge the ordinary presumption that the bond in suit evidenced a genuine transaction for consideration and that the debt which it purported to secure was a real debt existing at the date of suit, and, (2) that the onus was on the plaintiff to prove his mortgage against the defendants. **Meghraj v. Mukundram**, 46 Ind. Cas. 806.

BATTEN and STANYON, A.J.CS.

(5) **Advancement**, As to—Applicability of English rule to India—Purchase of property by husband in name of wife. See **ADVANCEMENT**, 47 Ind. Cas. 376.

(6) **Lakheraj title**, as to from long possession without payment of rent. See **EVIDENCE**, No. 2, 22 C.W.N. 896.

(7) **Long co-habitation—Husband and wife**, Treatment as, arising from. See **EVIDENCE**, No. 4-b, 146 P.L.R. 1917.

(8) **Presumption of law—Attempt at rebutting the presumption that execution sale was properly conducted—Duty of Court**. See **EVIDENCE ACT**, No. 55, 44 Ind. Cas. 661.

(9) **As to due execution—Evidence Act, 1872, S. 90—Certified copy, if arises in respect of, when original could not be produced**. See **EVIDENCE ACT (1872)**, No. 28, 46 Ind. Cas. 344.

(10) **Person not heard of for more than twenty years—Presumption as to precise period of death if can be raised**. See **EVIDENCE ACT**, No. 51, 33 P.R. 1918.

(11) **Alienation by Hindu widow—Consent of next reversioner—Effect on actual reversioner—Presumption of legal necessity**. See **HINDU LAW (ALIENATION)**, No. 5, 44 Ind. Cas. 611.

(12) **Due performance of duty by gomasta of a landlord**. See **LANDLORD AND TENANT**, No. 36, 45 Ind. Cas. 196.

(13) **Rent, Fixity of**, As to, under S. 50 (2), Bengal Tenancy Act (1885)—Tenure, Sub-division or amalgamation of, if destroys—Execution of fresh kabulyat if rebuts. See **LANDLORD AND TENANT**, No. 52, 46 Ind. Cas. 433.

(14) **Money advanced by two co-mortgagees—Presumption as to the interest of each of the co-mortgagees**. See **MORTGAGE (GENERAL)**, No. 6, 44 Ind. Cas. 621.

(15) **Purchase of mortgaged property, Discharge of prior incumbrance by—Intention to keep alive, if a question of law or fact—Presumption applicable to case**. See **MORTGAGE (SUBROGATION)**, No. 2, 8 L.W. 175.

(16) **Grant of land bounded by non-navigable river—Grant if extends to half of bed of river**. See **RIVER BED**, No. 1, 35 M.L.J. 159.

(17) **Entry as to title in wajib-ul-ara if creates title—Presumption in its support**. See **TITLE**, No. 3, 24 M.L.T. 271.

Priest.

Ordination before acquiring status of heir and property—Right after ordination to inherit such property—Ordination after acquiring status of heir—Divesting of such status after ordination. See **BUDDHIST LAW (INHERITANCE)**, No. 4, U.B.R. (1918), 2nd Ct., 91.

Principal and Agent.

(1 & 2) **Pro-note executed by general agent—Liability of principal—Evidentiary value of judgment in criminal trial**.

A lady executed a general power-of-attorney in favour of a relation of hers, which gave the latter authority to borrow money on her behalf but only for necessity. The agent borrowed a sum of Rs. 600 on a pro-note in which he signed himself as the brother-in-law and agent of the principal. The pro-note purports to borrow money to defray the expenses of the husband and another relation of the principal and for private expenses.

Held that the principal was not liable on the note, as no conclusion can be drawn that the money was borrowed on behalf of the lady or that it was borrowed for necessity.

Judgments in criminal trials are evidence only of the conviction or acquittal, but they cannot be used for any other purpose. **Muhamd Begam v. Durgaprasad**, 40 Ind. Cas. 452.

STUART, J.C.

(3) **Mortgage by agent on behalf of principal—Whether power by registered document required**.

There is nothing in the Transfer of Property Act or in the Registration Act requiring that an agent must be empowered by a registered document for executing a mortgage on behalf of the principal. **Ma Mo v. Mahomed Backer Hamadane**, 43 Ind. Cas. 536.

PABLETT and ORMOND, JJ.

(4) **Agent, Authority of, Limit of—Burden of proof—Evidence Act (I of 1872), S. 106**.

Where the question is whether an act was or was not within the limits of an agent's authority, under S. 106, of the Evidence Act, it is for the principal to show clearly the character of his agent's authority, for such character is a matter specially within the principal's knowledge. **David M. Bruce v. Mg. Kyaw Zin**, 45 Ind. Cas. 822.

TWOMEY, C.J. and MAUNG KIN, J.

(5) **Accounts, Suit for, by principal against agent—Agent, Death of, during pendency of suit—Legal representatives of agent, Liability of—Procedure to be followed in suit**.

A suit for accounts by a principal against his agent does not abate by the death of the agent during the pendency of the suit nor are his legal representatives exonerated from all liability to the principal. After the death of the agent, the proper procedure in the suit would be that

Principal and Agent—(Continued).

the statement of claim put in by the plaintiff should be investigated, preferably by a commissioner in the presence of the representatives of the deceased agent. The onus would be on the plaintiff to prove each item in the sum which he claims, i.e., to prove that each item was actually realised by the agent and further that it was not paid to his credit. The representatives of the deceased agent would be at liberty to adduce such evidence as they please, to show either that the money was not realised by the agent, or that after realisation it was paid to the plaintiff. After the amount actually due is thus ascertained, the Court would pass a decree against the assets of the deceased agent in the hands of the representatives. *Smt. Sekharswar Roy v. Hajirannessa Bibi*, 47 Ind. Cas. 371—28 C.L.J. 492.

WALMSLEY and PANTON, JJ.

References:—16 Ind. Cas. 742=17 C.W.N. 15=16 C.L.J. 282, *Not F.*

(6) *Rendition of accounts by agent of a Limited Company, after audit—Right of suit.*

Held, that a suit for rendition of accounts against a Managing Agent of a Limited Company, is maintainable even after audit of the Company's accounts. The auditing, in the absence of proof of fraud or mistake in connection with the audit, closes the account between the shareholders and the directorate but it does not affect the right of the Company so far as the Managing Agent is concerned. *Ramchand v. Imperial Oil, Soap and General Mills Co., Ltd.*, Delhi, 9 P.L.R. 1918=86 P.R. 1917.

SHADI LAL and LE-ROSSIGNOL, JJ.

(7) *C. I. F. contract—Purchase of goods under, from a commission agent—Agent, if a C. I. F. vendor—Agency, whether still subsists—Goods purchased on principal's behalf and at his risk—Outbreak of war while goods are in transit in an enemy ship—Loss, whether to be borne by the agent or by the principal—Indian Contract Act (IX of 1872), S. 222—Agency between vendor and vendee—Effect of, on C. I. F. contract.*

Where goods are purchased from a commission agent under a C. I. F. contract, though the agent is regarded for some purposes as a principal and as any other vendor under a C. I. F. contract, yet the relation of principal and agent still subsists and the agent remains accountable as an agent (a).

The true principle is that the assimilation of the agent to a vendor is only to be carried so far as is necessary to give business efficacy to the transaction (b).

Where an agent is requested by the principal to purchase certain goods on the principal's behalf and at the latter's risk and war breaks out while the goods are in transit on board an enemy ship, thereby dissolving the contract of affreightment between the shipper and the shipowner and making it impossible for the shipper

Principal and Agent—(Concluded).

to tender among the shipping documents, bills of lading which are still valid contracts and will be enforceable by the vendee against the ship-owner.

Held (i) that the whole transaction was at the buyer's risk and that he must bear the loss due to the outbreak of the war;

(ii) that a special contract throwing the risk on the buyer could be inferred from the fact that the goods were to be purchased and shipped on account of the buyer; and

(iii) that to throw the goods on to the agent's hands and leave him to bear the loss would be opposed to and inconsistent with the general principles of the law of agency (c). *Harry Meredith v. Abdul Sahib*, 35 M.L.J. 184=8 L.W. 566=41 M. 1060.

WALLIS, C.J. and SPENCER, J.

References:—(a) (1872) L.R. 5 Hl. 395; (1877) 9 Ch. D. 529, *F.* (b) (1902) 3 East 39; (1882) 11 Q. B.D. 797, *R.* (c) (1916) L.R. 1 K.B. 495; 45 C. 28, *Dist.*

(8) *Suit for recovery of money lent by agent to persons, to whom he had no authority to lend—Nature of suit—Termination of agency—Question of fact. See LIMITATION ACT (1908), No. 141, 41 M. 1.*

(9) *Minor member of firm—Whether such member can act as agent—Firm's liability. See MINOR, No. 6, 17 P.L.R. 1918.*

(10) *Successor-in-title of original mortgagee in possession with consent of mortgagor—Possession to be taken as under authority of mortgagor—Loan to be repaid before its authority. See MORTGAGE (EQUITABLE MORTGAGE), No. 3, 9 L.B.R. 173.*

(11) *Liability of, in respect of bills executed as trustee of temple charity. See NEGOTIABLE INSTRUMENTS ACT, No. 1, 35 M.L.J. 90.*

(12) *Hereditary Uralan and hereditary Samudayec—Relation between, if governed by ordinary principles of agency. See RELIGIOUS ENDOWMENTS, No. 7, 23 M.L.T. 187.*

(13) *Relationship of, when terminates. See REVISION, No. 26, 59 P.L.R. 1918,*

(14) *Vendee agreeing to pay vendor's creditors out of money left in hands of vendee—Covenant to compensate vendor on non-payment—Contract of agency, not indemnity, constituted. See VENDOR AND PURCHASER, No. 8, 24 M.L.T. 260.*

Principal and Surety.

(1) *Creditor obtaining decree on pro-note executed by principal and sureties—Subsequent recovery of amount from estate of principal—Sureties not liable to contribute.*

Where a creditor obtained a decree on a pro-note executed by the principal debtor and some sureties and recovered the amount from the estate of the principal debtor, **held** that the

Principal and Surety—(Concluded).

receiver of the estate of the principal debtor cannot claim contribution from the sureties. *Abdul Bari Chowdry v. M. Jotin*, 44 Ind. Cas. 231.

ORMOND and PARLETT, JJ.

(2) *Suit for money but against debtor and surety—Omission and express waiver of right to pursue remedy against principal debtor—Dismissal of suit against debtor under Civ. Pro. Code, O. IX, r. 5—Liability of surety in cases of omission and express waiver of right to pursue remedy against debtor—Contract Act, Ss. 134, 137. Maung Po U v. Maung Kyaw, U. B. R. (1917), 4th Qr., 62=44 Ind. Cas. 693. See Final Part, 1917, Col. 753.*

(3) Surety making himself liable for deprecat amount if dispute not settled—Compromise of suit—Decree based on compromise if can be executed against surety. See CIV. PRO. CODE (1908), No. 188, 99 F.W.R. 1918.

(4) Guarantees given at a time when claim against principal time-barred—Surety not liable to pay. See CONTRACT ACT, No. 66, 20 Bom. L.R. 447.

(5) Distinction between contracts of indemnity and suretyship—Sale of zurpeshgi interest in land leased at certain rate of rent to another—Undertaking given to purchaser at time of sale to indemnify purchaser against loss arising on his failure to collect higher rate of rent represented to be due by lessee—Contract whether one of suretyship or indemnity. See HINDU LAW (DEBT), No. 12, 3 Pat. L.J. 396.

Printing Charges.

Application for copies before recess—Arrangement for delivery during recess—Whether party bound to pay printing charges during recess—Vacation period, if can be deducted. See LIMITATION ACT (1908), No. 8, (1918) M.W.N. 886.

Priority.

Adjudication by Insolvency Courts having current jurisdiction—Priority, claim for, by the different Assignees, Test of—Priority of date of adjudication, not priority of date of act of insolvency relied upon, to determine vesting of property. See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), No. 4, 35 M.L.J. 533.

Privileged Communication.

(1) *Evidence Act (I of 1872), S. 126—Vakil and client—Communication made to vakil in the course of his employment—Privilege.*

A suit was brought by one firm for the revocation of a patent granted to another firm. The question was the formation and the process of the working of a certain stove, owned and used by the firm to which the letters patent had been granted for the purpose of manufacturing *banslochan*. A vakil was tendered in evidence by the applicant for the revocation. This vakil had been employed by the

Privileged Communication—(Concluded).

other firm to defend them against a charge of creating a nuisance by smell in the preparation of *banslochan*. In his capacity as vakil, the witness, at their invitation, visited the premises, in order to make himself acquainted with the stove, which it was alleged created the nuisance. The knowledge, which the witness had acquired as to the formation and process of the working of the stove, was acquired in the course of his employment:—*Held* that the evidence was not admissible. It is immaterial that a communication is verbal, that is to say, by word of mouth or by demonstration, and it is excluded by the rule of professional privilege. *Gopi Lal v. Lakhpat Rai*, 16 A.L.J. 987.

PIGGOTT and WALSH, JJ.

(2) Master and servant—Communication by servant to his co-employees of suspicion of being poisoned at the instigation of master—Communication made in self-interest but *bona fide* and without malice—Such imputation of crime, if actionable. See SLANDER, No. 1, 35 M.L.J. 673.

Privileges.

Defamatory statements made by party in petition to Criminal Court—Civil action for damages for libel—Statements absolutely privileged. See DEFAMATION, No. 1, 16 A.L.J. 360.

Privity of Contract.

Action for money had and received—Privity of contract between parties if and how far necessary to sustain such action. See MONEY HAD AND RECEIVED, No. 1, 35 M.L.J. 581.

Probate.

Will revoked by later will—Person entitled to greater benefit under revoked will if entitled to oppose grant of probate of later will—Probate of earlier will if necessary to entitle him. See WILL, No. 4, 22 C.W.N. 564.

Probate and Administration Act (V of 1881).

(1) *Delay in taking out probate of a will, if justified by circumstances and reasons—Probate applied for on necessity arising.*

Where a long time elapsed between the death of the testatrix and the date on which the will was put forward for probate and a testatrix was an illiterate Hindu lady, the prior history of the case was worthy of consideration. When there were reasons for the delay in propounding the will, although in such a case the Court was bound to scrutinize the evidence very carefully, there was no rule of the law of evidence that such a will was incapable of being proved. *Binodini Debby v. Hriday Nath Ghoshal*, 22 C.W.N. 424=45 Ind. Cas. 177.

FLETCHER and NEWBOULD, JJ.

(2) *S. 5—"Deposited in Court," meaning of—Will proved in French Court and kept with Notary if deposit within the meaning of section—Copy given by Notary if*

Probate and Administration Act (V of 1881)
—(Continued).

authenticated copy within the meaning of section.

A French subject of Chandernagore executed a mystic will according to the French Code. On his death a general legatee applied to the Court of Chandernagore for having the Will deposited according to the French Law. After the usual proceedings were taken the French Court recognised the Will and made it over to a Notary with power to give copies to the parties. The trustees under the Will applied to the District Judge of Hughly for Letters of Administration with a copy of Will annexed :
held—That S. 5 of the Probate and Administration Act does not require that the Will should have been deposited once and remain in Court for all time. The fact that the Will was deposited in the French Court and the Court had before it the original Will at the time it made a judicial pronouncement as to the validity of the Will under the French Law was a sufficient deposit within the meaning of S. 5.
That the French Court having so provided, a copy authenticated by the notarial seal was a properly authenticated copy within the meaning of S. 5. *Sushilabala Dasal v. Anukul Chandra Choudhury*, 22 C.W.N. 719=44 Ind. Cas. 166.

FLETCHER and SHAMSUL HUDA, JJ.

(3) Ss. 8 and 9—*Some of the executors under the Will obtain grant of probate—Subsequently some others apply—Application of S. 9 of the Act.*

Where a number of persons were appointed executors of a Will and only some of them first obtained a grant of probate, and subsequently some of the remaining executors applied to be joined in the grant, *held*, that as no citation calling upon the subsequent applicants to accept or renounce their executorship was ever issued, it was a case to which S. 9 of the Probate and Administration Act is strictly applicable. *Pearl Lal Das v. Bepin Behari Das*, 45 Ind. Cas. 336.

TEUNON and NEWBOULD, JJ.

(4) S. 9. See No. 3, *supra*.

(5) S. 23—Person entitled to letters, who is. See **BUDDHIST LAW (ADOPTION)**, No. 1, 9 L.B.R. 163.

(6) S. 23—Rival applicants for Letters of Administration—Status of one applicant only admitted—Letters to be given to him or his legal representative. See **LETTERS OF ADMINISTRATION**, No. 3, 9 L.B.R. 174.

(7) Ss. 23 and 41—*Proceedings under, Object of—Adoption, Question of, not to be entered into in—Letters of Administration, Grant of, to minor, to sister.*

The object of proceedings under the Probate and Administration Act is to determine the question of representation of the deceased for the purpose of administering the estate, and not to determine questions of inheritance. The

Probate and Administration Act (V of 1881)
—(Continued).

Court should not enter into questions of adoption in such proceedings (a).

Letters of Administration cannot be granted to a minor.

In a case of intestacy Letters of Administration might be granted to a sister. *Ma Shan Ma Byu v. Ma Chit Saw*, 10 Bur. L.T. 184 =44 Ind. Cas. 138.

FOX, C.J. and ORMOND, J.

Reference :—(a) 5 L.B.R. 75 (73), *F*.

(8) S. 34—*Position of Administrator pendente lite—Fowers of Court.*

The position of an Administrator *pendente lite* in a probate proceeding is closely analogous to that of a Receiver appointed in a partition suit, and S. 34 of the Probate and Administration Act gives ample power to the Court to direct the Administrator *pendente lite* to do such acts as may be necessary in the interests of the several parties to the proceedings.

Where by a will the widow of the testator was given a very inadequate maintenance and the two minor sons were given shares in the estate which were considerably smaller than what would fall to their lot under the ordinary law of inheritance, *held* that proper provision should be made to afford opportunity for the widow to contest as to the proper execution of the will on her own behalf and on behalf of her minor sons. *Gour Mohi Dasal v. Borada Kanta Jana*, 44 Ind. Cas. 657.

TEUNON and NEWBOULD, JJ.

(9) S. 41. See No. 7, *supra*.

(10 & 11) S. 50 — *Letters of Administration, whether can be granted in respect of part of estate—Probate Court, duty of—Revocation to grant—Minors—Compromise, whether binding on minors—Guardian acting illegally—Minor, whether can repudiate act of guardian—Estoppel.*

The Probate and Administration Act contains no provision for granting Letters of Administration in respect of only a part of the testator's estate.

An executor, who has been appointed by the testator for the administration of a particular fund, is competent to take out Probate limited to that particular fund, but where there is no discretion as to any particular fund, and where the applicants apply in their capacity as heirs, there is no provision in law which empowers the Court to refuse administration of the whole estate and to limit it to a fractional undivided portion thereof.

In a Probate proceeding, the Court has no concern with a devolution of the property. The only issue before it is whether the Will has been proved to be genuine and duly executed. It can record a contract or agreement made between the parties in consideration of the withdrawal of the caveator's objection, but it is wholly powerless to enforce such contract or agreement.

Probate and Administration Act (Y of 1881) —(Concluded).

It is always open to a minor to repudiate the Act of his guardian if it can be shown that the act was clearly illegal.

The father of certain minors applied, as their guardian, for Letters of Administration with the Will annexed in respect of a moiety of an estate to which the minors were entitled under the Will. The devisee of the other half of the estate filed a caveat, but a compromise was made whereby the guardian of the minors was allowed to take Letters of Administration in respect of a quarter of the estate. The Letters were actually taken out by one of the minors who had attained majority and who acted as the natural guardian of the others. The minors subsequently applied for revocation of the Letters:

Held, (1) that the Will having been proved and the objection having been withdrawn, it became the duty of the Court to grant Probate or Letters of Administration, as the case might be, in respect of the whole of the estate;

(2) that if the guardian of the minors was not willing to administer the whole estate, the application should have been dismissed altogether;

(3) that no ratification by the minor who had attained majority could bind the other minors who were entitled to the protection of the Court;

(4) that the order of the District Judge granting Letters of Administration in respect of one-quarter of the estate was illegal, and there was just cause for revocation within the meaning of S. 50 of the Probate and Administration Act, *Sarada Prasad Tej v. Triguna Charan Roy*, 46 Ind. Cas. 117 = 8 Pat. L.J. 415.

MULLICK and ATKINSON, JJ.

Reference:—1 Pat. L.J. 377, R.

(12) S. 50—Dismissal of administration suit on ground of limitation—Subsequent application for revocation of letters if barred as *res judicata*. See *RES JUDICATA*, No. 46, 9 L.B.R. 273.

(13) S. 98 (1)—*Furnishing annual accounts by executor, not provided for*.

The provisions of S. 98 (1) of the Probate and Administration Act do not require the executor of the Will to submit accounts annually to the District Court and the order to furnish them is not valid. *Jagat Durlaw Mazumdar v. Iodu Bhushan Mazumdar*, 44 Ind. Cas. 58.

TEUNON and NEWBOULD, JJ.

(14) S. 128—Right of legatee of specific legacy to clear produce thereof—Interest. See *WILL*, No. 9, 7 L.W. 513.

Probate Proceedings.

Probate Court, final order of, as to due execution of Will, effect of—Competency to contest its validity otherwise. See *RES JUDICATA*, No. 40-a, 122 P.W.R. 1917.

Professional Misconduct.

(1) Suspicion of, in conduct of pleader conducting cases—Case to be decided on merits—Question of professional conduct to be taken up after disposal of suit. See *CIV. PRO. CODE* (1908), No. 238, 16 A.L.J. 64.

(2) Conviction of pleader for keeping gaming house—Offence relates, to character—Pleader unfit for profession. See *LEGAL PRACTITIONERS ACT* (1879), No. 1, (1918) M.W.N. 847.

Profession Tax.

Munif if can be said to follow profession in the popular sense of term. See *PUN. ACT III OF 1911 (MUNICIPALITIES)*, No. 1, 74 P.L.R. 1918.

Profit a prendre.

In gross, Acquisition of. See *FISHERY*, No. 2, 14 N.L.R. 35.

Profits.

Transfer of a right to, of a village actually accrued due, an assignment of debt, not a transfer of a mere right to sue. See *TRANSFER OF PROPERTY ACT* (1882), No. 4-a, 47 Ind. Cas. 634.

Prohibitory Order.

Purchase of original mortgage-debt at execution sale by sub-mortgagee under his decree—Prohibitory order issued at his instance if precludes him from claiming interest due on mortgage. See *MORTGAGE (GENERAL)*, No. 15-a, 21 O.C. 400.

Promissory Note.

(1) Sale of land—Promissory note as part consideration—Dispute regarding title of land in question—Suit on pro-note—Conditional decree—Validity.

Where a purchaser of land gave to the vendor a pro-note as part of the consideration and where a suit was filed against the purchaser by a third party claiming the land in question, *held* that the purchaser was equitably entitled to be protected by a conditional decree in a suit brought by the vendor of the land on the pro-note as the vendor's title to the land was in jeopardy in another suit. *Paramasivam Pillai v. Subbaya Nadar*, 43 Ind. Cas. 551.

SPENCER and SRINIVASA AYYANGAR, JJ.

References:—*Milligam v. Cooke*, (1808) 33 E.R. 884, *Appr.*

(2) Pledge of, Validity of.

A promissory note may be the subject of a pledge. *Mama Bros. v. Sallayjee*, 46 Ind. Cas. 609.

YOUNG, J.

(3) By executor, suit on—Executor's right of indemnity—Creditor's right of subrogation—Whether can be enquired into when not expressly pleaded. *Ammalu Ammal v. Nannaghi Ammal*, 23 M.L.T. 391 = 83 M.L.J. 631 = 6

Promissory Note—(Concluded).

L.W. 722—(1916) M.W.N. 110—48 Ind. Cas. 760. See Final Part, 1917, Col. 759.

(4) *Portion of amount due not transferable by endorsement—Negotiable Instruments Act (XXVI of 1881), S. 56.*

Held, that the object of S. 56 of the Negotiable Instruments Act, XXVI of 1881, is simply to prevent a promissory note from being transferred for a portion only of the sum at the time due thereon, but there is no bar to endorsing over or transferring whole of the balance payable under it. *Jai Chand v. Sardar Singh*, 150 P.L.R. 1917=5 P.W.R. 1918=44 Ind. Cas. 264.

JOHNSTONE, C.J.

(5) *Document in which no date for payment is fixed* *is a*. See ACT II OF 1910 (PAPER CURRENCY), (1918) M.W.N. 177.

(6) *Execution of promissory note by two promisors—Promisor a benamidar for one promisor—Suit by promisee on note if maintainable.* See BENAMI TRANSACTIONS, No. 5, 24 M.L.T. 592.

(7) *Executed in Nizam's territories with British stamp affixed thereto—Right of suit on such note in British Courts.* See JURISDICTION (GENERAL), No. 9, 20 Bom. L.R. 464.

Property Protection Act.

See ACT XIX OF 1841.

Proprietary Estates Village Services.

See MAD. ACT II OF 1894.

Proprietary Rights.

Acquisition by grove-holder of superior proprietary rights through inheritance—Auction sale of superior proprietary rights to third person—Auction sale whether affects also rights of grove-holder in grove. See VENDOR AND PURCHASER, No. 9, 21 O.C. 263.

Provincial Insolvency Act (III of 1907).

(1) *Ss. 3, 43, 46—Subordinate Judge invested with jurisdiction under S. 3 declines to take action under S. 43 (2) against insolvent—Whether appeal lies to District Judge against the order under S. 46—Creditor, if an aggrieved person.*

The appellant was adjudicated an insolvent by a Subordinate Judge invested with jurisdiction under the proviso to S. 3 of the Provincial Insolvency Act and thereafter certain creditors of the insolvent made applications before the Subordinate Judge to the effect that the insolvent had concealed certain properties and prayed that he should be punished under S. 43 (2). The Subordinate Judge after hearing the creditors and the insolvent rejected the applications, whereupon some of the creditors applied to the District Judge who, after examining witnesses on both sides, sentenced the insolvent to three months' simple imprisonment.

Held, per Tushnet, J.—The orders made by the Subordinate Judge, while he has seisin of

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the case, could be interfered with by the District Court only under the provisions of S. 46, which, in the matters therein dealt with, subordinates all other Courts to the District Court or under the powers conferred by the Code of Civil Procedure in regard to civil suits as provided in S. 47.

That no appeal lay against the order of the Subordinate Judge declining to take action against the insolvent under S. 43 (2) (a).

Per Newbould, J.—The word "Court" in S. 43 of the Act does not mean the Court of original jurisdiction only, and the District Judge's order in this case was an original and not an appellate order. *Digendra Chandra Basak v. Ramani Mohan Goswami*, 22 C.W. N. 958.

TEUNON and NEWBOULD, JJ.

Reference :—(a) 40 M. 630, F. and Dist.

(2) *S. 5—Petition to be declared insolvent—Dismissal of petition, grounds for—When petition should be granted.*

The mere fact that a petitioner in insolvency has transferred his houses to his son, is no ground whatever for refusing to declare him an insolvent if he fulfils all the conditions laid down in the Act. *Ram Rakha Mal v. Nasar Mal*, 52 P.R. 1918=127 P.L.R. 1918=46 Ind. Cas. 435.

SHAH DIN, A.C.J.

Reference :—44 C. 535, F.

(3) *Ss. 5, 15, 16—Application to be adjudicated insolvent—Rejected as premature—Order illegal.* *Net Ram v. Bhagrat*, 15 A.L.J. 885=40 A. 75=43 Ind. Cas. 160. See Final Part, 1917, Col. 26.

(4) *S. 6 (3)—Petitioner to be declared insolvent—Dismissal of petition on the ground that petitioner was well able to pay his debts and that his intention was to defraud creditors—Material irregularity—Revision.*

The petitioner alleging that his liabilities amount to Rs. 3,450 while his assets were only Rs. 1,580, applied to be declared an insolvent. It also appeared that he had been arrested in execution of a decree for the payment of money. His application was dismissed on the ground that he was well able to pay his debts and that his intention was really to defraud his creditors. *Held* that, as the debts of the petitioner amounted to more than Rs. 500 and as he had been arrested in execution of a decree, he was entitled to present an insolvency petition under cls. (a) and (b) of S. 6 (3) of the Provincial Insolvency Act, and that the Courts below acted with material irregularity by not granting the petition (a). *Mehr Singh v. Dayanand College*, 27 P.R. 1918=116 P.L.R. 1918=49 P.W.R. 1918=44 Ind. Cas. 850.

BROADWAY, J.

References :—(a) 28 P.R. 1915; 11 Ind. Cas. 745, F.; 7 Ind. Cas. 39, 691 (694); 39 Ind. Cas. 745 and 199; 6 Ind. Cas. 870, R.

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- (5) Ss. 6, 15, 16—*Petition for insolvency—Petitioner examined and evidence taken—Case adjourned—Petitioner absent on adjourned date—Petition dismissed for want of prosecution—Order illegal.*

On a debtor's petition of insolvency presented under S. 6 (3) of the Provincial Insolvency Act, the duty laid upon the Court, after completing the necessary enquiries, is to come to a decision on the various matters spoken of in S. 15 and either to dismiss the petition or to make an order of adjudication. There is no warrant in the Act for dismissing such a petition for want of prosecution, if the debtor does not appear on a subsequent date, when the Court, on a previous date, had examined the petitioner and taken some evidence. *Lakshminarain Dube v. Kishun Lal*, 16 A.L.J. 703=40 A. 665=46 Ind. Cas. 733.

BANERJI and PIGGOTT, JJ.

- (6) S. 15. See Nos. 3 and 5, *supra*.

- (7) S. 16—*Insolvent's right to sue after adjudication—Whether he has any right of suit for property acquired after adjudication and before Official Receiver's intervention.*

A person who is an undischarged insolvent at the date of suit has no right to sue, even if the Official Receiver's permission is given. When property becomes vested in the Official Receiver under S. 16 of the Provincial Insolvency Act, the insolvent is *ipso facto* divested of the same, and has no vested interest until restored after administration.

Obiter.—The right to sue in respect of property acquired after adjudication and before the intervention of the Official Receiver appears to be for the protection of third parties dealing with him *bona fide* and for value. *Subbaraya Chettiar v. Papathi Ammal*, (1918) M.W.N. 289=7 L.W. 516=46 Ind. Cas. 239.

AYLING and PHILLIPS, JJ.

References:—3 B. 437; 22 Ind. Cas. 687; 23 Ind. Cas. 813, *F.*; 30 M. 145, *Dist.*; 31 M. 493, *R.*

- (8) S. 15 (2), cl. (a)—*Civ. Pro. Code (Act V of 1908), S. 60—Application praying half salary of insolvent be attached rejected—Rejection of application illegal.*

When an appropriation of the income of an insolvent is made for the benefit of creditors, the Court usually acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for his proper maintenance according to his position in life. The statute-law of this country fixes this amount by S. 60 of the Civ. Pro. Code read with S. 16 (2) of the Provincial Insolvency Act. Consequently an order, rejecting a creditor's application praying for the attachment of half the salary of an insolvent on the mere ground that his

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pay is not large enough to allow half of it being attached, is illegal. *Devi Prasad v. J. A. H. Lewis*, 16 A.L.J. 107=40 A. 213=48 Ind. Cas. 984.

RAFIQ, J.

References:—18 C.W.N. 1052; 38 Ind. Cas. 410, *F.*

- (9) Ss. 16, 18—*Court has no power to call upon insolvent's debtor to deposit amount due before proceeding under S. 16 or 18 of the Act.*

Where a party applied to be declared an insolvent, under the Provincial Insolvency Act, the Court, without making any order of adjudication under S. 16, or for the appointment of a Receiver under S. 18 of the Act, directed a debtor of the insolvent to deposit the amount alleged to be due to him, *held*, that the order was *ultra vires* and should be set aside. *Ganpat Wanjarl v. Amrita*, 44 Ind. Cas. 537:

STANYON, A.J.C.

- (10) Ss. 16 (e), 18 (3)—*Property alleged to be held by stranger in benami for insolvent if may be recovered without suit—Judge's power to order inquiry by Receiver.*

Where a creditor of an insolvent alleged that certain Government promissory notes were being held by insolvent's brother in *benami* for the insolvent and the insolvent's brother denied that the insolvent had any title to the Government promissory notes and alleged that they were his own property; and the Judge called for a report on the matter from the Receiver:

Held that it was open to the Judge to direct the Receiver to enquire and report to him for his own information.

That, on receipt of such report, it was for the Judge to consider whether, upon the facts before him, he should direct the Receiver to bring a suit in order that the question of title may be decided, or whether the case is so clear (that is to say, the title is not really in dispute) that it can be dealt with in the insolvency without the necessity of a suit. If the question of title be seriously in dispute, the Judge should direct the Receiver to bring a suit to have the question determined. *Satya Kumar Mukerjee v. The Manager, Benares Bank, Ltd.*, 22 C.W.N. 700=46 Ind. Cas. 335.

WALMSLEY and GREAVES, JJ.

Reference:—37 A. 65, *R.*

- (11) Ss 16 (6), 36—*Voluntary transfer—Order of adjudication—Relating back.*

By virtue of S. 16 (6) and S. 36 of the Provincial Insolvency Act the order of adjudication relates back to and takes effect from the date of presentation of the petition for adjudication so as to avoid voluntary transfers made

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within two years before the presentation of the petition *Sankaranarayana Aiyar v Alagiri Aiyar*, 24 M. L. T. 149 = 35 M. L. J. 495 = 8 L. W. 281 = (1918) M. W. N. 487.

OLDFIELD and SARDASIVA AIYAR, JJ

References — 12 C 289; 2 Pat D J 101, dissented from.

(12) S. 16 See Nos. 3 and 5, *supra*

(13) S. 18—*Decree obtained by insolvent before bankruptcy—Attachment of decree by decree holder of insolvent before bankruptcy—Whether such decree holder can execute decree—Effect of vesting order Dambhar Singh v Munawar Ali Khan*, 15 A. L. J. 877 = 40 A. 86 = 43 Ind. Cas. 129 See Final Part, 1917 Col. 31

(14) S. 18 (3)—*Creditor alleging property of insolvent being kept in Benami by his wife—Court may summarily enquire into allegation—Proper procedure—Court to authorise Receiver to sue on creditor putting him in funds and indemnifying him for costs.*

Where a creditor of an insolvent applied to the District Judge complaining that the insolvent had concealed certain properties by having them vested in the name of his wife and prayed that certain persons and the insolvent and his wife be examined in regard to the matter

Held—That such a summary inquiry is not supported by any provision of the Provincial Insolvency Act; and the Judge was right in refusing to order such an inquiry. But the creditor could not be told to bring a suit for title against the alleged *benamidar*. The proper procedure was for the creditor to apply to the Court to direct the Receiver to institute and continue a suit against the wife of the insolvent to recover the property in question making it a condition precedent that the creditor so applying put the Official Receiver in funds and properly indemnifying him against the costs of the suit, and the Court should make such an order if in its opinion the creditor has a *prima facie* case. *Joy Chandra Das v Mahomed Amir*, 22 C. W. N. 701 = 44 Ind. Cas. 143.

FLETCHER and N. R. CHATTERJEE, JJ.

(15) Ss. 18 (3) and 20—*Transfer by insolvent challenged as benami—Judge if may order transferee to be dispossessed without suit—Judge if may direct Receiver of insolvent's properties to hold a judicial inquiry—Receiver may report administratively—Judge when he directs a suit should order creditor to put Receiver in funds and indemnify him.*

Where a transfer, dated the 16th March, 1913, by a person who was adjudicated an insolvent on 11th February, 1916, having been attacked in the interest of his creditors as *benami*, the Judge ordered the Receiver appointed to take over the insolvent's properties (who

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was not the Official Receiver appointed by the Local Government under S. 19 of the Provincial Insolvency Act) to enquire and report, and the Receiver after holding an enquiry of a judicial character submitted his report, which however the Judge did not accept but directed the inquiry to be re-opened in Court

Held—That the duties of an ordinary Receiver under S. 20 of the Act are executive in their character and the Receiver is not a Judicial Officer and has no jurisdiction to make anything in the nature of a judicial inquiry.

S. 18 (3) of the Act is not intended to authorise the removal of any person whom the insolvent himself could not remove without the aid of legal proceedings.

When the *benami* character of the title is admitted or when the veil is transparent, and the insolvent is in substantial beneficial possession, the Court may order the delivery of the property to the Receiver. But where the alleged *benamidar* is in possession claiming adversely to the insolvent, then any claim made by the Receiver or the creditor that the property is really the property of the insolvent can only be enforced by suit in the regular Courts

The Court may direct an administrative inquiry by the Receiver for the purpose of informing his mind and deciding what action should be taken, and if in the result he is of opinion that a suit should be brought, he should make the order on terms requiring the creditor at whose instance the suit is directed to put the Receiver in funds and indemnify him against the costs of the suit. *Nilmoni Choudhury v. Durga Charan Choudhury*, 22 C. W. N. 704 = 46 Ind. Cas. 377

RICHARDSON and WALMSLEY, JJ

References — 37 A. 65, 15 C. W. N. 253, 22 C. W. N. 335, 24 C. W. N. 700, 702, 39 A. 683, R.

(16) Ss. 19 (3), 20 22 and 47—*Official Receiver, sale by—Application by purchaser to remove obstruction by third party—Jurisdiction of Court to remove obstruction—Suit to set aside order—Maintainability—Frame of suit—Civ. Pro. Code, O. XXI, rr. 97, 98.*

An order passed by the District Court on the application by a purchaser of the insolvent's property from the Official Receiver directing a third party claiming title to the property, to deliver possession of the same to the purchaser is without jurisdiction. Neither S. 47 of the Provincial Insolvency Act nor O. XXI, rr. 97 and 98, Civ. Pro. Code, have any application to such an order (a).

A suit by the party in possession against the purchaser to establish his right is maintainable (b)

Per *Bakewell, J*—S. 18, cl. 3 of the Provincial Insolvency Act is not intended to confer

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jurisdiction over a person against whom the insolvent had merely a right enforceable by a suit.

Per *Bakewell, J.*—The decision of the District Judge in the proceedings in insolvency is not binding in the suit.

Per *Krishnan, J.*—Under S. 18, cl. (3) of the Act, the Court has power in a proper proceeding instituted before it by the Receiver, to enquire into and decide on the merits of an adverse claim for possession set up by a third party. But a purchaser from the Receiver cannot come in under S. 18, cl. 3.

Per *Krishnan, J.*—It may be that it was open to the third party to have the order set aside by the High Court, but he was not bound to do so and hence the suit is not barred. The fact that the third party did not plead to the jurisdiction would not give that Court jurisdiction nor would it amount to an election by him.

The cause of action for such a suit is the threat of the defendant to obtain possession of property by irregular proceedings and the prayer of the plaint should be for a declaration of plaintiff's title and for an injunction. *Maddipati Peramma v. Gaudrapu Krishnayya*, 8 L.W. 136=24 M.L.T. 106=(1918) M.W.N. 479=47 Ind. Cas. 308.

BAKEWELL and KRISHNAN, JJ.

References:—(a) 6 L.W. 694, R. (b) 40 M. 1173; 39 A. 626, Dis.

(17) S. 18. See Nos. 9 and 10, *supra*.

(18) S. 20. See Nos. 15 and 16, *supra*.

(19) S. 22—Insolvency—Property taken by Receiver as insolvent's property—Objection of third person claiming title thereto—Court's decision that property belongs to insolvent—Suit by third person—Suit maintainable.

Where, a plaintiff does not complain of any Act of the Receiver in insolvency, but complains that the Court executing the decree, held by a certain person against certain insolvents, disallowed her objection and decided that the property attached belonged to the insolvents and not to her, held that the suit is not barred by S. 22, Provincial Insolvency Act. *Mohini v. Balj Nath*, 16 A.L.J. 456=40 A. 582=46 Ind. Cas. 394.

RICHARDS, C.J. and BANERJI, J.

References:—15 A.L.J. 49, F.; 36 A. 8, Dis.

(20) S. 22—Power of District Court to interfere with contract made by Receiver. See CIV. PRO. CODE (1908), No. 349, 7 L.W. 406.

(20 a) S. 22—Application under, by third person for property taken possession of by Receiver—Limitation for—Meaning of "aggravated." See LIMITATION, No. 11, 47 Ind. Cas. 62.

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(21) Ss. 22, 23—Civ. Pro. Code (Act V of 1908), S. 11—Evidence Act, S. 41—Claim to property attached by Receiver in insolvency—Adjudication by Insolvency Court—Subsequent Civil suit for same relief, bar of. *Pitaram v. Jujhar Singh*, 33 Ind. Cas. 798=15 A.L.J. 661=39 A. 626=43 Ind. Cas. 573, See Final Part, 1916, Col. 47 and Final Part, 1917, Col. 32.

(22) S. 22. See No. 16, *supra* and No. 37, *infra*.

(23) S. 23—Attachment of property—Judgment-debtor subsequently adjudicated insolvent—Attachment imperative.—Property vests in Receiver—Locus standi to maintain appeal.

After an adjudication in insolvency, an attachment of property though made before the adjudication, ceases to have any effect, and the property of the insolvent vests in the Receiver who is the person to maintain all proceedings.

Where no Receiver is actually appointed the Court is the Receiver under S. 23 of the Provincial Insolvency Act. *Gobind Das v. Karan Singh*, 16 A.L.J. 32=40 A. 197=43 Ind. Cas. 672.

RICHARDS, C.J. and BANERJI, J.

(24) S. 23. See No. 31, *supra*.

(25) Ss. 24, 26, 36—Official Receiver, framing of schedule by—Nature of enquiry held before framing schedule—Order of Receiver, if final—Subsequent application by Receiver to expunge name of creditor previously entered—Court if may entertain application.

The power delegated to the Official Receiver under the provisions of the Provincial Insolvency Act, is to frame the schedule after an *ex parte* examination of the evidence tendered by the alleged creditors, and, in doing so, he does not decide judicially or finally upon contested claims. Where an Official Receiver upon the claim of the creditor of an insolvent to rank as a secured creditor under an hypothecation bond, disputed by another creditor, decided that the bond was supported by consideration, but his successor in office impeached the transaction notwithstanding this decision, held that the action of the Official Receiver amounted only to an entry of the name of the creditor in the schedule of creditors under S. 24 and did not preclude the Court from entertaining an application by the Receiver under Ss. 26 and 36 to expunge the entry of the creditor's name from the schedule. *S. K. Mohideen Kadirahaw Maralkar v. The Official Receiver, Tanjavely*, 41 M. 80=45 Ind. Cas. 67.

OLDFIELD and BAKEWELL, JJ.

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(26) S. 26. See No. 25, *supra* and No. 37, *infra*.

(26-a) Ss. 34, 35 and 47—*Applicability of Ss. 34 and 35—Sum due by District Board to debtor, Attachment of, before judgment—Insolvency petition, Filing of, by debtor—Decree in suit and precept directing payment by District Board to decree holder—Injunction to stop payment, Validity of—Injunction, Conditions necessary for issue of—Civ. Pro. Code (1908), O. XXXIX, r. 1.*

In a suit instituted by the appellant against the respondent in August 1916, the amount in the hands of the District Board was attached on 25th September 1916 before delivery of judgment. On the 2nd June 1917 the appellant got his decree and on the 6th in execution of the decree a precept was issued directing the District Board to pay over to the decree-holder the amount in deposit at the credit of the debtor and the precept was received by the District Board that very day. In the meanwhile, the respondent filed, on the 13th April 1917, an insolvency petition before the District Judge, and having applied on the 17th June 1917 to the District Judge for an order of injunction directing the District Board to stop payment, an injunction was issued as prayed for. In an appeal by the objector against the order of injunction:

Held—(1) That the order upon the District Board was without jurisdiction, inasmuch as (i) no injunction could issue against a person not a party to the proceeding and (ii) as also the circumstances enumerated in r. 1 of O. XXXIX of the Civ. Pro. Code (1908) as requisite for the issue of an injunction did not exist (a).

(2) that justice, equity and good conscience did not warrant the decree-holder, who had instituted his suit long before the insolvency petition was filed, should be kept out of his money (b).

(3) that Ss. 34 and 35 of the Insolvency Act had nothing to do with the present case where no adjudication of insolvency had been made nor a Receiver appointed, and

(4) that, from the time the District Board was directed to pay the money to the decree-holder, the money became the decree-holder's money and the District Board mere trustees on behalf of the decree-holder (c). *Ram Sunder Rai v. Ram Dheyam Ram*, 8 Pat. L.J. 456—46 Ind. Cas. 224.

MULLICK and THORNHILL, JJ.

References:—(a) 11 O.L.J. 435, Dist. (b) 15 A.L.J. 479, approved. (c) 16 Ind. Cas. 84, Dist.

(26-b) S. 35. See No. 26-a, *supra*.

(27) S. 36—*Proceeding questioning transfer*
—*Onus*.

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In a case arising under S. 36 of the Provincial Insolvency Act, the burden of proving that the transaction impugned was carried out in good faith and for valuable consideration is on the transferee (a). *Basiruddin Thanadar v. Mokima Bibi*, 22 C.W.N. 709—44 Ind. Cas. 916.

RICHARDSON and BEACHROFT, JJ.

References:—(a) 19 C.W.N. 865; 39 A. 95, R.

(28) S. 36—*Annulment of a transfer—Notice to transferee necessary*.

When a question arises whether a transfer should or should not be annulled under S. 36, it is requisite that the transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity to put his case before the Court. *Jugalpada Dutt v. Ganesh Chandra Pal*, 44 Ind. Cas. 169.

RICHARDSON and BEACHROFT, JJ.

(29) S. 36—*Applicability of section to transfer made two years before adjudication of insolvent*.

Where transfer of property is made more than two years before the transferor was adjudicated an insolvent, S. 36 of the Provincial Insolvency Act has no application. *Amina Khatun v. Nafar Chandra Pal Choudhury*, 45 Ind. Cas. 180.

TEUNON and NEWBOULD, JJ.

(30) Ss. 36, 37, *Applicability of—Mortgage of insolvent's property, validity of—Bona fide transfer for valuable consideration*.

N mortgaged certain property to C, and absconded immediately after the registration of the mortgage-deed. On the petition of his creditors, he was declared an insolvent. The Receiver in insolvency applied to have the mortgage to C declared void and fraudulent, under Ss. 36, 37 of the Provincial Insolvency Act.

Held, (1) that the mortgages not being a previous creditor, S. 37 of the Provincial Insolvency Act had no applicability to the case;

(2) that under S. 36 of the Act the mortgagee was entitled to show that he was a bona fide purchaser for valuable consideration. *Girdhari Lal v. Sarab Kishan*, 188 P.W.R. 1918—46 Ind. Cas. 667.

SCOTT-SMITH, J.

(31) S. 36. See Nos. 11 and 25, *supra*.

(32) S. 37. See No. 30, *supra*.

(33) Ss. 43, 44, 53—*Court's powers under S. 43 to punish insolvent for misconduct if should be invoked only at stage of discharge*.

The ordinary procedure contemplated by the Act no doubt is that a debtor should, after he

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has been adjudicated an insolvent and his assets have been dealt with, apply for a discharge and be discharged; and where an application for discharge is made, that is the proper time to punish misconduct by a debtor. But it is going too far to say that the insolvent cannot be punished for dishonesty if he fails to apply for his discharge. Under S. 43 of the Provincial Insolvency Act, the Court's powers in this matter can be put in motion at any time by a creditor and the Court is then bound to consider whether the debtor has made false entries in the inventories or lists or committed any of the other wrongful acts set out in that section. *Ko Bela Wa v. District Court*, U.B.R. 1918, 3rd Qr., p. 97.

SAUNDERS, J.C.

Reference:—10 Bur. L.T. 25, *Dist.*

(34) S. 43. See No. 1, *supra*.

(35) S. 44. See No. 33, *supra*.

(36) S. 46—*Appeal under section—Application of S. 5 of Act IX of 1908—Review when sufficient cause.*

Held, that the provisions of S. 5, Limitation Act (1908), apply in computing the period prescribed for an appeal under S. 46, Provincial Insolvency Act. Although the Provincial Insolvency Act is a special law within the meaning of S. 29 of the Limitation Act, yet, as it is not in itself a complete Code, there is nothing to prevent the application thereto of the general provisions of the Indian Limitation Act, which do not affect or alter the period prescribed by a special law, but only the manner in which that period is to be computed (a).

Held, also, that the time occupied in prosecuting a review is to be excluded under S. 5, Limitation Act, if the appellate Court considers that there was a ground for review, and the review proceedings were sufficient cause within the meaning of S. 5, Limitation Act. *Waryam Singh v. Wadhava*, 88 P.W.R. 1918—87 P.L.R. 1918—89 P.R. 1918—46 Ind. Cas. 588.

SCOTT-SMITH, J.

References:—(a) 34 A. 496, *F.*; 35 A. 410, *Dist.*

(37) Ss. 46 (1), 22, 26 (2)—*Appeals under the Act—Last day for preferring appeal being dies non—Computation of period fixed for appealing. Principles governing—General Clauses Act, Ss. 9, 10—Petition to District Court against Official Receiver's order, if appeal—Limitation Act, S. 4.*

S. 46, cl. 4, merely declares that ninety days shall be the period of limitation for appeals to the High Court, without specifying the method of computing that period.

Though S. 9 of the General Clauses Act does not directly apply to S. 46 of the Provincial

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Insolvency Act, the Courts must apply the general principle contained in S. 9, under which the day, on which the act appealed against is done, is to be excluded.

If the period of ninety days, fixed for appeals by S. 46 of the Provincial Insolvency Act, expires on a *dies non*, then it must be excluded under S. 10, General Clauses Act, and it is unnecessary to resort to S. 4 of the Limitation Act for this purpose.

An application to the District Court to take action under S. 26, cl. (2) of the Provincial Insolvency Act, not being an appeal against any order passed by the Official Receiver, is not governed by the 21 days rule in S. 52 of the same Act. *Chavadi Ramasamia Pillai v. Venkateswara Aiyar*, 35 M.L.J. 531.

SPENCER and KRISHNAN, JJ.

(38) Ss. 46, 47—*Appeal in insolvency proceedings—Memorandum of objections. Respondent's right to file—Appeal out of time—Memorandum of objections if barred also—Civ. Pro. Code, O. XLII, r. 22.*

A respondent is entitled to file a memorandum of objections in an appeal against a decision under the Provincial Insolvency Act (a).

Such a memorandum of objections cannot be heard after the appeal is dismissed as presented out of time (b). *Alagappa Chettiar v. Chokkalingam Chetty*, 35 M.L.J. 236—24 M.L.T. 137—(1918) M.W.N. 688—8 L.W. 240—41 M. 904.

WALLIS, C.J., SADASIYA AIYAR and SPENCER, JJ.

References:—(a) 29 B. 514, *R.* (b) 10 A. 587, *Appr.*; 19 M.L.T. 86, *overruled*.

(39) S. 46. See No. 1, *supra*.

(40) S. 47, *scope and extent of—If empowers Judge sitting in Insolvency to decide by a summary proceeding. questions of title—Order by Judge directing delivery of possession of property to Official Receiver's vendee—If can be justified as one made in execution—Official Receiver—Status and powers of. Guntapalli Narasimhaaya v. Malapati Veeravaghavulu*, 6 L. W. 694—(1917) M.W.N. 857—41 M. 440. See Final Part, 1917, Col. 41.

(41) S. 47. See Nos. 16 26-a and 38, *supra*.

(42) S. 53. See No. 33, *supra*.

Provincial Small Cause Courts Act (IX of 1887).

(1) Ss. 5, 16—*Special Courts constituted under—Courts vested with Small Cause Court Jurisdiction—"Court of Small Causes" in S. 24, Civ. Pro. Code (1908), S. 24, Meaning of—Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), S. 25. See SMALL CAUSE COURT, No. 3, 27 C.L.J. 481.*

Provincial Small Cause Courts Act (IX of 1887)—(Continued).

(1-a) Ss. 15, 16—*House rent and ground rent, distinction between—Suit to recover Mutharfa—Jurisdiction of Small Cause Court.*

A Court, to satisfy itself whether it has jurisdiction to try a case, should examine the plaint and decide on the plaint and not on the written statement.

The distinction between a house rent and a ground rent lies in the fact that if a lessee takes a parcel of land and then builds a house upon it, the rent that he pays to his lessor is a ground rent; if, on the contrary, the lessor builds the house and then lets house and land together, the rent is house rent.

Whether the levy of *mutharfa* is regarded as a rent or a tax, a suit to recover it is cognizable by a Small Cause Court. *Earnest Mylne v. Nathu Sundi*, 44 Ind. Cas. 887=4 Pat. L.W. 218.

ROE, J.

(2) S. 16. See No. 1 and 1-a, *supra*.

(2-a) S. 23—*Transfer of a suit from Small Cause side to the ordinary side of the District Munsif's Court—Effect—Appeal.*

A suit to recover damages for the appropriation of a jack tree was instituted on the Small Cause Court side of a Munsif's Court. The Munsif transferred the suit to his ordinary jurisdiction as the case implied the question of title to immovable property. The case was tried under the ordinary procedure and decree passed. Appeal was preferred against the decree, and an objection was raised against the appeal on the ground that, as the suit was of a Small Cause Court nature, no appeal lay. *Held* that as the transfer of the case was made from the Small Cause Court side to the ordinary side at the instance of both parties, the order should be considered as one made under S. 23 of the Small Cause Courts Act, and so the decision of the Court was open to appeal. *Anhayeswarl Dabi v. Hatu Shelkh*, 45 Ind. Cas. 645.

TEUNON and NEWBOULD, JJ.

(3) S. 25—*Erroneous decision on question of limitation—Power of High Court to revise.* See REVISION, No. 19, 21 O.C. 139.

(4) S. 25—*Suit for compensation for breach of contract—Issue as to whether suit properly instituted, Decision of—No disposal of case to justify revision.* See REVISION, No. 8, 16 A.L.J. 777.

(5) S. 25, Art. 41—*Jurisdiction—Suit for contribution arising out of satisfaction of a joint debt.*

A Mahomedan died leaving two brothers, a sister and a daughter as his heirs, and also certain property. He also left debts due by him to one J. Each of the heirs was entitled to shares

Provincial Small Cause Courts Act (IX of 1887)—(Continued).

in the property according to the Mahomedan Law. The daughter having purchased the shares of the sister and one of the brothers, her share was augmented to 8/10 and the other brother's share was 2/10 in the property. The daughter paid off the debt due to J, and then brought a suit in the Small Cause Court against the brother for contribution, the brother being liable for 2/10 of the debt proportionately to his share:—*Held* that the suit was cognizable by the Small Cause Court and Art. 41 to the Small Cause Courts Act did not exclude it from the cognizance of the Court. *Mahmud Ali v. Tamiz-un-Nissa Bibi*, 16 A.L.J. 787=47 Ind. Cas. 842.

RICHARDS, C.J. and TUDBALL, J.

References:—38 A. 292; 4 A.L.J. 548; A.W.N. (1906) 6; 13 A.L.J. 452; 23 O. 189; 24 Ind. Cas. 259; 27 Ind. Cas. 56, *Dist.*

(6) S. 35—*Suit pending in Sub-Judge's Court on Small Cause side—Departure of Sub-Judge on leave—Suit does not cease to be Small Cause suit—Transfer of suit to Munsif's Court and decree by Munsif—Appeal from Munsif's decree if lies.* See CIV. PRO. CODE (1908), No. 54, 16 A.L.J. 548.

(7) Art. 1—*Jurisdiction of Court to try suit questioning legality of tax levied by Municipality.* See PUN. ACT III OF 1911 (MUNICIPALITIES), No. 2, 74 P.L.R. 1918.

(8) Art. 7—*Lease—Loss of lessor's title to portion of property leased—Suit for rent at reasonable amount—Absence of apportionment—Nature of suit—Transfer of Property Act, S. 36, principle of—Applicability to execution sales—Second appeal.* *Yema Ranglah Chetty v. Y. M. Yajravelu Mudaliar*, 33 M. L.J. 618 (F.B.)=41 M. 370=43 Ind. Cas. 78. See Final Part, 1917, Col. 18.

(9) Art. 8—*Suit for rent if includes suit for recovery of consideration agreed upon for right of fishing in tank.* See FISHERY, No. 2, 14 N.L.R. 35.

(10) Art. 13—*Limitation Act, Arts. 86 and 102—Archakas, pay and perquisites of—Nature of suit.*

The first defendant, the trustee of a temple suspended the plaintiffs the hereditary *archakas* of the temple. The plaintiffs sued more than 2 years after the suspension for (1) pay during suspension, (2) value of perquisites during the same period, and (3) damages for loss of dignity, etc.

On the question being raised that no second appeal lay.

Held—The suit is not of a Small Cause nature, since it is to recover an amount alleged to be due to a hereditary *archaka* as the dues of his office and therefore a second appeal lay (a).

Provincial Small Cause Courts Act (IX of 1887)—(Continued).

On the question being raised that the suit was barred by limitation.

Held—The position of an *archaka*, though hereditary, is essentially that of a servant and the claim for pay is governed by Art. 102 of the Limitation Act. The claim for perquisites would also be governed by the same article if the perquisites are payable by the temple (b). *Bharadwaja Mudalliar v. Arunachala Gurukkal*, 23 M.L.T. 288=7 L.W. 524=41 M. 528=45 Ind. Cas. 414.

SADASIVA AIYAR and BAKEWELL, JJ.

References:—(a) 31 Ind. Cas. 206, F.; 31 M.L.J. 829, Appl. (b) 35 M. 631, F.; 14 Ind. Cas. 254; 9 M.L.J. 163; 6 W.R. 33, R.

(11) Art. 13—*Suit for realization of dues—Wajib-ul-ars—Landlord and tenant—Haggs—Small Cause Court, Jurisdiction of.*

A suit instituted by a Zemindar in the Court of Small Causes to realise from his tenant, an oilman, the price of the quantity of oil, which the latter was bound to render to him under the provisions of the *Wajib-ul-ars*, is not cognizable by such Court under Art. 13 of the Provincial Small Cause Courts Act. *Baldava v. Panna Lal*, 16 A.L.J. 644=40 A. 663=46 Ind. Cas. 569.

RAOOF, J.

(12) Art. 13—*Suit against temple trustee to recover dues belonging to hereditary archaka, nature of. See LIMITATION ACT (1908), No. 107, 41 M. 528.*

(13) Art. 15—*Suit to recover Rs. 45 awarded to plaintiff by arbitrators—Suit if one of Small Cause nature in which no second appeal lies—Suit for Specific Performance of award if one for Specific Performance of contract. See APPEAL (SECOND APPEAL), No. 26, U.B.R. 1918, 3rd Qr., 109.*

(13-a) Arts. 15 and 24—*Suit to enforce part of an award partitioning immoveable properties, whether cognisable in a Court of Small Causes. Kunja Behary Bardhan v. Gosto Behary Bardhan*, 22 O.W.N. 66=27 O.L.J. 486. See Final Part, 1917, Col. 19.

MOOKERJEE and WALMSLEY, JJ.

(13-b) Art. 24: See No. 13-p, *supra*.

(14) Art. 31—*Suit for mesne profits for wrongful dispossession from a grove—Jurisdiction of Small Cause Court.*

A suit for recovery of mesne profits of a grove from which the plaintiff had been wrongfully dispossessed is not a suit of Small Cause Court nature and the Small Cause Court cannot take cognizance of such a suit (a). *Drig Pal Singh v. Kunjal*, 16 A.L.J. 55=40 A. 142=44 Ind. Cas. 689.

RAFIQ, J.

References:—(a) 11 A.L.J. 238, F.; A.W.N. (1906) 10, R.; 23 C. 884, D.

(14-a) Art. 31—*Suit for definite sum of money claimed as share of profits of land*

Provincial Small Cause Courts Act (IX of 1887)—(Continued).

under defendant's sole management—Suit if one for accounts not cognisable by Small Causes Court.

The jurisdiction of a Small Causes Court must be determined on a consideration of the plaint and not of the written statement (a).

Every case in which accounts may have to be looked into is not a suit for accounts (b).

Where the plaintiff claimed relief in a Small Cause Court for a definite and ascertained sum representing in money the profits and produce of his share of the land under the sole management of the defendant and offered to prove the exact sum without calling for an account, held that the suit was not barred from the cognizance of the Court by Art. 31 of the Provincial Small Causes Courts Act of 1887. *Rajiva Narain Sahay v. Kirat Narain Singh*, 3 Pat. L.J. 423.

MULLICK and ATKINSON, JJ.

References:—(a) 32 B. 660; 7 Ind. Cas. 390, Rel. on; 10 Ind. Cas. 883, Dist. (b) 28 M. 394, R.

(15) Art. 31—*Suit for money paid at request of defendant—Necessity to look into accounts—Suit if converted into one for accounts. See ACCOUNTS, No. 3, 24 M.L.T. 453.*

(16) Art. 31—*Rent of house paid to one co-owner—Suit by another to recover his share—Jurisdiction of Small Causes Court, if barred. See REVISION, No. 5, 16 A.L.J. 679.*

(16-a) Sch. II, Art. 31—*Definite and ascertained sum representing share of profits of land—Small Cause Court, jurisdiction of—Test to determine, Plaint, not written statement—Suit for account, What is. See SMALL CAUSE COURT, JURISDICTION OF, No. 2, 43 Ind. Cas. 755.*

(17) Art. 35, cl. (i)—*Jurisdiction—Damage to wall—Diversion of water course.*

Held, that a damage caused to the wall of the plaintiff by the defendant's diversion of his own water-course is not a suit falling within the scope of Art. 35, cl. (i) of the schedule to the Small Cause Courts Act (IX of 1887). *Jagdat v. Jagmohan*, 21 O.C. 138=46 Ind. Cas. 801.

LINDSAY, J.C.

Reference:—20 B. 283, F.

(18) Art. 35 (2)—*Applicability of the Act to a suit for recovery of paddy forcibly taken away.*

Where plaintiff alleges that certain paddy in the possession of the plaintiff was forcibly taken away by the defendant, the suit is not one triable by Court of Small Causes. *Lalu Sardar v. Ohedall Mriohe*, 45 Ind. Cas. 15.

TRUNON and NEWBOLD, JJ.

(19) Art. 41—*Decree for maintenance against three persons—One of them made liable—Liability of the other two in the event of the former's default—Suit to recover the amount paid by the former—Amount*

Provincial Small Cause Courts Act (IX of 1887)—(Concluded).

below Rs. 500—Suit cognisable by Small Cause Court—Contribution.

A decree for maintenance was passed in favour of a certain lady against three brothers. Under some arrangements one of the brothers alone was made liable for the payment of the amount, and neither the property on which the maintenance was charged nor the other two brothers were made liable unless the first man made default in complying with the decree. The first brother having paid the maintenance brought a suit against his other two brothers to recover a sum below Rs. 500: *Held* that the suit was not under the peculiar circumstances, one for contribution and it was cognisable by a Court of Small Causes; hence no second appeal. *Ant Ram v. Mithan Lal*, 16 A. L. J. 44=40 A. 135=45 Ind. Cas. 560.

KNOX, J.

References:—30 M. 214; 14 M. L. J. 480; 13 A. L. J. 452, R.

(20) Art. 41. Sec No. 5, *supra*.

Public Charities.

(1) *Civ. Pro. Code, S. 92—Persons interested in bringing suit under section, who are—Mismanagement of charity for a long period—Liability of son to account for trust funds collected by his father and grandfather—Hindu Law—Deuts—Ayyavaharika debts. Meaning of—Period of accounting, if will be co extensive with period of mismanagement.*

A suit for the removal of the defendant from the trusteeship of a certain charity, viz., a choultry, and for settling a scheme of management by the residents of the locality in which the choultry is situated and members of the community for whose benefit the charity was founded is a suit in the institution of which the plaintiffs are sufficiently interested within the meaning of S. 92 of the Civ. Pro. Code, 1909.

Where, in such a suit, it was found that the father and the grandfather of the defendant had neglected the charity and appropriated the income of the trust property to their own use, *held* that the defendant was liable to account for the misappropriation, even though it might have been criminal, of the trust funds by his predecessors, but that he should be made liable only for collections during the twelve years before suit, as the Courts have a discretion in fixing the period for which the trustee of a charity should require to render accounts (a). Meaning of the term 'ayyavaharika' debts explained (b). *Garuda Sanyasayya v. Nerella Marthanna*, 35 M. L. J. 661.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References:—(a) *A. G. v. Mayor, etc.*, of *Baster*, 37 E. R. 918 (1826), *F.* (b) 39 O. 862, *App.*; 32 B. 348, *Not F.*; 40 B. 126; 39 A. 472; 37 M. 458, R.

(2) *Civ. Pro. Code (Act V of 1909), S. 92—Public Trust—Duty of trustees to keep*

Public Charities—(Continued).

distinct accounts of trust funds and private funds—Mixing up of both funds in the accounts—Property purchased out of such funds—Ownership—Presumption in favour of temple—Possession of office of trustee for many years, it can be lightly disturbed in the absence of positive misconduct—Defendant, if might be left as sole trustee when association of strangers is likely to cause friction—Exhibition of accounts—Scheme.

It is the duty of the trustees to keep their private property distinct from the trust property, and to maintain accounts of all loans taken from one property for the benefit of the other.

Where the question is as to the ownership of the properties purchased by the trustee, and it is not shown that the purchase money came from private funds, the properties will be held to belong to the trust.

Where it is clear that the funds of the temple and the funds of the family have not been kept distinct in the accounts, but have been mixed up together, the onus is upon the trustee to prove that the property purchased belongs to him and not to the trust.

Where the defendant and his predecessors, though not rightful trustees, have been in possession of the office for many years, Courts would be disinclined to disturb the defendant's possession and to deprive him at the instance of strangers unconnected with the family of former trustees, unless the defendant was clearly guilty of misconduct and it appeared to be for the clear benefit of the trust that he should be deposed.

Where it was found that the association of strangers along with the defendant in the management was likely to lead to friction, the defendant was allowed to manage the trust as the sole trustee, subject to an arrangement for exhibiting the accounts for the examination of worshippers; and a scheme was framed on the lines adopted in 24 M. 219. *Subbaraya Chetti v. Subramania Iyer*, (1918) M. W. N. 786.

WALLIS, C.J. and SPENCER, J.

References:—(1911) 2 M. W. N. 350; (1910) M. W. N. 445; 31 M. L. J. 847; (1916) M. W. N. 460=43 I. A. 147; 24 M. 219, R.

(3) *Civ. Pro. Code, 1908, S. 92—Declaration by Berag: Sadhus of unfitness of defendant to be Mahant and election of another in his place—Defendant in charge of trust property and still acting de facto mahant—Suit with Collector's permission for removal of such de facto mahant and his ejection from trust property and for appointment of another person with direction to deliver property to him—Person elected by Sadhus if necessary party to suit—Ad valorem Court-fee on value of property if payable.*

A body of persons the Berag Sadhus entitled to elect a Mahant after deciding that the defendant Mahant was no longer fit for the office elected another as the new Mahant, without removing from office, the defendant.

Public Charities—(Concluded).

who was still acting as *Mahant* and in charge of the trust property. Two persons, with the permission of the Collector under S. 92 of Civ. Pro. Code, brought a suit for the removal of the defendant from the *Mahantship*, for his ejection from the trust property for the appointment of the elected person or any other *Beragi Sadhu* and for an order directing the property to be made over to the new *Mahant*. Held that the suit was the proper procedure under the circumstances the effect of the resolutions of the body declaring the defendant to be unfit not being to remove him from office, that the person elected by the body was not a necessary party to be joined as plaintiff in the suit, that it was not necessary to stamp the plaint with a Court-fee stamp calculated *ad valorem* on the value of the trust property and that the death of one of the plaintiffs in this suit did not cause the abatement of the suit. *Gopi Das v. Lal Das*, 97 P.R. 1918=173 P.W.R. 1918=47 Ind. Cas. 989.

SCOTT-SMITH, J.

References:—28 A. 112; 53 P.R. 1909, F.; 40 M. 110, Appr.

(4) Application to be appointed *Mutwali* rejected by the District Judge—District Judge whether has powers of Kazi—Petitioner whether to proceed by application or by suit—Civ. Pro. Code (1908), S. 92. See *MAHOMEDAN LAW (WAKF)*, No. 5, 23 C.W.N. 138.

(5) Trustee of, spending money not required by terms of endowment—Right to be allowed credit for such amounts. See *TRUSTS ACT*, No. 2, (1918) M.W.N. 555.

Public Document.

Register of births and deaths kept at police station, *it*. See *EVIDENCE ACT*, No. 12, 22 C.W.N. 822.

Public Nuisance.

(1) *Right of maintaining civil suit—Encroachment on village Shamlat by some owners—Incompetency of a few to maintain an action for removal without special damage—Meaning of special damage—Whole proprietary body need not prove special damage—When, proof of special damage is not required in case of removing obstruction to a highway.*

Held, that without proof of special damage, one, or a few, of the proprietary body cannot maintain a suit against certain others for removal of a building erected by them on the *Shamlat* ground not exceeding their share, which is likely to fall to them on partition, even if the building has lessened the area of the village *sath* or narrowed the entrance to it.

Obiter.—Held, also, that special damage means damage experienced by one or more persons in particular.

Held, further, that in such a case the whole proprietary body can maintain an action against the trespassers without proving special damage. So too in the case of highway open

Public Nuisance—(Concluded).

to all the world there would be no need of showing special damage, if all the world can be joined in the claim against the obstructor. *Lekha v. Hanwanta*, 176 P.W.R. 1918=129 P.L.R. 1918=114 P.R. 1918.

SHAH DIN and CHEVIS, JJ.

References:—33 P.R. 1901, R.; 99 P.R. 1918=114 P.W.R. 1918, R.; 78 P.R. 1892; 74 P.R. 1885; 9 A. 484, Dist; 84 P.W.R. 1911=9 P.R. 1912, disapproved.

(2) *Village pathway. Obstruction of, If—Use of pathway. Right to, Declaration of, Suit for—Civ. Pro. Code (Act V of 1908), S. 91, if applicable to—Village pathway—Limitation Act (IX of 1908), S. 26, if applicable to.*

A village pathway is not a public nuisance, nor are the public at large affected by the obstruction of the pathway which only the inhabitants of a particular village have the right to use, and therefore S. 91 of the Civ. Pro. Code has nothing to do with a suit for a declaration of the right of the inhabitants of a village to the use of the village pathway.

S. 26 of the Limitation Act has nothing to do with an ancient village pathway used by the inhabitants of a particular village from time immemorial. *Nagendra Nath Mazumdar v. Banwar Lal Das*, 46 Ind. Cas. 970.

FLETCHER and SHAMSUL HUDA, JJ.

Public Policy.

(1) *Dancing and singing boy, Contract to hire a—If against to public policy—Contract Act (IX of 1872), S. 23.*

The plaintiff having engaged the services of a "Qhatu" or dancing and singing boy for a certain period, next contracted with the defendant that, for a monthly payment, the boy should give exhibitions in accordance with arrangements made by the defendant. The defendant in fact detained the boy for a period of one month and twenty-four days but refused to make any payment to the plaintiff. In a suit by the plaintiff for the recovery of the amount due:

Held, that in the absence of any evidence to show that the employment of the boy was connected with immoral practices, the contract between the plaintiff and the defendant to hire the boy was not contrary to public policy and the contract having been fulfilled, the defendant must pay the sum he agreed to in consideration of the artist's services. *Samir v. Syed Ali*, 47 Ind. Cas. 136.

TEUNON and NEWBOULD, JJ.

(2) *Sanction to prosecute, Application for, Agreement to withdraw, If void as against—Contract Act (1872), S. 23. See AGREEMENT*, 46 Ind. Cas. 424.

(3) *Arbitration, Agreement to refer to, of a non-compoundable criminal case, if against—Contract Act (1872), S. 23. See AWARD*, No. 5-a, 47 Ind. Cas. 506.

Public Policy—(Concluded).

(4) Promise to abstain from bidding at exorcise auction—Not against public policy. See CONTRACT ACT, No 11, 44 Ind. Cas. 223.

(5) Agreement opposed to—Money paid under such agreement—Suit for refund of such money if lies—Slavery bond, Enforceability of. See VOID AGREEMENT, No 1, 27 C.L.J. 459

Public Right

Representative suit to establish public right—Payment into Court of amount necessary for service of notice—Notice not served—Adjudication on merits. See REPRESENTATIVE SUIT, No 1, 42 Ind. Cas. 543.

• Public Street

(1) *Limitation Act* (IX of 1908), S 23, Sch I, Art 146 (a)—*Fixture—Integral part of building—Calcutta Municipal Act* (III B C of 1899), S 341

A platform was in existence for about 50 years and rested upon its own foundation. It was an integral part of the main building of the plaintiff. The land upon which the platform stood, belonged to the Municipality as the owner thereof.

Held, that the Municipality lost their right under Boh' I, Art. 146 (a) of the Limitation Act, to that portion of the land upon which the wall stood, that S 23 of the Limitation Act had no application as the injury was complete on the erection of the wall and the mere fact that the effect continued could not extend the time of limitation.

That though the drain or street was vested in the Municipality, the platform being an integral part of the main building, was not a fixture within the meaning of S. 341 of the Calcutta Municipal Act. (2) *Ashutoosh Sadu Khan v. Corporation of Calcutta*, 28 C.L.J. 494.

CHATTERJEE and SHEEPHANKS, JJ.

Reference —(a) 13 C.L.J. 611, R.

(2) *Public right to go in procession—Obstruction—Special damage*

Where some members of the Moopan caste were prevented by the hostile and threatening attitude of some other castes from taking a marriage procession on horseback along a public street near Firmangalam in Madura and in a suit by the Moopans for a declaration of their right and an injunction it was contended that the plaintiffs had no cause of action as they were not actually stopped while going along the street and also as they had suffered no special damage.

Held. Proof of actual obstruction or the use of violence is unnecessary.

The plaintiffs should prove some special damage. Where it is found that by being prevented from riding on horseback through the street, the plaintiffs did suffer special damage (mental suffering) compensation may be awarded on an estimate of the moral damage suffered and the possibility of such award is sufficient.

Public Street—(Concluded).

to entitle the plaintiffs to sue for a declaration and injunction (a) *Ganapathy Moopan v. Subba Nayakan*, 23 M.L.T. 258—(1918) M.W. N. 547—44 Ind. Cas. 834.

OLDFIELD and PHILLIPS JJ.

References —(a) 22 C 551, 14 M 177; 12 M.L.T. 491; *Winterbotham v. Derby*, L.R. 2 Ex. 316, 32 M 473, 17 M.L.T. 453, R.

(3) Right to use a street—Right to play music in a street. See DECLARATORY SUIT, No. 1, 20 Bom L.R. 667.

Public Trust

(1) Duty of trustees to keep distinct accounts of trust funds and private funds—Property purchased out of such funds—Presumption of ownership in favour of temple—Possession of office of trustee for long time, Disturbance of—Defendant as sole trustee without association with others—Exhibition of accounts—Schemes. See PUBLIC CHARITIES, No. 4, (1918) M.W. N 786.

(2) Circumstances justifying removal of hereditary trustee—Want of capacity to manage if sufficient ground—Applicability of S 23 (e) of Trusts Act to public trusts. See TRUSTS ACT, No 2, (1918) M.W.N 555

Punjab Court

See PUN ACT III OF 1914

Punjab Land Alienation.

See PUN ACT XIII OF 1900.

Punjab Land Revenue.

See PUN ACT XVII OF 1887.

Punjab Laws.

See PUN ACT IV OF 1872

Punjab Limitation.

See PUN ACT I OF 1900.

Punjab Municipalities

See PUN ACT III OF 1911.

Punjab Pre-emption Act.

See PUN. ACT I OF 1913

Punjab Tenancy.

See PUN ACT XVI OF 1877

See PUN ACT XVI OF 1887.

Purchase Money.

(1) *Sale of land—Sale deed, Stipulation in—Vendor, not liable if purchaser dispossessed by anybody other than vendor—Possession, Failure of purchaser to get—Suit for refund of, Maintainability of*
Plaintiff made a speculative purchase of a piece of land from the defendant. The latter protected himself by inserting a clause in the *Kobala* to the effect that if the plaintiff-purchaser was dispossessed by anybody other than

Purchase Money—(Concluded).

the vendor, the vendor would not be liable to the purchaser. In a suit by the plaintiff for possession of the disputed land and in the alternative for refund of the purchase-money.

Held, that effect should be given to the saving clause and that the plaintiff was not entitled even to a refund of the purchase-money. *Indra Narain Das v. Badan Chandra Das*, 47 Ind. Car. 340.

WALMSLEY and PANTON, JJ.

(2) Execution sale, Setting aside of—Purchase-money, Withdrawal of, by auction-purchaser—Subsequent confirmation of sale, Refund of purchase-money on. See AUCTION PURCHASER, No. 4, 46 Ind. Cas. 275.

(3) Ejectment by landlord of purchaser of occupancy holding under mortgage decree—Suit by purchaser for refund of purchase-money, if lies. See CIV. PROC. CODE (1908), No. 260, 22 C.W.N. 760.

(4) Contract of sale void *ab initio*—Article of limitation applicable to case. See LIMITATION ACT (1908), No. 133, 44 P.R. 1918.

(5) Immoveable property, Sale of—Non-payment of purchase-money—Remedy of vendor. See TRANSFER OF PROPERTY, No. 1, 45 Ind. Cas. 860.

Purchaser.

(1) Rights of, how affected in case of purchase at sale by a guardian with sanction of Court of property already mortgaged without sanction. See GUARDIAN AND WARD, No. 3, 46 Ind. Cas. 665.

(2) Title of, under a registered document dates from date of execution, not date of registration. See REGISTRATION ACT (1908), No. 80-a, 22 C.W.N. 318=33 Ind. Cas. 817.

(3) Unregistered sale-deed, Claiming title under *in*, Position of—Trespasser—Ejectment of, by person claiming title under a subsequent registered sale-deed. See TRESPASSER, 111 P.R. 1918.

Purdanashin Lady.

Deed executed by—What is proper explanation—Consent of reversioners—Presumption that there was legal necessity—Annuity whether a charge on property—Question one of intention—No specific properties mentioned but payment charged on executant's whole property—Penalty—Contract Act (IX of 1872), S. 74—Stipulation to take less than specified rate of interest, if payment punctually made, whether penalty—Manager of mortgaged property nominated by mortgagee and not dismissable by mortgagor at will, if agent of mortgagee—Title paramount, if to be enquired into in mortgage suit.

Where in the case of a Purdanashin lady the draft of a deed of English mortgage was interpreted in Bengalee to her by her legal adviser by reading two to four lines at a time and it took about three hours to do so, and ten or twelve days afterwards it was executed by her,

Purdanashin Lady—(Continued).

when it was again explained to her by giving out the substance, it was held that the deed was duly executed (a).

The consent given by the reversioners would certainly raise a presumption of the existence of legal necessity (b).

Where in an *ekranama* between A and B it was agreed that A would receive Rs. 150 per month during her lifetime from the share of the estate which she inherited from her son, that B would pay the said sum every month and if B did not pay it A would be entitled to recover it by suit from the said share.

Held—That the annuity was a charge upon the said share. The property could be easily ascertained and that being so it did not matter that no schedule of property was given in the deed (c).

The question in all such cases is one of intention. "In equity no charge can be created unless there is an intent to charge" (d).

The mortgage-deed provided that interest at 9½ per cent. was to be paid by equal half-yearly payments, but that if the interest at the rate of 7½ per cent. was paid before the half-yearly day appointed for payments of interest, the mortgagees shall accept the same in lieu of and in satisfaction for interest at 9½ per cent. :

Held—That if the stipulation was to pay interest at 7½ per cent., and on default of payments on a certain date interest was to be paid at 9½ per cent., there was no doubt that it could be treated as a penalty, though in the converse case it would not be a penalty according to English Law (e).

Indian cases appear to have followed the English Law. But in the present case the schedule for liquidation of mortgage-debt showed that the intention of parties was that the interest should be paid at 7½ per cent. and on default at 9½ per cent.

S. 74 of the Indian Contract Act does away with the distinction between penalty and liquidated damages and, under the section as amended by Act VI of 1899, the Court has the power to grant relief if the contract contains any stipulation by way of penalty. The amendment does not appear to have made any real change in the law, the only difference being that if the stipulation is penal, relief can now be granted under the provisions of the section and it is not necessary for Courts to resort to their equitable jurisdiction in order to grant relief.

Where in an English mortgage it was agreed only between the mortgagor and the mortgagees that certain nominees of the mortgagees should be appointed managers and be liable to furnish accounts to the mortgagees not as to owners but to enable the mortgagees to satisfy themselves that their security was not endangered by mismanagement, and a separate deed of management was contemporaneously executed by the mortgagor in favour of the nominees to which the mortgagees were not parties and by which such nominees were appointed managers :

Purdanashia Lady—(Concluded).

Held:—That the managers were agents of the mortgagor.

In a suit upon the mortgage, no question of title paramount should be gone into. *Shyampeary Dasya v The Eastern Mortgage and Agency Co., Ltd*, 23 O.W.N. 226=40 Ind. Cas. 865.

N.R. CHATTERJEE and NEWBOULD, JJ.

References:—(a) 28 C. 546=5 U.W.N. 489, *Dist.* (b) 40 C. 721=17 C.W.N. 701; 42 I.A. 64=49 C. 876=19 C.W.N. 370, *R.* (c) 9 A. 158, *R.*; *Montagu v Earl of Sandwich* L.R. 32 Ch D. 625, 539, (1886), *R.*; 3 C. 386, 7 C. 196; 38 C. 1133=10 C.W.N. 1010. *Discussed and Dist.* (d) 19 I.A. 95, 99, 100, *R.* (e) *Wallis v. Smith*, L.R. 21 Ch. Div. 243 (1894), *Hardy v. Martin*, 1 Bro. O.C. 419n (1785), *Wallingsford v. Mutual Society*, L.R. 5 A.C. 685, 702 (1880), *R.*

Patni Lease

Clause reserving power to zamindar to appoint and dismiss chowkidars—Chowkidari chakran land if excluded from patni and reserved to zamindar. See *CHOWKIDARI CHAKRAN LAND*, No. 2, 24 C.W.N. 487.

Patni Tenure.

See **PATNI TENURE**.

Question of Fact.

(1) *Pre-emption, Suit for*—*Suo divisions, Existence of, in a village, a—Second appeal, Question not to be gone into n—Or in appeal from an order of remand—Civ Pro. Code (1908), O. XLI, r. 23*

In a suit for pre-emption, the question whether certain *pattis* are real sub-divisions of the village is a question of fact (a)

Questions of fact can no more be gone into in an appeal from an order remanding this case under O. XLI, r. 23, Civ Pro Code (1908) than it could be in a second appeal (b)

Semble.—The real question is simply whether there are actual sub-divisions of the village, not for what reason were the sub-divisions made. *Waryam Singh v. Harnam Singh*, 109 P.R. 1918.

CHEVIE, J.

References:—(a) 64 P.R. 1887, *Ref. to.* (b) 85 P.R. 1914, *Ref. to.*

(3) Finding of fact based on wrong assumption of facts and wrong principles open to second appeal. See **APPEAL (SECOND APPEAL)**, No. 23, 27 P.W.R. 1918.

(3) Right to succeed to occupancy holding—Findings of fact based on conjectures, not judicial findings—Not final in second appeal. See **APPEAL (SECOND APPEAL)**, No. 24, 109 P.W.R. 1918.

(4) Civ. Pro. Code (1908), O. XVII, rr. 2, 3—Decision whether r. 2 or r. 3, Question, a question of fact. See **CIV. PRO. CODE (1908)**, No. 263-a, 3 Pat. L.J. 481.

Question of Fact—(Concluded).

(5) Plea of stipulation being in part a penalty—Plea one of fact—Plea not to be raised for first time in appeal. See **HINDU LAW (DEBTS)**, No. 8, 14 N.L.R. 41.

(6) Application for certified copy of judgment first made—Application for copy of decree next made—Total time taken for obtaining both the copies if may be said to be requisite and be deducted from time fixed for appeal—Question as to what time is requisite if question of fact or law. See **LIMITATION ACT (1908)**, No. 47, 100 P.R. 1918.

(7) Meaning of word a. See **MEANING**, 46 Ind. Cas 794.

(8) Purchase of mortgaged property, Discharge of prior incumbrance by—Intention to keep alive, if a question of law or fact—Presumption applicable to case. See **MORTGAGE (SUBROGATION)**, No. 2, 8 L.W. 176.

(9) Factum of notice on part of subsequent transferee, if question of law or fact—Question if contract is conscionable if question of fact or law. See **SPECIFIC PERFORMANCE**, No. 6, 137 P.W.R. 1918.

(10) Questions whether bargain is unconscionable and whether stipulation is penalty if questions of law or fact. See **UNCONSCIONABLE BARGAIN**, No. 2, 14 N.L.R. 21

Question of Law.

(1) Fact raised in appellate Court—Question raised on admitted or proved facts—Question to be entertained. See **APPEAL (GENERAL)**, No. 9, 28 C.L.J. 23.

(2) Plea of stipulation being in part a penalty—Plea one of fact—Plea not to be raised for first time in appeal. See **HINDU LAW (DEBTS)**, No. 8, 14 N.L.R. 41

(3) Application for certified copy of judgment first made—Application for copy of decree next made—Total time taken for obtaining both the copies if may be said to be requisite and be deducted from time fixed for appeal—Question as to what time is requisite if question of fact or law. See **LIMITATION ACT (1908)**, No. 47, 100 P.R. 1918.

(4) Factum of notice on part of subsequent transferee, if question of law or fact—Question if contract is conscionable if question of fact or law. See **SPECIFIC PERFORMANCE**, No. 6, 137 P.W.R. 1918.

(5) Res judicata, Plea of, a. See **RES JUDICATA**, No. 22-a, 47 Ind. Cas 686.

(6) Questions whether bargain is unconscionable and whether stipulation is penalty if questions of law or fact. See **UNCONSCIONABLE BARGAIN**, No. 2, 14 N.L.R. 21.

Railway.

(1) *Liability for loss—Railway administration—Insurer—Indian Railways Act (IX of 1880), S. 73, sub-S (1)—Goods not delivered*

Railway—(Concluded).

to the consignee—Burden of proof—Negligence—Extraordinary cause. *Surendra Lal Chaudhuri v. Secretary of State*, 25 C.L.J. 87=21 C.W.N. 1125=38 Ind. Cas. 702=43 Ind. Cas. 263. See Final Part, 1917, Col. 764.

(2) *Railway administration, Liability of, in respect of goods consigned for carriage and delivery—Obligation to grant shortage certificate.*

A Railway Company is under no liability to re-weigh goods consigned to them for carriage and delivery and give a certificate of shortage, if the consignor alleges loss in the transit. *Joganath Marwari v. East Indian Railway Company*, 22 C.W.N. 902=45 Ind. Cas. 993.

FLETCHER and SHAMSUL HUDA, JJ.

References:—16 C.W.N. 356; 22 C.W.N. 310, F.

Railway Company.

Liability of—Station-master, Issue of receipt by, for non-existent goods, if acting within scope of his authority.

Where a Station-master fraudulently issued a railway receipt acknowledging the delivery to him of a certain consignment of rice for despatch to another station, while in fact no such consignment had been delivered for despatch at all:—

Held, that the Railway Company was not liable for the fraud of the Station-master, inasmuch as the latter could not be said to have been acting within the scope of his authority or in the course of his employment. *Hukumchand v. Bengal Nagpur Railway*, 45 Ind. Cas. 856.

BROCKMAN, J. O.

References: *Lloyd v. Grace, Smith and Co.*, (1912) A.C. 716=81 L.J.K.B. 1140=107 L.T. 531=56 S.J. 723=28 T.L.R. 547; 34 Ind. Cas. 598=23 C. 511=20 C.W.N. 268=23 C.L.J. 225, F.

Railway Receipt.

(1) Goods covered by receipt, Delivery of, to person entitled—Duty of Railway Company to call in such receipts to prevent fraudulent transactions regarding same. See RAILWAYS ACT, No. 5, 35 M.L.J. 35.

(2) Delivery of goods by Railway without asking for railway receipt pledged with Bank—Receipts obtained from Bank by consignee after making delivery—Subsequent endorsement by consignee of receipts to third party for value—Railway if liable to third party for not calling in receipts after delivery of goods. See RAILWAYS ACT, No. 5, 35 M.L.J. 35.

Railways Act (IX of 1890).

(1) S. 72, sub-S. 2—Risk Note, Form "B," framed under—Whether a consignee of goods covered by this Risk Note can make the Railway Administration liable for the loss thereof—Whether ss. 151, 152 and 161 of Contract Act (IX of 1872) will apply, in

Railways Act (IX of 1890)—(Continued).

such a case—S. 76 of the Indian Railways Act, whether it governs S. 72 and the contract in the Risk Note—Proof of negligence, onus on whom lies.

Where goods were consigned to a Railway Company for carriage at a reduced rate of freight and the senders executed a Risk Note in Form "B" and several bags forming part of the consignment were missing and could not be delivered to the consignee:

Held—That in a suit for compensation for the missing bags the defendant Railway Company would not be liable if the plaintiff (consignee) failed to prove that the loss was due to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of, its servants (a).

Held, also, that such a case would be guided by the terms of the special contract embodied in the Risk Note, Form "B," and not by ss. 151, 152 and 161, Contract Act, or the other provisions of the Indian Railways Act. *The East Indian Railway Co. v. Kanak Behari Halder*, 22 C.W.N. 623=44 Ind. Cas. 691.

RICHARDSON and BEACHCROFT, JJ.

References:—16 C.W.N. 766; 41 C. 576, *Rel. on*; 25 C.L.J. 97=21 C.W.N. 1125; 21 C.L.J. 566, *Dist.*

(2) S. 72 (2) (b). See No. 6, *infra*.

(3) S. 75—"Value," meaning of—"Loss," meaning of—Railway Company liable for negligent misdelivery of a parcel.

The word "value" in S. 75 of the Indian Railways Act, 1890, does not mean cost of an article in the package delivered to a Railway Company for carriage, by railway, but it means intrinsic value of the article, i.e., market value, i.e., the price for which it would reasonably sell at the time in the market as well as the value in the market independently of any circumstances peculiar to the person delivering the article (a).

The word 'loss' in S. 75 of the Indian Railways Act, 1890, means a loss by the carrier such as by abstraction by a stranger or by his own servants or by losing them from vehicles in the course of carriage or by mislaying them so as not to know where to find them and the like. It includes temporary as well as permanent loss. The loss for which a Railway Company is protected from liability must be loss to the Railway Company itself and it must be loss which occurs whilst the goods are in their capacity as carriers and cannot apply to a loss to the owner. Negligent misdelivery of goods to a person other than the owner is not such a loss of goods (b). *Ramachandra Jagannath v. The Great Indian Peninsula Railway*, 20 Bcm. L.R. 591=44 Ind. Cas. 401.

KAJIJI, J.

References:—(a) *Stössiger v. S. E. Ry. Co.*, (1854) 23 L.J. Q.B. 293; *Blankens v. London & N. W. Ry. Co.*, (1851) 45 L.T. 761, B. (b) *Hearn v. London & S. W. Ry. Co.*, (1855) 10 Ex. 793; 6 P. R. 1897, R.

Railways Act (IX of 1890)—(Continued).(4) S. 76, See No. 6, *infra*.(5) S. 77—*Misdelivery—Notification—Railway receipt—Endorsement after delivery of goods, effect of—Fraud of third party, damage caused by—Negligence—Proximate cause.*

Cotton was consigned by G for carriage by the defendant Railway Company and delivered at Madras to G's order. The railway receipt granted by the company reserved liberty to it to refuse delivery unless the receipt was produced or in its absence an indemnity was given. S who was in the habit of taking up G's cotton by first paying the price to and obtaining the railway receipts from G's Bank at Madras and then presenting the same to the Railway Company managed to get the cotton from the railway without presenting the receipts but shortly afterwards paid for the receipts and obtained them from the Bank. Instead of returning them to the Railway Company he then endorsed them for value to the plaintiff who took them in the belief that the cotton was still with the company. The plaintiff not being able to obtain the cotton or its price from the company sued for the same. No notice of the claim had been given as required by S 77 of the Indian Railways Act (IX of 1890).

Held:—A notice of claim should have been given under S. 77 of the Railways Act. The notice is required not only in cases of accidental or inadvertent loss but in all cases including negligent or wilful misdelivery in which a Railway Company is in pursuance of its liability as limited by the Act sought to be made liable or responsible for loss, destruction or deterioration of goods entrusted for carriage.

Case under the English Charter Act, 1830, distinguished.

Held, also, a railway receipt after the goods covered by it have been delivered to the person entitled stands on the same footing as a Bill of Lading in the same circumstances. A Railway Company in India is not under a public duty to seal its railway receipts and the transfer of such a document after delivery of the goods confers no rights on the transferee against the company (a).

Held, further, assuming that the railway was in some manner at fault in not calling in the railway receipt the loss caused to the plaintiff was not the natural consequence of that fault, but was caused by the fraud of S for which the company is not answerable. There is a distinction between doing that which enables a fraud to be committed and being the cause of that fraud (b). *Madras and Southern Mahratta Railway Company, Limited v. Karl Doss Banmall Doss*, 35 M L J. 35—24 M L T. 38—8 L W. 340—41 M. 871.

WALLIS, O J and SPANCOER, J.

References:—(a) (1870) 4 E and F Ir. App 417, R (b) (1897) 21 Q B D. 160; (1902) A.C. 325; (1917) 2 K.B 489, F.

Railways Act (IX of 1890)—(Concluded).

(6) Ss. 80, 72 (2) (b), 76—*Goods entrusted to Railway Company for transit Risk note, Execution of—Liability of Railway Company for loss of consigned goods—Finding based on conjecture.*

In a suit against the G.I.P. Ry. and E.I. Ry. Companies for compensation for loss of goods consigned from Saugor for delivery at Calcutta, a risk note duly executed under S 72 (2) (b) of the Railways Act was relied upon by the defendants, *held* that the plaintiffs ordinarily had only to prove the loss, that thereupon it was for the Railway Company to show that the loss occurred under circumstances, which exempt a bailee from responsibility for the loss, or the Railway Company may rely upon a special contract exempting them from liability and that where the risk note exempted the company from all liability except in certain specified circumstances, the plaintiff could only succeed by establishing that his case came within those exceptions (a).

Held, also, that S. 80, Railways Act, authorised the plaintiff to sue the G I. P. Railway Company to whom the goods were delivered, and that, in the absence of proof that the loss occurred whilst the goods were in the custody of the E I Ry. Company, no decree could be passed against that company, and that in no case, could a decree be passed against both companies. *The Agent, G I P. Ry. Co., Bombay v Karayal*, 14 N.L.R 122.

MITTRA, J C.

References.—(a) 16 C W N 766, 41 C. 576, R.; 127 E R. 322, Dist.

Rakyat.

Homestead of a—Bengal Tenancy Act (VIII of 1885), Applicability of, to, See HOMESTEAD 46 Ind Cas. 489.

Rateable Distribution.

(1) *Application to execution made by two decree-holders—Attachment under each execution—Permission to raise by private alienation—Money enough to satisfy one decree only, Payment of into Court—Right of other decree holder to rateable distribution of such money—Civ. Pro Code, S. 73, O XXI, r 83.*

S 73, Civ. Pro. Code, is wide enough to cover cases where money is in the hands of the Court by whatever process the same has been realised; and when permission is granted under O XXI, r. 83, Civ Pro Code, to raise money by private alienation, the money is paid under a pending execution application. The mere fact that the money is paid into Court by virtue of the permission granted to raise it privately does not give a larger right to the decree-holder in execution of whose decree the permission is so granted, but it is liable to be rateably distributed between all decree-holders who have.

Rateable Distribution—(Continued).

applied for execution of their decrees. *Thiruvaiyamp Pillai v. Lakshmana Pillai*, 41 M. 616—85 M.L.J. 150—(1918) M.W.N. 524—47 Ind. Cas. 538.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—38 M. 241 (224), R.; 44 C. 789, Dist.; 36 B. 156, Diss.

- (2) *Civ. Pro. Code (Act V of 1908), S. 73—Execution of decrees—Proportionate distribution of sale-proceeds—Subt for refund of assets distributed.*

Held that a suit brought by a plaintiff (a decree-holder) for refund of assets before the actual distribution of them to the other decree-holders was premature and liable to be dismissed. Where plaintiff and defendants held money-decrees against certain judgment-debtors, and the judgment debtors of the plaintiff represented only $\frac{1}{2}$ hs of the property sold, *held* that the plaintiff was entitled to rateable distribution out of the $\frac{1}{2}$ hs which was the share of his judgment debtors. *Ram Chandra Naik Kalia v. Raghunath Saran Singh Deo*, 16 A.L.J. 530—46 Ind. Cas. 101.

TUDBALL and RAOOF, JJ.

References:—30 C. 583; 27 A. 158, F.

- (3) *Civ. Pro. Code (Act V of 1908), S. 73—Decree against estate of deceased testator—Decrees obtained against two out of three executors.*

Two decrees were obtained against the estate of a deceased testator, each obtained against two out of three executors. One of these two executors was common to the two suits. Each decree was *prima facie* capable of execution against the estate:

Held, that the decree-holders were entitled to rateable distribution of the assets under S. 73 of the *Civ. Pro. Code* (a) *Nilmani Dey v. Hiralal Das*, 27 O.L.J. 100—43 Ind. Cas. 451.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 19 B. 83, *Rel. on.*

- (4) *Civ. Pro. Code, 1908, S. 73—Decree against same judgment debtor—Sale by inferior Court.*

Where the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade the sale should be held by the Court of the superior grade. But where the sale has been held by Munsif, the Subordinate Judge is not to direct the Munsif to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred and the sale-proceeds are then rateably distributed in accordance with the provisions of S. 73 of the *Civ. Pro. Code* (a). *Milkantha Rai v. Gasto Behary Chatterjee*, 27 O.L.J. 145—44 Ind. Cas. 249.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 12 C. 393; 18 B. 458, R.

- (5) *Civ. Pro. Code, S. 73—Payment into Court and application for rateable distribution made on the same day—Priority—Pres-*

Rateable Distribution—(Concluded).

umption if any as to—Same judgment-debtor.

Where the payment into Court of assets realised and the application for rateable distribution were made on the same day:

Held there was no presumption as to the order of events and that the officer distributing assets should have ascertained which act was prior in time.

Where the appellants obtained a decree for money against the 3rd and 4th defendants personally and the respondents obtained a similar decree against the 3rd defendant alone and it appeared that the 3rd defendant had an ascertained interest in the fund in Court:

Held that, in respect of the said fund, he must be regarded as the same judgment-debtor within the meaning of S. 73, *Civ. Pro. Code*. *Muthiah Chetty v. Alagappa Chetty*, (1918) M.W.N. 520—24 M.L.T. 179—47 Ind. Cas. 296.

BAKEWELL and KRISHNAN, JJ.

References:—33 M. 465; 13 C. 294; 16 B. 638; 42 M. 241, R.

- (6) *Civ. Pro. Code (1908), S. 73—Moveables of judgment-debtor sold by Court auction and receipts held by Nazir—Application by certain decree holder for execution after realisation of above sale-proceeds—Decree-holder if entitled to claim rateable distribution of assets in hands of Nazir.*

The moveable property of a judgment-debtor was sold in auction by the Civil Nazir on different dates from the 13th November to the 1st December and the proceeds realised were held by him. A decree-holder made an application to the Court for execution of his decree on the 5th December. *Held* that, though the sale-proceeds in the hands of the Civil Nazir were assets held by the Court, the decree-holder was not entitled to claim rateable distribution of them as they were realised before the 5th December, the date of the decree holder's application for execution, but that he had a right to claim a *pro rata* share in the amount realised after the 5th December (a). *Firm Surjan Singh Budh Singh v. Firm Prag Das Mangal Salu*, 33 P.R. 1918—45 Ind. Cas. 108.

SHAH DIN, C.J.

References:—(a) 26 M. 179; 10 Ind. Cas. 627, Dist.

- (7) Whether money held by purchasing decree-holder to be set off towards his decree, liable to be rateably distributed among several decree holders. See *CIV. PRO. CODE* (1908), No. 108, 43 Ind. Cas. 715.

- (8) See *CIV. PRO. CODE* (1908), S. 73.

(9) Persons entitled to rateable distribution not served with notice of application to set aside auction sale—Order passed cancelling sale if binds such persons. See *REVISION*, No. 17, 35 M.L.J. 604.

Rating.

Principles of, in assessing salt works. See *ADEN SETTLEMENT*, No. 1, 20 Bom. L.R. 689.

Receiver

- (1) *Right to continue suit—Permission to sue in forma pauperis granted—Suit filed before insolvency—Subsequent insolvency*

Where a person obtains leave to sue *in forma pauperis* in a suit commenced before his insolvency, the Receiver appointed on a judgment of insolvency is entitled to continue the suit as the insolvent might have done. **Mohammad Zakki v The Municipal Board**, 16 A L J 440—47 Ind Cas. 577

—**RICHARDS, C J.** and **BANERJI, J.**

- (2) *Irregular appointment of—Suit brought by such receiver under authorisation of Court of maintenance—Propriety of the Receiver's appointment if can be challenged in the suit*

In a suit pending in the lower Court, the High Court in appeal directed the appointment of a Receiver on taking proper security. The lower Court appointed a Receiver but took no security and authorised him to bring a suit against the respondent which was done. The suit was dismissed on the ground of invalidity of the Receiver's appointment.

Held—That an order which is erroneous in law is not necessarily an order made without jurisdiction and the order for the appointment of the Receiver was operative in law. That the propriety of a order of decree made in a case in which the Court has jurisdiction cannot be challenged collaterally and the lower Court was wrong in dismissing the suit on the ground that the Receiver was not competent to maintain the action. **Bhairab Chandra Dutt v. Nandiram Agrani**, 22 O W N 540—43 Ind Cas 804—27 C L J 395

—**MOOKERJEE** and **BRACHCROFT, JJ.**

References—**Greenwall v Wilson**, 62 Ka 109, **Devi v Oread** 31 L J Ch 807, *Ex parte Evans* 13 Ch D 252, **R. v Edwards v Edwards**, 1 Ch. D 491, *Dist.*

- (3) *Premises good will and stock in trade of business, Mortgage of—Floating charge—Mortgage given option of retaining possession of property on giving security—Receiver Appointment of*

The defendant mortgaged to the plaintiffs by a document in the English form certain premises and the good will and the stock in trade in the business carried on therein were pledged by way of a floating charge to secure the money that would become due from the mortgagor to the mortgagees. The mortgage contained a proviso that at no time during the continuance of the security would the mortgagor permit the stock-in-trade to fall below a certain value. Default being made in the payment of interest, the floating charge matured, and attached to the property that was on the premises at the time the charge ceased to float. All on the stock-in-trade that was on the premises at the time the mortgagees determined to enforce the floating charge became a portion of the mortgage security and in order to preserve that and to prevent the assets including all the actionable

Receiver—(Continued).

claims relating to the business from being lost to the mortgagees the mortgages applied to the Court for the appointment of a Receiver.

Held, that the appointment of a Receiver was under the circumstances valid and proper specially after the mortgagors were offered the option of remaining in possession of the property on giving proper security. **Hardwarimall Dibiahand v. Lachmandas Puruk Chaud**, 46 Ind Cas. 389

—**FLETCHER** and **SMITHER, JJ.**

- (4) *Rent, Arrears of Suit for—Receiver of solvent tenant's estate, if a necessary party to—Landlord and tenant—Rent, Suit for—Tenant, insolvency of—Receiver, whether necessary party.*

A Receiver of a tenant's estate in insolvency is not a necessary party to suit for arrears of rent if the suit is regarded as a simple money suit.

A Receiver in a mortgage insolvency stands on much the same footing as the Official Assignee in the Presidency towns, and it has always been held that the Official Assignee is not a necessary or proper party to a suit against an insolvent for the recovery of a simple money debt. **Amritlal Ghose v. Narain Chandra Chakrabarthy**, 46 Ind Cas. 395

—**CHITTY** and **SMITHER, JJ.**

- (5) *Civ. Pro. Code (Act V of 1903), S 115—Receiver appointed to recover property—Suit by Receiver—Court postponing trial—Refusal to exercise jurisdiction—Conversion of original petition into revision petition—Lower Court refusing appointment of Receiver—Appointment on appeal*

A Receiver was appointed to take charge of certain jewels in suit. The Receiver, alleging that the jewels were in the possession of the respondent, prayed for an enquiry and for orders. The Court directed the Receiver to sue the respondent and, on his suing, postponed trial of suit pending disposal of the original suit.

Held that there was a clear refusal to exercise jurisdiction. The Court was bound to assist the Receiver in getting possession of the jewels. **Ramachandra Iyer v. Yalthinathan**, 8 L. W. 436

—**OLDFIELD** and **BAKEWELL, JJ.**

- (6) *Possession by, when adverse—Nature of Receiver's possession—Res judicata—First suit for partition—Second suit for possession of certain items—If second suit is barred.*

Though the possession of the Receiver is, in one sense, the possession of the Court, it is also the possession of all the parties to the suit according to their title. During the continuance of the Receivership, it is incompetent for him to set up a title in himself adverse to that of the parties.

When there was a first suit for partition on plaintiff's general right or on the basis of an arbitration, and a second suit was brought to recover specific items on the basis of a partition

Receiver—(Concluded).

already effected: *Held* there was no *res judicata*.
Kuppusawmy Chetty v. Kusala Ramiah Chetty, (1918) M.W.N. 688=8 L.W. 561.

WALLIS, C.J. and SPENCER, J.

References:—*Horlock v. Smith*, 11 L.J. Ch. N.S. 157; *Corea v. Appusami*, (1912) A.C. 230; *Rains v. Buxton*, 14 Ch. D. 537, R.

(7) *Execution proceedings. Appointed in, Question as to discharge of—Satisfaction of decree, a question as to—Order refusing to discharge. Appeal, if lies from—Civ. Pro. Code* (1908), S. 47.

The question of a discharge of a Receiver appointed in an execution proceeding is a question relating to the satisfaction of the decree. An order refusing to discharge a Receiver is therefore an order under S. 47, Civ. Pro. Code (1908) and an appeal lies from such order. **Maharaja Sir Rameshwar Singh v. Htendra Singh**, 3 Pat. L.J. 513=46 Ind. Cas. 655.

MULLICK and THORNHILL, JJ.

Reference:—5 B. 45, *Ref. to*.

(8) *Suit for dissolution of firm—Acknowledgment of debt made by Receiver appointed under suit—If valid. See ACKNOWLEDGMENT OF DEBT*, No. 5, 35 M.L.J. 571.

(9) *Appointment of, Objection to, Order dismissing appeal, if lies from—Civ. Pro. Code* (1908), O. XL, r. 1. See **APPEAL (GENERAL)**, No. 31-a, 3 Pat. L.J. 573.

(10) *Appointment of—Defendant in uninterupted possession—When proper. See CIV. PRO. CODE* (1908), No. 479, 43 Ind. Cas. 550.

(11) *Appointment of Receiver—Its effects on a person in possession of property and not a party to suit. See CIV. PRO. CODE* (1908), No. 480, 45 Ind. Cas. 177.

(12) *Principles of appointing a Receiver—Conformity of Indian and English Law. See CIV. PRO. CODE* (1908), No. 481, 45 Ind. Cas. 224.

(13) *Insolvency—Contract of sale entered into by Insolvency Receiver—District Court's power to interfere with such contract. See CIV. PRO. CODE* (1908), No. 349, 7 L.W. 406.

(14) *Administration suit by creditors—Receiver appointed by decree in such suit—Sanction of District Judge under S. 505, old Civ. Pro. Code, not obtained—Lease granted by Receiver to discharge debts, if void. See LESSOR AND LESSEE*, No. 1, 45 C. 940.

Recognised Agent.

Right of, to examine and cross-examine witness or address Court on behalf of his principal—Upper Burma Civil Courts Regulation (1 of 1896), S. 25—*Civ. Pro. Code*, 1908, O. III, r. 2.

S. 25 of the Upper Burma Civil Courts Regulation forbids the recognised agent of a party, holding a power-of-attorney, from the latter doing such acts as examining and cross-examining a witness or addressing the Court on behalf of his client, unless he is generally or

Recognised Agent—(Concluded).

specially licensed by the Judicial Commissioner to do so. **Banerjee v. A. C. Mukerjee**, U.B.E. 1918, 3rd Qc., 91.

SAUNDERS, J.C.

References:—19 C.W.N. 64; 7 Bur. L.T. 206, *Dist.*

Record of Rights.

(1) *Entry in, Presumption as to, and value of—Rebuttal of presumption, Evidence as to, Consideration of—Court, Duty of.*

An entry in the Record of Rights merely raises a presumption as to its correctness. Where evidence is adduced to rebut this presumption, it is the duty of the Court to show by its judgment that it has considered that evidence and then come to a distinct finding as to whether or not that evidence has or has not rebutted the presumption that arises from the Record of Rights. **Durga Prasad v. Harihar Prasad**, 45 Ind. Cas. 916=4 Pat. L.W. 448.

IMAM, J.

(2) *Entries in, likely to be fatal to relief claimed, Effect of—Wrong entry, Determination of, Court's power re—Determination essential for consequential relief—When claim for declaration barred by limitation.*

A claim is not necessarily barred merely by reason of the fact that the Record of Rights contains entries which, if produced in evidence, and un rebutted, would be fatal to the relief claimed.

The fact that the claim for a declaration in respect of the character of the holdings is barred by limitation, would not prevent the Court from determining that the survey entry is wrong, provided it was essential for the determination of the main or consequential relief as to the damages claimed by the plaintiffs. **Uttam Sahu v. Arzani**, 46 Ind. Cas. 229.

MILLER, C.J. and JWALA PRASAD, J.

(3) *Bengal Tenancy Act (VIII B.C. of 1885), S. 106, Proceedings under, for correction of entry in—Entry of plaintiff and defendant as joint landlords—Partition—Possession of plaintiff, if possession on behalf of defendant also—Onus of proof.*

The names of the plaintiff and the defendant having been entered as joint landlords in the Record of Rights, in a proceeding under S. 106 of the Bengal Tenancy Act (1885) for the correction of the entry it was held, that, considering the facts that a partition had taken place long before the Record of Rights and that the plaintiff had been in sole possession since then, the plaintiff should, in the absence of any evidence on the part of defendant to show that the plaintiff's possession was possession on his behalf, be recorded as the sole landlord. **Brojendra Kishore Roy v. Jugendra Kishore Roy**, 47 Ind. Cas. 5.

CHITTY and WALMSLEY, JJ.

Record of Rights—(Concluded).

(4) Suit for amendment of—Dispute between neighbouring proprietors—Question for determination See BEN., ACT VIII OF 1885 (TENANCY), No. 42, 45 Ind. Cas. 781.

(5) Presumption of correctness of—Finding of lower appellate Court as to whether presumption rebutted not liable to be disturbed in second appeal. See APPEAL (SECOND APPEAL), No. 6, 92 O.W.N. 449.

(6) First record containing entry hostile to plaintiff—Plaintiff in possession—Publication of second record again containing similar wrong entry—Failure to bring suit for declaration of incorrect nature of first record if bars subsequent suit to correct second record. See DECLARATORY SUIT, No. 6, 3 Pat. L.J. 861.

(7) Entries in, Correctness of, Presumption as to. See PARTITION, No. 2 a, 43 Ind. Cas. 359.

(8) Officer in charge of, in Berar if an officer authorised to recognise division of a survey number. See PRE-EMPTION, No. 11-a, 42 Ind. Cas. 447—14 N.L.R. 51.

Rectification of Instrument.

Time to effect, Lapse of—Title if may be proved without—Omission of party's name from document by fraud or mistake, Proof of See TITLE, No. 2, 28 O.L.J. 197.

Redemption and Foreclosure.

See BEN. REG. XVII OF 1806

Re-entry.

(1) Landlord, Right of, of—Non transferable occupancy holding, Sale of, to a Zaiseshgudar.

The landlord has a right of re-entry on a sale of a non-transferable holding to a Zaiseshgudar thereof, even though the landlord had recognised the zaiseshgi right prior to the sale. *Mukaram Singh v. Sadasi Koer*, 47 Ind. Cas. 32.

ROE and COUTTS, JJ.

(2) Grant of permanent and heritable tenure in land by landlord—Right to re-enter, if should be reserved See LANDLORD AND TENANT, No. 7, 48 O.L.J. 278.

(3) Right of, of landlord on abandonment of holding without recourse to provisions of S 87 of the Bengal Tenancy Act (1885). See LANDLORD AND TENANT, No. 52 e, 47 Ind. Cas. 147.

(4) Right of—Lease of land for digging up tank for benefit of men and cattle—Tank dug but silted up—Forfeiture of lease See LEASE, No. 11, 46 Ind. Cas. 507.

Refund.

(1) Money refunded under illegal order, to be brought back into Court. *Surendra Nath Goswami v. Bangishadan Goswami*, 24 O.L.J. 539—36 Ind. Cas. 457—22 O.W.N. 160. See Final Part, 1916, Col. 1228.

Refund—(Concluded).

(2) Civ. Pro. Code (1908), O. XXI, rr. 91, 92, 93—Sale confirmed—Suit by stranger—Sale found invalid—If auction purchaser can apply for refund of purchase-money deposited—Old and new Code.

An auction-purchaser, who has deposited money in Court for a sale in Court auction, if he finds that no interest has passed to him, can only apply under O. XXI, r. 93, Civ. Pro. Code, after having got the sale set aside under r. 91 before confirmation. He has no substantive right to recover his money after the sale was confirmed and a suit was brought by a stranger wherein the sale was held to pass no interest (a). Difference between the old and the new Code pointed out. *Subbu Reddi v. Ponnambala Reddi*, (1918) M.W.N. 655.

OLDFIELD and SADASIVA Aiyar, JJ.

References.—(a) (1912) M.W.N. 1180 and 14 A.L.J. 1216, F; (1916) M.W.N. 797; 36 A. 529; 85 B. 29, R.

(3) Execution sale—Property sold in auction second time after previous sale—Suit by purchaser for refund of purchase money. See CIV. PRO. CODE (1908), No. 359, 16 A.L.J. 296.

(4) Ejectment by landlord of purchaser of occupancy holding under mortgage decree—Suit by purchaser for refund of purchase-money, if lies. See CIV. PRO. CODE (1908), No. 360, 22 O.W.N. 760.

(5) Court-fees, Of excess, paid on memorandum of appeal—High Court, Power of, to order—Civ. Pro. Code (1908). See COURT FEES, No. 3, 3 Pat. L.J. 452.

(6) Contract of sale void ab initio—Article of limitation applicable to case. See LIMITATION ACT (1908), No. 133, 44 P.R. 1918.

(7) Organization to place capital at disposal of members in turn on payment of monthly subscriptions—Right of subscriber to claim refund of part subscription. See SUBSCRIPTION, No. 1, 77 P.R. 1918.

(8) Agreement opposed to—Money paid under such agreement—Suit for refund of such money if lies—Slavery bond, Enforceability of. See VOID AGREEMENT, No. 1, 27 C.L.J. 459.

Register of Births and Deaths.

Kept at police station, if public document. See EVIDENCE ACT, No. 12, 22 O.W.N. 822.

Registration.

(1) Compromise embodied in Court's proceedings—Registration not necessary—Admission of compromise before Court—Suit withdrawn—Estoppel.

Where the compromise entered into between parties is embodied in the proceedings of the Court, such a compromise requires no registration.

Where a party admitted a compromise before a Court and induced the other party to withdraw his suit, the party making the

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admission is estopped from bringing a fresh suit on the matter. *Gulab v. Badhawa*, 45 Ind. Cas. 331.

LE-ROSSIGNOL and WILBERFORCE, JJ

- (2) *Document, of—Enquiry as to, under Registration Act (1908), S 74 Nature of—Procedure—Criminal Court, Jurisdiction of to enquire into fact of execution—Result of enquiry—Consideration of by Registrar's Court—Registration Act (XVI of 1908), Ss 74, 75 82*

It is the intention of the Registration Act that the enquiry made under S 74 should be a summary enquiry, and that the real enquiry as to the genuine character of the document should be made in a suit brought under S. 39 of the Specific Relief Act

A Criminal Court has full jurisdiction to enquire into a fact of execution of a document, when the party denying execution is present before it as an accused under S 81 of the Registration Act and the result of that enquiry can be taken into consideration in the Registrar's Court in an enquiry under S 74 of the Act. *Azhar Hussain v Sawial Marwari*, 46 Ind. Cas. 878.

ROE and COUTTS, JJ.

- (3) *Burmese Buddhist religious gifts—Registration, if necessary in case of—Transfer of Property Act S. 123, Applicability of. See BUDDHIST LAW (GIFT), 45 Ind. Cas. 926.*

- (4) *Moveable and immoveable property, Charge on, Document creating, Non-registration of, Charge how affected by See CONTRACT, No. 8, 47 Ind. Cas. 563*

- (5) *Endorsement of—Evidentiary value—Execution of document if conclusive proof of—Evidence Act, S 67. See DOCUMENT, No. 2, 46 Ind. Cas. 379.*

- (6) *Allegation that property not in existence has been included in mortgage deed—Onus of disproving existence of property See ESTOPPEL, No. 2, 22 C.W.N. 894*

- (7) *Compromise decree affecting immoveable property, if requires registration. See MALABAR LAW, No. 6, 35 M.L.J. 51.*

- (8) *Act constituting fraud upon law of—Validity of act—Registration, which is invalid for one purpose if valid for any other See MORTGAGE (ANOMALOUS MORTGAGE), No. 1, 21 O.C. 341.*

- (9) *Surrender of lease if requires registered document. See SURRENDER, No. 1, 28 C.L.J. 220.*

Registration Act (1908).

- (1) *Registration in one district by inclusion of property not intended to be conveyed—Validity Rama Naik v. Nagamuthu Nachiar, 22 M.L.T. 516—7 L.W. 33—48 Ind. Cas. 515. See Final Part, 1917, Col. 778.*

Registration Act (1908)—(Continued).

- (2) *S. 17—Reversioners—Agreement to forego right to sue for declaration in Court—Document not compulsorily registrable.*

Certain reversioners executed an agreement whereby they agreed to forego their right to sue for a declaration that a deed of gift executed by a widow in favour of certain persons was not binding after her death. Held that the document did not convey any right, title or interest nor did it purport or operate to extinguish any right, etc., and therefore was not compulsorily registrable within the meaning of S. 17 of the Registration Act. *Musammam Bhaba v. Guman Singh*, 16 A.L.J. 191—40 A. 384—44 Ind. Cas. 629.

TUDBALL and RAFIQ, JJ.

- (3) *S. 17—Compromise between landlord and tenant purporting to create a lease—Necessity of registration—Bengal Tenancy Act, S 29—Enhancement of rent in contravention of section.*

Where a compromise petition purports to create a lease and not an agreement to create a lease in future, it requires registration under cl (d) of S. 17 of the Registration Act.

Where a landlord and tenant enter into a compromise enhancing the rent contrary to the provisions of S 29, Bengal Tenancy Act, the enhancement is held illegal. *Srikishun Lal v. Sheobalak Gope*, 44 Ind. Cas. 638—4 Pat L.W. 247

SIR ALI IMAM, J

Reference —37 C. 808, Dist.

- (4) *S. 17—Composition deed—Money suit, in—Creating charge on immoveable property—Registration, Necessity of. See COMPOSITION DEED, 46 Ind. Cas. 243*

- (5) *S. 17—Document varying rent is lease and requires registration—Absence of registration, effect of See LEASE, No. 6, 27 C.L.J. 107.*

- (6) *S 17 (b)—Letter by mortgagor to mortgagee stating purpose of deposit of title deed if requires registration. See MORTGAGE (EQUITABLE MORTGAGE), No. 1, 22 C.W.N. 758.*

- (7) *S. 17—Equitable mortgage—Memorandum of securities handed over to mortgagee—Registration if necessary. See MORTGAGE (EQUITABLE MORTGAGE), No. 2, 45 Ind. Cas. 918.*

- (8) *S 17—Successor in title of original equitable mortgagee in possession with mortgagor's consent—Registered document if necessary for such transfer of possession. See MORTGAGE (EQUITABLE MORTGAGE), No. 3, 9 L.B.R. 172.*

- (8-a) *S. 17—Unregistered deed of sale, Vendee claiming title—Position of—Trespasser—Ejectment—Vendee claiming title under subsequent registered deed of sale. See TRESPASSER, 111 P.R. 1918.*

Registration Act (1908)—(Continued).

(9) S 17 (b).—Transfer of mortgage-debt requires registration. See **TRANSFER OF PROPERTY ACT, No. 80, 22 C.W.N. 641.**

(10) S 17 (1) (b).—*Letter reciting certain facts and delivery of possession—Whether compulsorily registrable.*

A letter reciting certain facts and stating that the writer has given possession of the property, that he had nothing to do with the property in future and that it has been sold is not an instrument which, of itself purports or operates to create or declare any right, title or interest in the property in question and does not require registration. **Kaju Mal v Parama Pand, 40 Ind. Cas. 455.**

SCOTT-SMITH, J.

(10 a) S. 17 (1) (b).—Document acknowledging partition not compulsorily registrable. See **RES JUDICATA, No 40 a, 122 P.W.R. 1917.**

•(11) S 17 (1) (b), (d) (2) (vi).—*Compromise—Adjustment made up partly of matters outside scope of suit—Entire compromise filed in Court—Duty of Court disposing of suit—Compromise referred to in order of Court—Necessity of registration of compromise even when it alters registered document—Documents filed in judicial proceedings if admissible in evidence without registration—Transfer of Property Act, Ss 105, 107—Civ Pro Code (1908), O XXIII rr 3 and 7—Compromise accepted by Court how far binds minors subsequently*

By a lease of 1895 of certain land, it was provided inter alia that a certain rate of commission subject to a minimum royalty should be paid by the lessees to the lessors. One of the clauses of the lease also stipulated that the royalty and commission payable should be payable to each of the co-sharer lessors according to their respective shares and that in respect of the share of each co-sharer he should be entitled to recover the same by suit from the lessees. In 1901 a suit was filed on behalf of all the existing co-sharer lessors as a body each co-sharer claiming to recover according to his respective share, an aliquot part of the royalty and commission due under the lease of 1895. Four of the co-sharers, Grish, Narahari, Harihar, Khageshwar, were minors when the suit was filed but they were properly brought upon the record by their guardians. The suit was compromised in 1902 on the understanding that a certain sum of money should be accepted in lieu of the arrears of rent and that the rate of commission and royalty should be reduced. The compromise was subsequently filed as part of the record in the suit then pending and was recorded by the Court with the remark, that the terms of the lease had also been changed, but that that was no part of the subject-matter of the suit. The Court, however, never expressly recorded its sanction to the compromise on behalf of the minors as a compromise beneficial to them. In 1906, another suit was instituted between practically the

Registration Act (1908)—(Continued).

same parties with reference to the same subject-matter. Grish now a major contended that the compromise of 1902 was not binding on him as he was then a minor. Narahari was still a minor in 1902, did not, in 1906, impeach the validity of the compromise of 1902. The suit of 1906 was also subsequently compromised. But again another suit was brought in 1918 to recover royalty and commission on the basis of the lease of 1895. Held that the rent being divisible by the terms of the original lease, Grish and Narahari were entitled to royalty and commission on the basis of the lease of 1895, and the rest of the plaintiffs, who were adults, were conclusively estopped and bound by the terms of the compromise of 1902 (a). Held, also, that the compromise in question was not per se a lease which required to be registered under the provisions of sub S 1, sub cl. (d) of S 17 of the Registration Act, read with S 107 of the Transfer of Property Act but was protected from registration under cl (vi) of sub-S 2 of S. 17 as it was embodied in the decree of the Court and was admissible in evidence (b).

In respect of documents of the nature of affidavits, petitions or pleadings which are filed in the course of a proper judicial proceeding, the same are admissible in evidence without the necessity of registration where a compromise is referred to and is incorporated in the order of the Court or is filed by way of petition in the proceedings, then it is within the protection provided by cl (vi) of sub-S. 2 of S. 17, Registration Act.

Under Civ Pro Code, 1908, O XXIII, r. 3, the duty of a Court in dealing with a compromise relating to matters directly within the scope of the suit is to accept the compromise and record it and to prepare and draw up a decree in accordance with it, so that the same may be executed in the due and ordinary course of procedure. But if it contains matters outside the scope of the suit, then the Court must make an order recording the entire compromise and then draw up a decree giving the parties the right to execute the decree in respect of matters which fall within the scope of the action, leaving it to the parties to enforce by whatever means they like that portion of the compromise which refers to the matters outside the scope of the suit. The entire compromise must be recorded, and be embodied by an order in the record of the suit or proceeding. Each case must depend upon its own facts, as to whether or not the compromise does in fact include within its terms matters outside the scope of the original suit (c).

Per **Chapman, J**.—In order to bring a case within sub cl 2 (vi) of S. 17, Registration Act, it is permissible to look not only to the order of the Court but also to look at the pleadings which resulted in that order. Where a suit is properly adjusted but the adjustment consists partly of an agreement relating to matters

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outside the scope of the suit if the entire compromise is laid before the Court and the Court is invited in consequence to dispose of the suit and the Court does dispose of the suit accordingly, then the agreement is exempt from registration under the Registration Act, although the decree deals only with the subject matter of the suit and does not deal with the portion of the compromise which lies outside the suit, the only limitation of the rule being that the proceedings must be proper and they must not be fictitious or collusive and they must be regular and in accordance with law. **Chandra Chandra Mitra v Sambhu Nath Pandey**, 3 Pat. L. J. 255 = 46 Ind. Cas. 358.

CHAPMAN, ATKINSON and IMAM, JJ.

References—(a) 26 B. 109 and 24 M. 326, B. (b) 42 C. 801, Dist., 37 C. 393; 20 A. 171; 22 M. 508; 28 A. 78, 1 Pat. L. J. 308; 3 Pat. L. J. 43; 33 A. 798; 22 Ind. Cas. 687, 19 Ind. Cas. 551; 26 Ind. Cas. 790, 31 Ind. Cas. 260; 12 Ind. Cas. 35; 91 P. R. 1915, 20 P. R. 1914; 29 Ind. Cas. 311, Rel. on, 38 M. 959, R; 36 M. 46, 36 C. 193, 32 A. 206, 22 Ind. Cas. 687, Not F.; 33 M. 102, Comm. on. (c) 30 M. 478, R.

(12) S. 17 (a) (b) 2 (2s)—*Agreement to relinquish portion of moneys due under mortgage—Agreement of requires registration—Admissibility in evidence*

An instrument whereby a mortgagee agrees to relinquish more than a hundred rupees out of the mortgage debt due to him is one which purports to limit or extinguish interest in immoveable property and under S. 17 (b), Registration Act, requires registration to render it admissible in evidence and it is neither an acknowledgment nor a receipt to be exempted under cl. (24) of sub S. 2 of the Act (a). **Lakshmana Setti v. Chenchuramayya**, 34 M. L. J. 79 = 7 L. W. 229 = (1918) M. W. N. 261 = 44 Ind. Cas. 133.

ABDUR RAHIM and NAPIER, JJ.

References—(a) 35 A. 49, 26 C. 707; 41 C. 499 (P. C.); 35 A. 202. Rel. on; 4 B. 235, 42 C. 546, Dist.

(13) S. 17 (c) (d)—*Agreement to mortgage—Construction—Registrability—Specific performance*

1 The question whether, for the purpose of the Registration Act an instrument is an agreement to execute a mortgage or a lease depends on the intention of the parties. The essential test is whether by the transaction in question the debt was secured or satisfied; if the former it would be an agreement to execute a mortgage and need not be registered, if the latter it will be an agreement to give a lease and must be registered.

2. The Court will not decree specific performance of an agreement to lend or borrow money, whether on security or not; but will only award damages in case of breach. Where, however, the lender in an agreement to mortgage has advanced the money either in whole or in part and the borrower is not prepared to

Registration Act (1908)—(Continued).

repay the same, the Court will specifically enforce the execution of the mortgage.

Where the defendant agreed to give the plaintiff in swambogham certain immoveable properties for twenty years for Rs. 5,000 and the principal and the interest were to be realised by the enjoyment of the properties for the twenty years and the plaintiff agreed to pay annually certain quantities of paddy and straw and money and provide certain number of labourers to the defendant and it was stipulated that the plaintiff was to enjoy the properties for eight years certain and the defendant could at his choice redeem the properties after the expiration of eight and before the expiry of twenty years and after the plaintiff had paid Rs. 4 250 in pursuance of the said agreement, the defendant refused to execute the instrument and complete the transaction.

Held, (1) the agreement was one to execute a mortgage and did not require registration (a);

(2) the plaintiff was entitled to a decree that, unless the defendant repaid the sum paid to him or on his account, he should execute the mortgage according to agreement; and, in case the defendant paid off the amount received by him, he would be also liable for damages for breach of contract (b).

Per **Abdur Rahim, J**—The mortgage in question is an anomalous mortgage.

Per **Seshagiri Aiyar, J.**—The mortgage in question is a usufructuary mortgage. There is no reason why a contract that a definite portion of the income shall be paid annually to the mortgagor should not be included in a usufructuary mortgage.

Assuming that the above agreement was one to execute a combination of a mortgage and a lease, such an agreement is not compulsorily registrable. **Meenakshi Sundara Mudallar v. Rathinasawmy Pillai**, 24 M. L. T. 315 = 35 M. L. J. 489 = (1918) M. W. N. 811 = 8 L. W. 438 = 41 M. 959.

ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

References—(a) 26 B. 252, 7 M. 303, F. (b) (1879) L. R. 16 Equity Cases 18; (1898) A. C. 309; 34 M. L. J. 342; 43 C. 59, F.

(14) Ss. 17 (1) (d) and 2 (v), 49—*Lease—Agreement in writing for 5 years' lease—Non registration—Inadmissibility in evidence—Secondary evidence inadmissible—Intention to execute more formal document.*

A mere proposal to take a lease does not require registration; but when a proposal in writing is accepted in writing, it, in fact, becomes a lease, or at least an agreement for a lease, and, if the lease is for a period of more than one year, it would require registration under the provisions of S. 17 of the Registration Act.

A paper containing a list of bids with an endorsement signed by the successful bidder to the effect that he agrees to take a lease for 5 years at a certain annual rent and also an endorsement signed by the lessor to the effect that the sale is confirmed amounts to an agreement for a lease and requires registration.

Registration Act (1908)—(Continued).

If the document is unregistered, no oral evidence can be given of the terms of the lease. *Rajaramji v. Ganesh*, 49 Ind. Cas. 629.

MITTRA, A J C.

Reference :—7 C. 703, F.

(15) S. 17 (c)—*Partition, if necessary to be in writing—Partition already effected, possession of land allotted under, Receipt for, if requires registration.*

The law does not require writing to complete a partition already effected by Panchas.

An instrument, which is in terms, merely, a receipt for possession of land allotted to one of the parties in a partition, which had already been effected by Panchas, is not compulsorily registrable under S. 17 (c) of the Registration Act. *Fakira v. Tuladram*, 45 Ind. Cas. 854—1 N.L.J. 5.

DRAKE BROOKMAN, A J C

Reference :—25 C. 210—2 C.W.N. 91, F.

(16) S. 17 (d)—Oral lease for more than one year—Letters confirming lease memoranda of fact accomplish—Letters require no registration. See RES JUDICATA, No. 39, 11 P.L.R. 1918.

(16a) S. 17 (2)—Petition of compromise addressed to Court, Necessity of, Registration of, under. See WITHDRAWAL OF SUIT, No. 1, 46 Ind. Cas. 913.

(17) S. 17 (2) (a)—Solenamah in criminal case reciting agreement to give up possession of suit land—Registration, if necessary.

A petition of compromise (solenamah) whereby the defendants agreed to give up possession of suit land in favour of plaintiff was filed by the defendants in a criminal case between parties. *Held*, that the solenamah is admissible in evidence, though unregistered. *Kundu Bibi v. Abdul Majid*, 43 Ind. Cas. 26.

FLETCHER and NEWBOULD, J.J.

(17a) S. 17 (2) (a) (iv)—Compromise decree comprising property not subject matter of suit, whether requires registration—Civ. Pro. Code (Act V of 1903), O. XXIII, r. 3—Adjustment of suit.

Where a permanent lease was taken of certain lands by three parties, and one of them subsequently instituted a suit claiming about one third of the leased lands, and the suit was settled by a compromise by which it was agreed that each of the three parties should be recognised as having a separate right in one-third of the property, and the compromise was incorporated in a decree of the Court.

Held, that such a compromise in which each defendant admits the plaintiff's claim to certain portions of the claim made by him in consideration of the plaintiff admitting each of the defendant's claim for certain property which he desires to retain, does not require to be registered (a).

(16a) (2) (a).
The subject of the Registration Act requiring registration of documents should be merely that a document of ensuring publicity of record for the purpose of facilitating proof of execution and to in order to prevent fraud and it is on this principle that a decree which is an order of the Court has been exempted from registration.

Registration Act (1908)—(Continued).

prevent fraud and it is on this principle that a decree which is an order of the Court has been exempted from registration.

Per *Jwala Prasad, J*—Under O. XXIII, r. 3, Civ. Pro. Code, all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. Under S. 17 of the Registration Act, cl. (2) (vi), "a decree or order of a Court" does not require registration and all that has to be seen is whether the subject matter of the subsequent suit was embodied in the compromise decree or not, and if the lands were embodied in the decree it is not opened in the subsequent suit to go behind the decree and find out whether the lands were the subject matter of the suit in which the decree was passed. *Karu Mian v. Tejo Mian* 43 Ind. Cas. 282—3 Pat. L.J. 48—3 Pat. L.W. 141.

CHAPMAN and JWALA PRASAD, JJ.

References :—(a) 12 M. 508—1 Bom. L.R. 394—3 C.W.N. 465—26 L.A. 101—9 M.L.J. 147—7 Sar. P.C.J. 516—8 Ind. Dec. (N.S.) 863; 20 A. 171—2 C.W.N. 123, 25 I.A. 9—7 Sar. P.C.J. 273; 9 Ind. Dec. (N.S.) 471 (P.C.), F.; 1 Ind. Cas. 913, 36 C. 193 at p. 222; 5 C.L.J. 611, Not F.

(18) S. 17 (2) (vi)—Award signed by parties as well as arbitrators, whether compulsorily registrable.

A dispute between three brothers, with regard to immoveable property of the value of more than Rs. 100, was settled by means of a document, which was signed by all the brothers as well as six other persons described as *punches*. It appeared that the parties had assented to the opinion of the *punches*. One of the brothers having taken forcible possession of the property that had fallen to the plaintiff's share, the latter sued for possession.

Held that the documents settling the dispute was an award and did not require registration. *Khazan Chaud v. Hamir Chaud* 189 P.W.R. 1918—46 Ind. Cas. 635.

LESLIE-JONES, J.

References :—101 P.W.R. 1914—10 P.R. 1914—22 Ind. Cas. 414, F.

(19) Ss. 17, 49—Unregistered document, lost—Admissibility of secondary evidence to prove fact which does not affect land or interest in land.

A document, which requires registration under S. 17 of the Registration Act, but not registered, was lost. The person in whose favour the lost document was executed, though debarred from proving it by secondary evidence in regard to any transaction affecting the land, is entitled to use that document as evidence of an oral agreement which does not affect the land or any interest in the land. *Ma Pan U v. Ma Shwe Tint*, 44 Ind. Cas. 91.

ORMOND, C.J.

References :—9 C. 590—12 C.L.R. 309 (F.B.); 4 L.B.R. 52, R.

Registration Act (1908)—(Continued).

(20) *Ss. 17, 49—Registration, Necessity of, of Admission—Admission in Solenama, Admissibility of, in evidence, when solenama unregistered.* See **ADMISSION**, No 1, 46 Ind. Cas. 442.

(21) *Ss. 17 and 49—Award filed by partner and accepted by Court—Registration if necessary.* See **AWARD** No 9, (1918) M W N 184.

(21 a) *Ss. 17, 49—Map and Chitta showing allotments on partition—Registration, Necessity of—Improper exclusion of documentary evidence on ground of non registration, Effect of* See **EVIDENCE**, No 4 a, 47 Ind. Cas. 159.

(22) *S. 21—Transfer of Property Act, S. 54—Registration of sale deed—Reference to map—Map not registered—Effect.*

Where a document (deed of sale) describes the lands sold and refers to a map which was not presented for registration held that such a document cannot be registered under S. 21 (1) and (4) of the Indian Registration Act and that, although such a document was registered, no registration of it has been effected within the provisions of the Act, and the document passes no title in the lands. **Campbell v. Maung Po Nyein**, 43 Ind. 18, 455

MAUNG KIN, J.

Reference —18 C. 556, F.

(23) *S. 28—Registration—Validity—Jurisdiction of registering officer—Property included in mortgage deed within jurisdiction of registering officer—Vendor having no title to it—Fraud*

Where in a mortgage deed certain immovable property was included which actually existed within the jurisdiction of the registering officer but the mortgagor had no title thereto, and the deed was duly registered, held that the registration was not vitiated by the fact of the mortgagor's want of title when there was no knowledge on the part of the mortgagee and no collusion between the mortgagor and mortgagee. **Fahlad Lal v. Musamat Laraiti**, 16 A. L. J. 871.

PIGGOTT and WALSH, JJ.

References —14 C. W. N. 532 F., 41 C. 979, Dist.

(24) *S. 28—Place of Registration—Jurisdiction of Registrar—Transferor not entitled to property transferred—Transfer merely ostensible—Burden of proof.*

In the absence of fraud on the part of the transferee, and collusion between the transferor and the transferee, the mere fact that the transferor had no title to a piece of land mentioned in the deed would not be a bar to the Registrar's jurisdiction.

In cases where a litigant alleges that a document to which he put his signature in token of resigning an interest does not contain a correct statement of the facts and of the intentions of the parties, the burden of proof lies on him. **Chandraball Bibi v. Ram Kishan Joshi**, 44 Ind. Cas. 399—4 Pat. L. W. 237.

ROE and JWALA PRASAD, JJ.

References —14 C. W. N. 532, F.; 18 C. W. N. 817, Dist.

Registration Act (1908)—(Continued).

(25) *Ss. 32, 33, 71, 73, 75—Mortgage bond—Registration—Presentation by person under a duly authenticated power of attorney on behalf of mortgagor—Failure to appear on the part of mortgagor—Refusal to register—Death of mortgagor—Application by his representative—Registrar's certificate ordering same to be registered—Presentation on behalf of Collector as Manager of Court of Wards for the mortgagor's representatives by a messenger along with a letter from Collector accompanied by Registrar's certificate—Validity of such presentation.*

Certain persons executed a mortgage-deed in favour of P on November 20 1911. Before the deed could be registered P fell ill, and on February 3, 1912, a special power of attorney as required by S. 33 of the Registration Act was executed in favour of N authorising him to present the document for registration on behalf of P. On February 5, 1912, N acting under this power of attorney presented it for registration before the Sub Registrar. On February 8, 1912, P died. The mortgagor having failed to appear to admit execution, the Sub Registrar refused to register the document. Thereupon the widow of P acting as the natural guardian of P's sons who were minors applied to the Registrar to have the document registered and on June 28, 1912, a certificate was granted by the Registrar ordering the same to be registered. On July 23, 1912, (within thirty days of the certificate) the Collector as Manager of the Court of Wards (which in the meantime until the superintendence of the estate of the minors) sent the document by a messenger with a covering letter accompanied by the Registrar's certificate to the Sub-Registrar for registration and it was duly registered. On a suit being brought on the document, it was objected, *inter alia*, that the document had not been validly registered.—*Held*, that under S. 75 (2) of the Act the document had been duly presented when on the 23rd of July, 1912, the Registering Officer received it under cover of an official letter from the Collector of Moradabad, no matter who the messenger might have been who carried the document in question; held also that when the Sub Registrar endorsed due authentication on the power of attorney on the 3rd February 1912, and the mortgage deed was presented for registration on the 5th February by the person holding such power of attorney, there was no defect in the presentation.

In the provision about presentation in S. 75 there is an absence of imperative language and that distinguishes cases under that section from cases under Ss. 32, 33 and 34 of the Act.

Per **Walsh, J.**—Part VI and Part XII (of the Registration Act) deal with totally different circumstances and contemplates a totally different situation. Part VI is a collection of sections dealing solely with "of presenting documents for registration." Part XII is also self-contained and deals with a situation created by what is called "of refusal to register," and a case of refusal to register and of another kind

Registration Act (1908)—(Continued).

of presentation in consequence thereof has to be dealt with. Consequently, it would be to attribute totally superfluous particularity to the legislature if one were to hold that the provisions in S. 75 superimpose upon the solemn proceeding and final decision, a duty upon the person who desires merely to carry out the order of the Registrar, of performing the strict formalities which are necessary before the registration by the Registrar has taken place. What takes place after the Registrar's order as provided by S. 75 is pure machinery. Any form of presentation, if it is supported by an application, which takes place on the part of the presenter and is noted on the order in his favour, is sufficient. If some other form of presentation is intended the mistake is merely a defect in procedure which is covered by S. 87. *Collector of Moradabad v. Maqbulul Rahman*, 16 A L J 313=40 A 434=45 Ind. Cas. 37.

PIGGOTT and WALSH, JJ.

References—23 A 933, 37 A 56, Dist.

(26) S. 33. See N. 15 *supra*.

(27) S. 35—*Partition deed unregistered as to some executants, admissibility of—Hindu Law—Partition power of father to enforce, between sons—Power, fraud on—Ben's liability of acting with notice*
M., a Hindu and his three sons, the plaintiff and defendants, and 2) signed a deed of partition of immovable property of the family. The 1st defendant objected to its registration on the ground that some of the said Jukes were inserted without his knowledge but M. and the plaintiff applied to have the deed registered and it was registered under S. 35 of the Registration Act so far as they were concerned. M. died leaving a will bequeathing his share to the 1st defendant.

(1) The plaintiff sued for a fresh partition and contended that the deed of partition was inoperative as it was not registered as to all the executants and inadmissible in evidence.

Held that M. as a Hindu father had the power of effecting a partition among his children without their consent and the partition deed registered by the father though without the 1st defendant's consent had effected a valid partition (a).

Held also that there is no irrebuttable presumption that a document intended to be executed by more than one person should not be construed as evidencing a contract by some only of the intended executants who have signed the deed, and the deed of partition could be used in evidence as containing a declaration of intention by M. and the plaintiff to be separated from the rest of the family which was sufficient to establish the status of division (b).

(2) The partition deed provided that a sum of Rs. 15,000 due to the family upon a mortgage-deed should be divided among the members when realised by the father and that if the mortgaged property itself was bought by the father, the property should be divided. Instead

Registration Act (1908)—(Continued).

of purchasing the mortgaged property himself, he had it conveyed to the 1st defendant.

Held—This was a fraud by the father on his power and the plaintiff was entitled to a share in the property itself and was not bound to accept a share of the mortgaged money. *Natesa Iyer v. Subramania Iyer*, 23 M L T. 307=45 Ind. Cas. 536=(1918) M W N 703.

AYLING and SESHAGIRI Aiyar, JJ.

References—(a) 2 M 317, 31 M L J 147; 32 M L J 419, 42 C. 56, F. (b) 25 M, 989, 1 A 465, 30 M 597, 43 C 1031, R, 19 M L T. 50, 18 M L T 161, *doubted*.

(28) S. 35—Protest by executant of sale-deed at registration time that he had not sold shamul—Protest amounts to denial of execution—Duty of registering officer. See *VANDOR AND PURCHASER*, No. 11, 37 P R. 1918.

(29) Ss. 35, 37—When Registrar bound to register document—Curing defects. See *TRANSFER OF PROPERTY ACT*, No. 34, 43 Ind. Cas. 777.

(30) S. 41 (2)—Depositions taken by registering officer in inquiry before him under section—Death of deponents—Subsequent suit between same parties on same question as were before Sub-Registrar—Previous depositions if admissible in subsequent suit. See *DEPOSITION*, No. 1, 35 M L J 657.

(30 a) S. 47—Time from which registered document operates—Date of execution and not date of registration.

The plaintiff purchased a certain property. The vendor on receipt of consideration executed a deed of sale in his favour but thereafter he executed a second conveyance in respect of the same property in favour of a third person who had no notice of the plaintiff's purchase and had the latter document registered first and put the second purchaser in possession.

Held—That the title of the second purchaser did not prevail against that of the plaintiff, for under S. 47 of the Registration Act as soon as the plaintiff's conveyance was registered it operated from the date of its execution and therefore the plaintiff's title was prior notwithstanding the prior registration and delivery of possession to the second purchaser. *Rajani Nath Das v. Ofajuddi Molla*, 22 C W N. 318=37 Ind. Cas. 817.

N R CHATTERJEE and NEWBOULD, JJ.

(31) Ss. 47, 50—Priority—Date of execution—Registration of deed subsequent to the execution of another deed—Registration within time.

A mortgage deed executed before a deed of sale but registered after the sale deed and within the time allowed by the Registration Act, has priority over the deed of sale, though the vendee may have acted in good faith and without notice of the mortgage. *Amid Ali v. Abdul Mea Musumdar*, 42 Ind. Cas. 616.

FLETCHER and NEWBOULD, JJ.

Registration Act (1908)—(Continued).

- (32) S. 49—*Lease—Agreement for permanent lease—Unregistered agreement—Evidence—Specific performance—Decree for specific performance whether affects land*

An agreement for a permanent lease, if unregistered, is not admissible for the purpose of affecting the land but it is not inadmissible for any purpose whatsoever. In a suit for specific performance between the parties themselves to the contract the agreement can be looked at for adjusting their personal liabilities. A decree for specific performance does not affect the land. It is an ordinary decree of a Court of Equity and the ordinary rule is that equity acts *in personam* and the execution of the decree is not by affecting the land but by suitable process against the defendant, if he is in contempt with reference to the decree of the Court. *Harinath Banerji v Pramathanath Dey Chowdhury*, 41 Ind. Cas. 633.

FLETCHER and NEWBOULD, JJ.

- (33) S. 49—*Suit for dower money—Document agreeing to convey house property in lieu of dower amount—Document not registered—Admissibility of document for collateral purposes.*

In a suit by a Mahomedan lady against her husband and her father-in-law for recovery of the amount of her dower (Rs. 1,000) an unregistered sale deed was produced executed to her by her father-in-law on the date of her marriage, purporting to convey a shop and two houses to her in lieu of the Rs. 1,000 fixed as dower. Held that the document was admissible to prove two collateral purposes, (1) that fact that dower was fixed at Rs. 1,000 in cash and that the father-in-law bound himself to pay the sum (a). *Muhammad Bukhsh v Mussammat Amir Begam*, 23 P R 1918=44 Ind. Cas. 897.

BROADWAY, J.

References — a) 68 P R. 1886; 92 P R. 1890; 10 P R. 1896, *Dist.*

- (38 a) S. 49—*Document relinquishing right in immoveable property—Interpretation of document.*

Held, that it is a cardinal principle of interpretation of documents that in determining the nature of a transaction the document evidencing it should be considered as a whole and the intention of the parties should be gathered not from isolated sentences but from all the facts mentioned therein.

Held, also, that an instrument relinquishing right in immoveable property of the value of Rs. 100 or upwards and indicating a clear intention that the title therein should pass at once to another is a conveyance requiring registration and not a mere agreement to convey.

It is further, that a relief not claimed in the lower Court cannot be granted in the time in second appeal. *Gopi Ram Shadi*, 157 P L R 1917=10 P.W.R. d. Cas 228.

AL and LE-ROSSIGNOL, JJ.

Registration Act (1908)—(Continued).

- (34) S. 49—*Deed of gift, Non-registration of—Admissibility of such deed for collateral purpose.* See GIFT, No. 2, 13 P.W.R. 1918.

- (35) S. 49. See Nos. 14, 19, 20, 21 and 21-a, *supra*.

- (36) S. 50—*Registration Act of 1848, S. 2—Priority between unregistered sale-deed with delivery of possession and subsequent registered sale deed.*

Neither under the Registration Act of 1848, nor 1877 nor of 1908 a subsequent registration of a sale deed would not annul and invalidate a prior sale-deed though unregistered, executed long before the registered sale deed, if possession was delivered to the vendee under the deed. In the case of an unregistered sale-deed, the vendee must not only prove the sale-deed, but also that it was completed by delivery of property to him under the deed. *Asgar Ali v. Dost Mahomed*, 44 Ind. Cas. 354.

JWALA PRASAD, J.

References — 12 W R. 217, 34 C. 307, F.; *Bhyroo Chunder Misser v Ramachander Bhutacharyee*, 1 Hay, 261, R.

- (37) S. 50 (1)—*Applicability to case where subsequent vendor under registered pleads purchase in good faith without notice of prior unregistered sale* See BURDEN OF PROOF, No 8, 14 N L R 47

- (38) S. 50. See No. 31, *supra*.

- (39) S. 71. See No. 25, *supra*.

- (40) S. 73. See No. 25, *supra*.

- (41) S. 75. See No. 25, *supra*.

(41-a) Ss. 74, 75, 82—*Document; Registration of, Enquiry as to, under S. 74, Nature of—Procedure in case of—Criminal Court, Jurisdiction of, to enquire into fact of execution—Result of enquiry—Consideration of, by the Registrar's Court in enquiry under S. 74.* See REGISTRATION, No 2, 46 Ind. Cas. 878

- (41 b) S. 75. See No. 41 a, *supra*.

(42) S. 77—*No appeal to Registrar preferred from Sub Registrar's refusal to register—Civil suit under S. 77, if competent.* *Harkishan Singh v. Sarmukh Singh*, 102 P R. 1917=169 P W R 1917=7 P L R 1918=43 Ind. Cas 294 See Final Part, 1917, Col. 778.

(43) S. 77—*Sale of land and execution of conveyance without having it registered—Procedure to be followed by purchaser before instituting suit to compel registration—Purchaser if prevented from proceeding against vendor to compel him to perform his agreement to transfer.* See VENDOR AND PURCHASER, No 2, 27 C L J 538

- (43-a) S. 82. See No. 41-a, *supra*.

- (44) S. 87. See No. 29, *supra*.

- (45) S. 90—*Land Revenue Code (Bom. Act V of 1879), Ss. 74, 76—Rajinama—Kabulayat—Registration.*

In cases governed by the Bombay Land Revenue Code, 1879, Rajinamas and Kabulayats need not be registered. Though they

Registration Act (1908)—(Concluded).

cannot in themselves be documents of transfer, they are fairly conclusive evidence that a transfer has in fact been made. *Narso Ramaji Kulkarni v. Nagava Ichvarappa*, 20 Bom. L.R. 353—42 B 359—45 Ind. Cas. 492.

BRAMAN and IRETON, JJ.

References:—18 Bom. L.R. 976, 19 Bom. L.R. 899, 16 Bom. L.R. 718, R.

Regulations.

- 1.—IMPERIAL
- 2.—BENGAL.
- 8.—BOMBAY.
- 4.—BURMA
- 5.—MADRAS.

—1.—Imperial.**Reg. III of 1872 (Santal Parganas)**

S. 5—Lands situate in Santal Parganas—Courts established under the Bengal, United Provinces and Assam Civil Courts Act (1887). Jurisdiction of, over. See JURISDICTION (CIVIL COURTS), No 8, 46 Ind. Cas. 949

Reg. VII of 1900 (Aden Settlement)

Assessment of salt works—Principles of rating. See ADEN SETTLEMENT, No 1, 20 Bom L.R. 639.

—2.—Bengal.**Reg. I of 1801 (Bengal Land Revenue Assessment).**

- (1) Ss. 8 and 14—*‘Independent Talook’ what, is—Reg VIII of 1793—Time within which separation was to be applied for—“Actual produce” in S 8 refers to the produce of what date*

Held—That the proprietors of Talook Bala suti, which was established by a decree of the Sudder Dewany Adaulat of 1805 to be an independent talook, having duly applied for the separation of the talook in accordance with the provisions of Reg I of 1801 within a year from the passing of the Act, had not been wanting in diligence in seeking the relief to which they were clearly entitled and that the delay of over 100 years that had occurred was due either to the opposition of the zamindar or the action of the Revenue authorities and that the objections of the zamindar in their present suit to the separation being effected by the Revenue authorities were purely vexatious and designed to prolong litigation.

“The actual produce” on which the assessment of revenue under S. 8 of Reg I of 1801 was to be based was “the actual produce” at the time when proceedings were instituted for the separation of the talook. *Rani Hemanta Kumari Debi v. Maharajah Jagadindra Nath Roy Bahadur*, 23 C.W.N. 149 (P. C.).

VISCOUNT HALDANE, LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE and MR. AMHERST ALI.

- (2) S. 14. See No 1, *supra*.

Regulations—(Continued).**—2.—Bengal—(Continued).****Reg. XVII of 1806 (Redemption and Foreclosure).**

(1) Mortgage created by consent decrees of 1908 providing for land becoming mortgagees' on default by mortgagor—Condition if valid under Punjab Land Alienation Act—Redemption of mortgage by mortgagor if permissible. See MORTGAGE (REDEMPTION), No. 20, 56 P.R. 1918

- (2) Ss. 7, 8—*Mortgage by way of conditional sale—Foreclosure—Notice, defective, effect of.*

Held, that the mere fact that parts of the seal of the District Judge are not legible, is not a fatal defect in a notice of foreclosure served under Ss 7 and 8 of Reg XVII of 1806 (a)

Nor is an ambiguity in the specification of the date of the mortgage deed fatal where it is such that it could not have led to any misconception on the part of the mortgagor

Nor is an omission of words describing the property mortgaged fatal where it could not have caused any misunderstanding. *Raghu Nath v. Rudna*, 80 P.L.R. 1918—82 P.W.R. 1918—45 Ind. Cas. 179

SCOTT SMITH, J.

References:—(a) 84 P.R. 1882, 13 Ind. Cas. 621—59 P.R. 1912—69 P.W.R. 1912—121 P.L.R. 1912, *Dist*

- (3) S 8—Object of proceedings under—Ministerial See LIMITATION ACT (1908), No 178, 25 P.L.R. 1918.

(4) S 8—Mortgage by conditional sale—Redemption—Right when lost—Notice to mortgagor—Foreclosure See MORTGAGE (CONDITIONAL SALE), No 1, 16 A.L.J. 377

(5) S. 8—Foreclosure notice under, contents of. See MORTGAGE (CONDITIONAL SALE), No 3, 18 P.L.R. 1918

(6) S. 8. See No. 2, *supra*.

Reg. XIX of 1814 (Partition of Revenue-paying Estates).

Maps and chittas relating to partition under Regulation Ss EVIDENCE ACT, No 11, 23 C.W.N. 48.

Reg VIII of 1819 (Bengal Patni Taluqs).

(1) Sale under—Purchaser given possession—Sale set aside—Reversal of decree—Mesne profits See LIMITATION, No 1, 27 C.L.J. 257

(2) S 13—*Depositor's lien for rent paid to superior landlord—Deposit under S 13—Applicability of the Transfer of Property Act (IV of 1882) to such deposits.*

The holder of a tenure under a *patni* tenure, who is in possession under S. 13 of Reg. VIII of 1819, has no lien for the amounts paid by him as rent to the superior landlord for the years during which he has been in possession. Therefore, he cannot add to his demand the

Regulations—(Continued).**—2.—Bengal—(Continued).****Reg. VIII of 1819 (Bengal Patni Taluqs)—(Concluded).**

payments made by him on account of the patni rent.

S 72 of Act IV of 1882 (Transfer of Property Act) has not given a new power to the mortgagee in possession and is not applicable to such a case. *Behari Lal Biswas v Nasirunnissa Bibi*, 41 Ind. Cas 694

BEACHCROFT and WALMSLEY, JJ

References—12 O 185 9 Ind Cas 489, 7 C.L.J. 604, R.

(3) S 13—Deposit of patni rent by darpatnidar—Possession given to darpatnidar—Payment of patni rent by darpatnidar—Right of darpatnidar to add to his demand of the advance made by him rent paid by him to superior landlord for the period of his possession. See PATNI TENURE, No 1, 27 C.L.J. 480.

(4) S 19 (4)—Tenure holder put in possession of patni, who then landlord—Limitation for recovery of arrears of rent by tenure holder Bengal Tenancy Act (VIII of 1885), Sch. III, Art 2

A tenure holder or *darpatnidar*, who pays the rent in order to save the patni from being brought to sale under S 19 (4) of Reg VIII of 1819 and who is put in possession of the patni is in the same position as that of a mortgagee put into possession under an English mortgage and is a landlord within the meaning of the Bengal Tenancy Act. Therefore, he has a right to recover the rent in arrears that has not been paid or realised and that has been owed prior to his being put in possession. The period of limitation for the recovery of such arrears is that provided for in the Bengal Tenancy Act and not the one under the Limitation Act. *Abdul Aziz Mandal v. Behari Lal Biswas*, 41 Ind Cas 711

FLETCHER and RICHARDSON, JJ.

(5) S 14—Collector in proceedings under section whether acts in judicial or ministerial capacity—Money paid under such proceedings—Payment does not exclude question of title—Title may be contested in subsequent suit. See RES JUDICATA, No 3, 16 A.L.J. 569 (P.C.)

Reg. XI of 1825 (Bengal Alluvion and Diluvion).

(1) *Permanently settled estate—Ownership of the bed of a public navigable river—Ownership of its banks—Slow accretion—Title to submerged land again left bare—Evidence—Admissibility—Survey maps made before and after 1793—Hakikat Chowhuddibandé (Boundary) papers—Burden of showing*

Regulations—(Continued).**—2.—Bengal—(Concluded).****Reg. XI of 1825 (Bengal Alluvion and Diluvion)—(Concluded).**

exact course of the river in 1793—Permanent Settlement and assumptions Haradas Acharjya Chowdhuri v. The Secretary of State for India in Council, 22 M.L.T. 438—FO Bom. L.R. 49—(1918) M.W.N. 28—26 C.L.J. 590—43 Ind Cas 361 (P.C.). See Final Part, 1917, Col 781

(2) Test of navigability of river—Obstructions forming in navigable river flowing through permanently settled estate—Right to resume—Riparian owner's right to middle of stream—Exclusive right of fishery as evidence of title in soil of river bed. See ALLUVION AND DILUVION, No. 1, 22 C.W.N. 872.

(3) S 4—Accretion if may be gradual or should also be slow—Applicability of law of accretion where original boundary ascertainable. See ALLUVION AND DILUVION, No 3, 14 N. L.R. 97

(4) S 4, sub S (4)—Tenancy. Accretion to, by formation of char in river—Tenant, Rights of, as to. See ALLUVION AND DILUVION, No 2, 46 Ind Cas 949

(5) Ss 1-5—Land previously in existence and property of individual section applicable to—Land thrown up as char, Ownership of. See AMENDMENT OF DECREE No 2a, 3 Pat. L.J. 458

(6) S 5. See No 5, *supra*

—3.—Bombay.**Reg. IV of 1827 (Bombay).**

S. 26—Presumption in favour of custom. See CUSTOM, No. 1, 16 A.L.J. 17 (P.C.).

—4.—Burma.**Reg. III of 1889 (Upper Burma Land and Revenue).**

S 12—Rules framed by Local Government under S 12, rr 5, 10—Revenue Court's order relating to moveable property. Mode of enforcement of. See JURISDICTION (OF REVENUE COURTS), No. 4, 46 Ind. Cas 475.

Reg. I of 1896 (Upper Burma Civil Courts).

S 25—Right of recognised agent of party to examine and cross examine witnesses and to address Court on behalf of principal. See RECOGNISED AGENT, No. 1, U.B.R., 3rd Qt., 1918, p. 94.

—5.—Madras.**Reg. XXV of 1802 (Permanent Settlement).**

S. 5—Omission to issue sannad under Regulation, if registers palayam subject to military and police services and therefore inalienable. See UNSETTLED PALAYAM, 84 M.L.J. 568.

Regulations—(Concluded).**—S.—Madras—(Concluded).****Reg. X of 1831 (Sale of Minor's Estates).**

S 2—Scope and applicability of—'Estate,' whether includes ryotwari estates—Extent and magnitude of estates—Whether take away the applicability of Regulation—Minor's right to object to the sale—If affected by the wrong issue of patta to an adult—'Ordinary' and 'considerable'—Meaning of—Scope of an enactment if can be limited by individual notions of what is ordinary or considerable—Jurisdiction of the Court of Wards—Whether depends on size or character of estate—Revenue Recovery Act (II of 1864), S. 59—Whether applies to sales prohibited by the Regulation.

The sale of a minor's property for default in the payment of the Government Revenue is not a proceeding to which S 59 of the Act, II of 1864, is applicable so as to compel the aggrieved parties to sue within six months of the sale (a).

The protection afforded by R. g. X of 1831 to the estates of a minor is confined to the permanently settled estates of a minor but applies equally to the ryotwari lands owned by him (b).

The fact that the patta stood in the name of the mother of the minor does not preclude him from invoking the aid of the R. g. X of 1831 (c).

Per *Spencer J*—(i) "Ordinary" and "considerable" are relative terms and the scope of an enactment such as Reg. X of 1831, should not be limited by notions of what is a considerable estate or of what estate, the Court of Wards generally take charge.

(ii) There is no authority for the position that an estate must be of any definite size or must not be an estate of ryotwari lands in order to give the Court of Wards jurisdiction over it. *Saminatha Iyer v Govindasami Padayachi*, 34 M L J 536=8 L.W. 37=(1918) M W N. 409=24 M.L.T. 72=41 M. 733=45 Ind. Cas. 595 (F B).

WALLIS, C.J., SADASIVA AIYAR and SPENCER, JJ.

References—(a) 10 M. 44, D st. (b) 11 M. 453; 13 M. 89, 33 M. 41, R (c) 13 M. 89, R (d) 33 M. 41, D st.

Release.

Defendant releasing rights in regard to property, when plaintiff's debt was existing—Whether transaction can be impeached under S. 53, Transfer of Property Act. See **TRANSFER OF PROPERTY ACT (1882)**, No 37, 48 Ind. Cas. 956.

Religious Endowments.

(1) **Appointment of member of committee managing religious endowment—Whether such appointment by a Civil Court is an administrative or a judicial act—Bengal and Madras Native Religious Endowments Act (XX of 1863).**

Religious Endowments—(Continued).

Ss. 7, 8, 9, 10, 14—'Case,' meaning of—Revisional powers of High Court—Code of Civil Procedure (Act V of 1908), S. 115. T. 4. Balakrishna Udayar v. Yasudeva Aiyar, 15 A.L.J. 645=21 M.L.T. 45=6 L.W. 501=22 O.W.N. 50=40 M. 793=19 Bom. L.R. 715=26 C.L.J. 143=33 M.L.J. 69=(1917) M.W.N. 628 (P.C.) See Final Part, 1917, Col. 790.

(2) **Code of Civil Procedure (Act V of 1908), S. 92—Public endowment—Breach of condition by Mohunt—District Judge ordering suspension of Mohunt on mere report—No suit filed—Jurisdiction—Interference by High Court in revision.**

The Code of Civil Procedure gives no powers to the District Judge to take any action in order to protect property forming the subject-matter of a public endowment, unless and until a regular suit is filed in his Court under S. 92, and when the District Judge exercises any of the powers vested in him under that section he acts without jurisdiction. The High Court therefore interfered in this case in its revisional jurisdiction and set aside the order of the District Judge suspending a Mohunt when there was no suit before him under S. 92. *Mohunt Darshan Das v. The Collector of Meerut*, 14 A.L.J. 74=47 Ind. Cas. 560.

FUDBALL and RAOOF, JJ.

(3) **Private charities—Right of management—Rule as to devolution of—Grant of lands to the head of a math for food chattram and construction of Agrahar round the tomb of original founder—Whether a grant to the person or the office—Right of management—Devolution of—Whether descends to one or divisible among the heirs of the grantee.**

With regard to private charities such as endowments for the support of the family idol, the law is that if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee and if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition or in turn by the several heirs after partition.

Where, however, certain lands have been granted in mass by the Rajah of Tanjore to his royal priest for the purpose of perpetually conducting the charities of a food chattram near the tomb of the first priest and for the purpose of making an agrahar by building houses round about the holy place and the grant was confirmed by the British Government by a title-deed to the manager for the time being of the charity and his successors without any mention of his personal name.

Held (1) that there was sufficient indication in the documents and the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee was inconsistent with the purposes of the founder when he created the endowments;

and (2) that the management would therefore vest only in the person who was for the time being the royal priest of Tanjore.

Religious Endowments—(Continued).

Quere:—Whether there is any general rule for the devolution of management of the charities of this latter kind? *See* **Sethuramaswamiar v Sri Meruawamiar**, 7 L W. 22=23 M L T 94=94 M L J 190=16 A L J. 113=27 O L J 231=10 Bom L R 514=11 C W N 457=43 Ind Cas 806=4 Pat L W 91=41 M. 296 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE,
MR AMEER ALI and SIR WALTER
PHILLIMORE

References—27 M 192, 32 M 167, 2 M H. C.R. 19, 20 B 495, R

(4) *Temple Committee—Mode of transacting business—Suspension of trustee by Committee—Suit to contest validity of order of suspension—Existence of sufficient grounds for suspension, no defence—Liability of members of Committee for damages for wrongful suspension* **Yenkata nayayana Pillal v Ponnusami Nadar**, 33 M L J 660=42 M L T 454=(19.7) M W N 889=7 L W 85=41 M. 357=43 Ind. Cas 205 See Final Part, 1917, Col 791

(5) *Fireworks sold on credit to Manager of Hindu temple—Suit for recovery of price—No equity of fireworks for trust purposes—Decree against temple funds if proper*

A plaintiff who sold fireworks on credit to the Manager of a temple is not, in a suit for the recovery of their price, entitled to a decree against the assets of the temple as the purchase of fireworks cannot be said to be necessary for the performance of the trusts (a) **Adiraja Arai v Shaik Budam Sahib** 31 M L J 353=7 L W 410=23 M L T 278=(1918) M W N 331=44 Ind Cas 815

BAKEWELL and KUMARASWAMI SASTRI,
JJ

Reference—(a) 40 M 712 (P.C.), *Rel. on.*

(6) *Mutt property improperly alienated by mahant—Suit by disciples for restoration to mahant whether maintainable—Limitation Act (1908), Arts 134, 144—Oiv. Pro. Code (1908), S 91, O I, r 8* **Chidambaranatha Thambirao v P S Nallaiya Mudaliar**, 22 M L T 218=33 M L J 857=6 L W 666=42 Ind. Cas 366=41 M 124 See Final Part, 1917, Col 789

(7) *Devswom—Management, right of—Hereditary Uralans—Hereditary Samudayees—Principal and agent—Prescrip. on.*

In a redemption suit, the question arose as to who had the right to sue on behalf of the devswom to whom the suit lands belonged. It is found that the 19th defendant who claimed to be the Uralan by purchase had been in active management of the temple till 1860, but thereafter never instituted any suit or granted any demise on behalf of the temple but that the plaintiff who was a hereditary Samudayee had been managing the temple since 1892 in open repudiation of the rights of the Uralan and had granted the demise sued on.

Held.—Even under the Limitation Acts prior to 1871, the rights of an Uralan could be

Religious Endowments—(Continued).

acquired by prescription and the 19th defendant's Kovilagam must be deemed to have acquired the Uralan's right before 1860 (a).

Held further—The relation between a hereditary Uralan and a hereditary Samudayee is not governed by the ordinary principles of agency, and the latter can by open and notorious repudiation of the Uralan's right, acquire a prescriptive right of management including the right to sue in his own name, even against the Uralan (b).

Per Seshagiri Aiyar, J.—Functions of Uralans and Samudayees are not to be inferred from 'a priori' notions regarding their right in a religious trust, but from the usage of the particular institutions concerned.

The origin of Uralans and Samudayee rights described in **Yysavanath Manakal Ramam Saomayaipad v Marampire Thalakkodi Madhathil Karnavathi Kunhu Kutti Kovilamma**, 23 M L T 187=34 M L J 344=(1918) M W N 179=7 L W 490=44 Ind Cas 680.

SESHAGIRI AIYAR and NAPIER, JJ.

References—(a) 11 M I A 345; 37 O 314, F (b) 32 C 129 R, 4 M 141, *doubled*

(8) *Debatar baryat lands of idol—Suit for declaration of nature of such lands and for possession of same from person claiming to be marfatdar or shabait of idol—Suit based on allegation that defendant's predecessor was appointed to act as Manager or agent for plaintiffs' ancestor and that on death of such agent, lands reverted to heirs or original grantor—Marfatdars' title, if can be transferred—Effect of transfer of marfatdars' rights on possession of transferor—Adversus possession—Shabait right if can be acquired by such possession—Limitation Act, 1908, S. 10, Arts 124 134, 144*

In a suit for a declaration that certain lands were the *debatar baryat* of an idol and that the plaintiffs were the *marfatdars* on the idol's behalf entitled to possession of the said lands as against the defendants, the plaintiffs based their claim upon the facts that they were the descendants of the original *marfatdars* of the idol and that in the year 1879 their ancestors the then *marfatdars* or *shabait*s appointed R, the father of the defendants to act as manager or agent on their behalf and that on his death which occurred some two or three years before the institution of the present suit, all right or title, if any, he might have had in the lands or office of *marfatdar* or *shabait* of the deity came to an end and did not devolve upon his heirs. The defendants contended that R, their father, acquired a valid title from the plaintiffs' ancestors by a deed of gift, to the *marfatdars* rights and that they on their father's death succeeded by inheritance to the same, and that they also claimed in the alternative that, if the gift was invalid by Hindu Law their father acquired a good title by adverse possession and that the plaintiffs' suit was barred by limitation: **Held**, that, when R, the father of the

Religious Endowments—(Continued).

defendants, first assumed in 1879 the duties of the office of *marfaddar*, and took over possession of the property adverse possession against the plaintiffs began as the trustees of the public religious endowment have no power to grant away even a life estate in the *Shabait* rights attending the worship of the idol (a) and as the grant to R, whether for his lifetime only or for the larger estate, was invalid, that, long before the institution of the present suit, R had acquired an indefeasible title and that the suit was consequently time-barred, *§ 10, Limitation Act*, having no application to the case (b).

The right to administer the trust property of a public religious endowment within the limits imposed by the trust and for that purpose the right to possession of the property as against those previously administering the trust or others claiming through them can be acquired by adverse possession, and, in trusts of this nature, it is only where a claim is set up adverse to the rights of the deity to whose worship the property is dedicated that *S. 10 of the Limitation Act* could have any application so as to deprive the defendant of the rights conferred by the remaining portions of the Act (c). *Nathe Pajari v. Radha Binde Naik*, 3 Pat. L.J. 327=4 Pat. L.W. 283=47 Ind. Cas. 290.

DAWSON MILLER, C.J., and MULLICK, J.

References:—(a) 11 C. 121; 5 M. 89, R. (b) 36 C. 1003, R. (c) 7 M. 399; 23 M. 271; 91 C. 814; 6 A. 1, R.

- (9) *Takia Rasul Shahi Faqirs—A religious institution—Suit by alleged Gaddi Nashin worshippers for removal of a mere trespasser afterwards found to be its manager and to set aside alienation by him of a portion of Waqf property—Sanction of Collector necessary under S 92 of Act V of 1908—Questions of validity and necessity of alienation when arise—Alleged Gaddi Nashin when to be treated as a mere worshipper—Effect of addition of plaintiffs without amendment of plaint—Presumption of property being Waqf—Costs.*

Held, that:—

(1) *Takia Rasul Shahi Faqirs* in Lahore is a religious institution and *Waqf* property.

(2) As soon as it is found that a suit in reality is for removal of a manager or trustee of a religious institution, sanction of the Collector as required by *S. 92 of the Civ. Pro. Code, 1908*, becomes necessary 'or its further progress', and it is liable to dismissal in the absence of such sanction. It is quite immaterial that the defendant was originally sued as a mere trespasser or that he claimed to be owner of the property in dispute.

(3) In case of joining other persons as plaintiffs in a suit after its institution without amending the plaint, it does not alter the nature of the claim.

(4) A person claiming the *Waqf* property, as *Gaddi Nashin* is to be treated as a mere worshipper, if he fails to establish his position.

Religious Endowments—(Continued).

(5) When some land is *prima facie* connected with the *Waqf* property and is not shown to be in any way different from the rest and it is not established that it was ever acquired by the manager with his own money, the presumption is that the whole of it is of the same nature.

(6) In a suit by the worshippers of a religious shrine for setting aside the alienation of a portion of that property on the allegation that the alienor has no sort of connection with the institution, no issue as to necessity can possibly arise as the alienation is *ab initio* void. But this question as well as that of validity of the alienation of such property can be properly decided in a suit framed for the purpose of contesting the alienation alleged to have been made by a *de facto* or *de jure* manager or trustee, and such an alienation cannot be set aside until the alienee is afforded an opportunity, and fails to establish the circumstances which would justify the transaction and render it binding upon the persons interested in the institution.

(7) Where the pleadings of both the parties leave the Court in dark as to the nature of the real contest between them, the proper course to follow is not to allow costs to any of them. *Muhammad Abdul Kadir v. Mussammat Hussain Bibi*, 11 P.W.R. 1918=44 Ind. Cas. 879.

SHADI LAL and CHEVIS, JJ.

(10) Dispute about management of private temple referred to arbitration—Award passed in pursuance—Decree on award—Villagers if can set aside provisions of award without intervention of Court. See *AWARD*, No. 10, (1918) M.W.N. 595.

(11) Application to be appointed mutwalli rejected by District Judge—District Judge whether has powers of kazi—Petitioner whether to proceed by application or by suit—*Civ. Pro. Code, 1908*, *S. 92*. See *MAHOMEDAN LAW (WAKF)*, No. 5, 23 C.W.N. 138.

(12) Liability of trustee to account for collections of trust income misappropriated by his father and grandfather—Criminal nature of the misappropriation if matters—Persons resident in locality where trust is situated, for whose benefit it was established if sufficiently interested in it to sue for removal of trustee—Period of accountability of trustee for misappropriated funds. See *PUBLIC CHARITIES*, No. 1, 35 M. L.J. 661.

(13) Duty of trustees to keep distinct accounts of trust funds and private funds—Property purchased out of such funds—Presumption of ownership in favour of temple—Possession of office of trustee for long time, Disturbance of Defendant as sole trustee without association with others—Exhibition of accounts—Scheme. See *PUBLIC CHARITIES*, No. 2, (1918) M.W.N. 786.

(14) Resolution by electors of unfitness of present incumbent of office of Mahant, and

Religious Endowments—(Concluded).

election of another thereto—Suit with Collector's leave for removal of incumbent from office and property and appointment of the elected with possession of property given to him—*Ad valorem* Court-fee on value of property if payable—Person elected if necessary party plaintiff to suit—Death of one of two plaintiffs to whom leave given—Suit if abates. See **PUBLIC CHARITIES**, No. 3, 97 P.R. 1918.

Religious Endowments Act (XX of 1883).

- (1) S. 14—*Civ. Pro. Code (Act V of 1908), S. 92—Muktesar of a temple—Suit to recover lands and moveable property, mesne profits, accounts and damages from the old Muktesars—Old Muktesars in possession also as trustees—They are not strangers holding the land adversely to trust—Court—Jurisdiction.*

The plaintiff, who claimed to be a representative of the original donor and was a newly-appointed Muktesar of a temple, sued the defendants, who were the trustees and the old Muktesars of the temple, to recover possession of land belonging to the temple and the moveable property belonging to the deity, and for mesne profits and accounts. The trial Court held that the suit was neither wholly governed by S. 92 of the Civ. Pro. Code nor S. 14 of the Religious Endowments Act, and decreed part of it on merits. The District Court dismissed the suit on the preliminary ground that the suit was barred by S. 92 of the Civ. Pro. Code. The plaintiff having appealed:—

Held, (1) that the suit fell within the scope of S. 92 of the Civ. Pro. Code, because it was a suit for the removal of the defendants from their position as trustees, for the restoration of the trust property to the plaintiff, as the Muktesar, for taking accounts, and for damages for their wrongful acts as trustees;

(2) that the defendants could not be regarded as strangers claiming to hold the lands adversely to the trust, though they might not agree as to their obligations under the trust, since they were really trustees and, as such, they claimed to be entitled to hold the lands from generation to generation subject to the due fulfilment of the trust.

Per *Marten, J.*—"There is much which is in common between the two sections (S. 92 of the Civ. Pro. Code and S. 14 of the Religious Endowments Act), but S. 2 is substantially the wider and provides *inter alia* for settling a scheme, which is a jurisdiction of a very wide and beneficial nature. A plaintiff may proceed for appropriate relief under either Act; and the opening words in S. 92 (2) only mean that, if he elects to proceed under the Religious Endowments Act, he is not to be prevented from so doing by S. 92." *Hansraj v. Anant*, 20 Bom. L.R. 954—42 B. 742.

SEAH and MARTEN, JJ.

Reference:—6 M. 64, *Dist.*

(3) S. 14—Scope of. See **MAHOMEDAN LAW (WAKF)**, No. 4, 28 C.W.N. 115.

Religious Endowments Act (XX of 1883)—(Concluded).

(8) Ss. 14 and 18—*Suit instituted by four persons—Death of one during pendency of suit—Suit if abates. Alagappa Chettiyar v. Muthiah Chettiar*, 33 M.L.J. 173—(1917) M. W.N. 740—41 M. 237. See *Final Part*, 1917, Col. 8.

(4) S. 18. See No. 3, *supra*.

Religious Office.

- (1) *Joshi—Right to fees—Funeral ceremonies—No right to receive fees where Brahmanical ceremonies dispensed with.*

On the occasion of his mother's death, the defendant No. 1, who was a non-brahmin, instead of calling the plaintiff, who was the *Vatandar Joshi* of the village, performed, with the help of his friend, also a non-brahmin, certain non-Brahmanical ceremonies over the body of the deceased. No fees were paid to defendant No. 2. The plaintiff having sued to recover the fees which would have been paid to him:—

Held, dismissing the suit, that inasmuch as the plaintiff's title to his fees resulted from his expert knowledge in the details of Brahmanical ceremonies, it would be difficult to find a ground upon which he could lawfully exact the payment of the fees in cases where these ceremonies had been deliberately avoided.

Per *Batchelor, Ag. C.J.*—"It is one thing to say that if the Hindu villager chooses to have Brahmanical ceremonies conducted, he must employ his village *Joshi*, or fee him as if he had employed him, but it is a very different thing to say that though the villager may prefer another rite and choose not to have the Brahmanical ceremony, he is still under obligation to pay the *Joshi*." *Bala Genuji Navale v. Balwant Laxman Ghatpande*, 20 Bom. L.R. 454—42 B. 613—46 Ind. Cas. 140.

BATCHELOR, AG. C.J. and KEMP, J.

References:—11 B.H.C. (A.O.) 6 (10); 6 B.H.C. (A.C.) 250 (253); 3 B. 9, 232; 14 B. 167, *Dist.*

- (2) *Pahan, Rights and duties of—Election of, Custom as to.*

A *panhan* is elected by a villager carrying on his head a basket blindfold; the house before which he stops is said to indicate the family whom the spirits desire to be their priest.

Neither the landlord nor the Government has any power to give the lands of a *panhan* to another until he is superseded.

To exorcise spirits and prevent them from attacking the cattle and people of the village are the duties of a *panhan*. *Kharat Pahan v. Bisra Pahan*, 43 Ind. Cas. 70—4 Pat. L.W. 119.

CHAPMAN and ROSE, JJ.

(3) Suit for precedence in receiving honours in temple—Suit if one of a civil nature. See **APPEAL (GENERAL)**, No. 23, 7 L.W. 614.

Religious Office—(Concluded).

(4) Whether widow can succeed to the office and emoluments thereof. See **HINDU LAW (RELIGIOUS ENDOWMENTS)**, No. 2, 85 M.L. J. 196.

(5) Suit against temple trustee for dues of hereditary office in temple, nature of. See **LIMITATION ACT**, No. 107, 41 M. 578.

(6) Woman's right to hold Head Mujavarskip of astana. See **MAHOMEDAN LAW (WAKF)**, No. 1, 41 M. 1038.

Relinquishment of Portion of Claim.

(1) *Civ. Pro. Code (Act V of 1908)*, O. II, r. 31 O. XXXIV, r. 1—*Mortgage—First suit against some of the co-owners—Subsequent suit against others, if maintainable.*

Where a person brought a suit on his mortgage against some of the co-owners of the mortgaged property and obtained a decree, a subsequent suit on the mortgage against the other co-owners is barred under O. II, r. 2 of the Code of Civil Procedure. *Kishake Manjambath Avalla v. Kanna Kurup*, 8 L. W. 162—47 Ind. Cas. 595.

BAKEWELL and PHILLIPS, JJ.

References:—12 C. 414; 14 M. 284, R.

(2) *Suit for specific performance of agreement to lease sir land—Possession of fields not claimed as a relief—Execution of lease deed by Court in proceedings in execution—Subsequent suit for possession if barred—Civ. Pro. Code, O. II, r. 2—Lis pendens—Transfer of Property Act, S. 59—Non-cultivation of land and non-payment of rent by tenant in consequences of landlord's improper conduct—Surrender—C. P. Tenancy Act, S. 35 (4).*

In execution of a decree obtained in a suit for specific performance of an agreement to let sir land where the relief claimed did not include possession of the fields the Court executed a lease. In a subsequent suit for possession under this lease, held that the plaintiff was not barred by r. 2 (2), O. II, Civ. Pro. Code, from obtaining that relief in spite of his omission to include it in his previous suit, as the execution of the lease gave rise to a new and distinct cause of action (a). In a suit for the specific performance of an agreement to lease lands in which the Court passes a decree directing the execution of a lease, the lis may properly be regarded as being under active prosecution until the decree-holder has had a reasonable time, by reason of the neglect or refusal of the judgment-debtor to obey the decree, to prepare a draft of the requisite document and then to move the Court for execution of the same; so that a transfer of the suit lands 18 days after the decree for specific performance will become invalid by virtue of the rule of *lis pendens* (b).

S. 35 (4), C. P. Tenancy Act, has no application to a case, which is not one of voluntary discontinuance on the part of the tenant, but is one

Relinquishment of Portion of Claim—(Contd.).

of obstruction resulting from the landlord's improper behaviour. *Pandu v. Sital Prasad*, 14 N.L.R. 176.

DRAKE-BROOKMAN, J.C.

References:—(a) 22 M. 24, Not F.; 88 M. 698; 8 B. 537; 4 N.L.R. 14, F.; 3 N.L.R. 160, Dist.; 6 O.W.N. 314, R. (b) 18 O.W.N. 226; 22 B. 939; 12 N.L.R. 50; 37 B. 621; 81 B. 893, R.

(3) *Mortgage, execution of deed of, and lease of mortgaged property to mortgagor on same day—Same transaction—Lease a mode of realising interest—Suit for rent due under lease without asking recovery of mortgage-debt—Separate suit for mortgage-debt if not barred—Civ. Pro. Code, 1908, O. II, r. 2.*

Where a mortgage-deed provided for the execution of a lease of the mortgaged premises to the mortgagor and the mortgage and the lease were executed on one and the same day the lease being granted simply to provide a mode for realising the interest due on the mortgage. Held that there was only one covenant between the parties and that the institution of a mere suit for rent when the principal mortgage-debt had also become due was a bar to a subsequent suit for recovery of such principal under O. II, r. 2, Civ. Pro. Code. *Natha Singh v. Chuni Lal*, 69 P.R. 1918=117 P.L.R. 1918=112 P.W.R. 1918=47 Ind. Cas. 364.

SHAH DIN and WILBERFORCE, JJ.

References:—28 P.R. 1907, F.; 4 A. 430; 19 A. 496; 26 M. 664; 177 P.W.R. 1916, Dist.

(4) *Prior suit for refund of money alleging payment of more than was due under mortgage—Dismissal—Subsequent suit for redemption of mortgage offering payment, if lies—Civ. Pro. Code, 1908, O. II, r. 2.*

Where a suit for a refund of a certain amount alleged to have been paid in excess of what was due under a mortgage was dismissed on the ground that the mortgage-debt had not been paid off, held that a subsequent suit for the redemption of the mortgage was barred by Civ. Pro. Code, O. II, r. 2. *Barkhurda v. Ghhatta Mal*, 119 P.R. 1918.

CHEVIS and BROADWAY, JJ.

References:—7 B. 377; 20 B. 469; 30 A. 225, R.

(5) *Suit on equitable mortgage for personal decree and for mortgage decree—Subsequent application for amendment of plaint by striking off prayer for mortgage decree as property mortgaged was outside jurisdiction—Amendment prayed for if permissible, or, return of plaint for presentation to proper Court under Civ. Pro. Code, 1908, O. VII, r. 10, to be made—Amendment of plaint, effect of allowing, if equal to entertaining claim sought to be abandoned.*

A mortgagee created an equitable mortgage, by depositing the mortgage and title-deeds. The plaintiff, the assignee of the equitable mortgage, sued for a personal decree against this

Relinquishment of Portion of Claim—(Old.).

mortgages and for a mortgage decree against this mortgagee original mortgagor. The property mortgaged being all outside the original jurisdiction of the Chief Court, the plaintiff applied to amend his plaint by striking out his prayer for the mortgage decree and the original mortgagors defendants leaving only his claim for personal decree against his mortgagor. The Original Side Judge held that he had no jurisdiction to entertain the suit; that by allowing the amendment he would be entertaining the suit; and that he could only return, under O. VII, r. 10, Civ. Pro. Code, the plaint for presentation to the proper Court. Held, that the Court should allow the amendment and proceed upon the remaining causes of action within its jurisdiction. Held also, that the Court, by allowing the plaintiff to abandon a claim, could not be said to be entertaining that claim, and that the effect of an application to amend a plaint by striking out certain claims was in substance as if the suit had never been commenced in respect of such claims. *Moolchand v. Po Theln*, 9 L.B.R. 275

TWOMEY, C.J. and ORMOND, J.

References:—5 Ind. Cas. 725; 28 M. 216; 8 A. 117, R.; 29 C. 315; 4 B. 492; 46 Ind. Cas. 265; 7 M. 171, *Dist.*

(6) Suit, Institution of, in ignorance of all one's rights—Effect on subsequent suit. See CIV. PRO. CODE (1908), No. 212, 21 O.C. 307.

(7) Suit by mortgage for interest only—Subsequent suit for principal and interest—Subsequent suit barred. See MORTGAGE (GENERAL), No. 19, 88 P.R. 1918.

(8) Construction of plaint for purposes of—Method. See RES JUDICATA, No. 11, 44 Ind. Cas. 518.

Remand.

(1) *Defective trial—Appeal—Liability of suit to be remanded.*

Where there was no proper trial of a suit and the defect was to a great extent due to the omission of defendant to produce his accounts, held that the case should go back to the Court of first instance for trial. *Muhammad Abdul Aziz v. Muhammad Abdul Jalil*, 19 Ind. Cas. 57.

BANERJEE and RYVES, JJ.

References:—2 A.L.J. 331, *Dist.*; 28 A. 153; 2 Ind. Cas. 377, *F.*

(2) *Decree by lower Court after, by High Court—Appeal from decree—Remand order, Propriety of, if can be questioned in.*

The propriety of the remand order cannot be questioned in an appeal against a decree passed by the lower Court under that remand order. *Aja Nanya v. Karimbahsh Sarkar*, 46 Ind. Cas. 816.

FLETCHER and SMITH, JJ.

Remand—(Continued).

(3) *Order of, under Civ. Pro. Code (1908), O. XLI, r. 23—Appeal to Privy Council if lies from, under S. 109—Appeal from final decree after remand, Order if can be reconsidered in.*

Under S. 109 of the Civ. Pro. Code (1908), an appeal does not lie to His Majesty in Council against an order of remand under O. XLI, r. 23, as it is not a final order within the meaning of S. 109 (a) of the Code.

In a remand under O. XLI, r. 23 of the Civ. Pro. Code, the case remains pending or undisposed of on the appellate Court's file, and the Judge may yield to conviction and change his mind at any time before he has pronounced a final judgment. A remand order under O. XLI, r. 23, cannot be reconsidered in a subsequent appeal from the decision of the first Court after remand. *Sultan Beg v. Chunnilal Malaram*, 46 Ind. Cas. 922.

PRIDEAUX and KOTWAL, A.J. CS.

(4) *Appellate Court's inherent powers of—Caution required in exercise of such powers—Appeal—Civ. Pro. Code (1908), S. 151, O. XLIII, rr. 23 and 25.*

Independently of the provisions of Civ. Pro. Code, O. XLIII, rr. 23 and 25, an appellate Court has, under S. 151, Civ. Pro. Code, inherent power to remand a case for re-trial and no appeal would lie against such an order of remand. But this power of remand should be exercised with the very greatest caution. *Raghunandan Singh v. Jadonandan Singh*, 3 Pat. L.J. 263=43 Ind. Cas. 959.

ROE and JWALA PRASAD, JJ.

Reference:—26 C.L.J. 49, *Rel. on*

(5) *When decision is not on a preliminary point—Trial on a point in dispute without express issue thereon—Right course to be adopted in such a case—Civ. Pro. Code (Act V of 1908), rr. 23, 25, 28 of O. XLI—In disputes relating to a private water-course from a State Canal, Government is no party—Incompetency of Canal Department to upset decree of Civil Court or confer permanent right of irrigation from one's water-course without proceeding either under S. 20 or 23 of the Indian Canal Act—Interference with right of irrigation is a continuing wrong under S. 23 of Limitation Act (IX of 1903).*

Held that:—

1. Where the parties are well aware with the question in dispute and produce their whole evidence and it is duly discussed in the judgment of the first Court, there is no need of remanding a case for further inquiry, although the issue is not rightly framed.

2. Where a case has been fully dealt with and decided on the merits, it is illegal to remand it under r. 23 of O. XLI of Act V of 1908 and the proper course to follow is either under r. 25 or 28 of the said order.

3. In a case of dispute as to the right of irrigation from a private water-course of a

Remand—(Continued).

Canal, it is illegal to make the Government a party to it where no relief is asked against the latter.

4 The Canal authorities may authorise temporarily a person to irrigate his land from the private water course of another, but they are quite incompetent to confer upon him a permanent right of irrigation without proceeding either under S. 20 or 23 of the Indian Canal Act of 1890 and have no power to go against the decision of a Civil Court.

5. The interference with the right of irrigation of a person is a continuing wrong within the meaning of S. 23 of Act IX of 1908. *Kanla Lal v. Narain Singh*, 177 P.W.R. 1918.

MARTINEAU, J.

(6) Rent suit—Remand—Appeal if lies from remand order as from preliminary decrees. See **APPEAL (SECOND APPEAL)**, No. 1, 16 A.L.J. 711.

(7) Finding of fact not clear in second appeal—Remand of appeal. See **APPEAL (SECOND APPEAL)**, No. 21, 62 P.L.R. 1918.

(8) Reversal of decrees and remand for further trial on merits—Remand if final judgment—Remand when can be regarded as final judgment. See **APPEAL (TO PRIVY COUNCIL)**, No. 7, (1918) M.W.N. 844.

(9) Dismissal of suit on ground of limitation—Reversal of same on appeal—Retrial on merits ordered—Order of remand if final order. See **APPEAL (TO PRIVY COUNCIL)**, No. 9, 21 O.C. 336.

(10) Civ. Pro. Code, O. XLI, r. 23—Local enquiry not held during trial of suit—Appellate Court remanding suit to hold local enquiry—Validity. See **CIV. PRO. CODE (1908)**, No. 504, 43 Ind. Cas. 815.

(11) Order of, by appellate Court—Lower Court refusing to record evidence—Validity of—Civ. Pro. Code, O. XLI, rr. 23, 27. See **CIV. PRO. CODE (1908)**, No. 510, 45 Ind. Cas. 892.

(12) Dismissal of suit for possession for mesne profits—Possession awarded by appellate Court—Remand for enquiry as to profits—Appeal from order of appellate Court—Court fees. See **COURT FEES ACT (1870)**, No. 1, 3 Pat. L.J. 99.

(13) Appeal not against suit disposed of on preliminary point, but against preliminary decrees—Right to certificate for refund of Court fees. See **COURT FEES ACT (1870)**, No. 21, 3 Pat. L.J. 116.

(14) Case remanded in appeal—Refusal to order refund of Court fees. See **REVISION**, No. 10, 20 Bom. L.R. 848.

(15) Reversal of first Court's judgment on preliminary point—Appellate Court if bound to remand case for re-decision. See **REVISION**, No. 26, 68 P.L.R. 1918.

Remand—(Concluded).

(16) No issue framed on particular point—Evidence adduced thereon—Finding arrived at by Court on such point. See **SPECIFIC PERFORMANCE**, No. 6, 197 P.W.R. 1918.

(17) Decree in possessory suit for land and crops thereon—Removal of crops by defendants—Subsequent suit against defendants for price of crops—Denial by defendants of title of plaintiff to lands—Remand by lower appellate Court for trial of question of title, if proper. See **SPECIFIC RELIEF ACT**, No. 1, 16 A.L.J. 924.

(18) Suit ostensibly brought for possession under S. 9, Specific Relief Act—Suit really found by appellate Court to be based on title—Dismissal of suit *in toto*, or remand if proper remedy. See **TITLE**, No. 1, 16 A.L.J. 611.

Renewal of Lease.

Grant under Arakan Waste Land Rules for fixed term, with right of renewal after expiry of term—Assignment of unexpired term by document not reserving right of renewal to assignor—Right of assignee to obtain benefit of renewal for himself—Assignment if operates as sale. See **GRANT**, No. 2, 9 L.B.R. 268.

Rent.

(1) *Suit for, Maintainability of, against one of the heirs of a deceased tenant—Contract Act (IX of 1872), S. 48, if applicable.*

A suit for arrears of rent cannot be maintained against one of several heirs of a deceased tenant without joining the others as defendants. S. 48 of the Contract Act is inapplicable to such a case. *Siba Krishna Sishu Sarma v. Jagat Chandra Talukdar*, 45 Ind. Cas. 782.

WOODROFFE and SMITHER, JJ.

(2) *Enhanced rate of, Agreement to pay—After expiration of term of tenancy—Validity of—Contract Act (IX of 1872), S. 74.*

An agreement by a tenant that, if he held over upon the expiry of the term, he would pay rent at a higher rate than he did during the term, is valid and enforceable. *Ramadhin Chaudhury v. Musat Kumodlal Dasal*, 45 Ind. Cas. 901.

THORNHILL, J.

(3) *Arrears of, Suit for—Intervener, Payment to, during period of suit—Effect of.*

In a suit for arrears of rent, the defendant pleaded payment to the intervener of the rent for the period in suit and it was proved that, up to that period the plaintiff had actually and in good faith been in receipt and enjoyment of rent.

Held, that the plaintiff was under these circumstances entitled to recover rent from the defendant as he had no right to depart from the previous practice and to pay rent for the years in suit to the intervener. *Ram Musammatt Nidha v. Ram Prasad*, 46 Ind. Cas. 6-5 O.L.J. 176.

KANHAIYA LAL, A.J.C.

Rent—(Continued).

- (4) *Landlord and tenant—Tenure, Auction sale of—Enhancement of rent, Proceedings for, while pending—Purchaser at sale, Liability of, to pay enhanced rate—Sale if can be set aside.*

At an auction sale for arrears of rent the plaintiff purchased a tenure and in the sale proclamation the rent was stated to be Rs. 64 but at the time when the property was advertised for sale, there were proceedings pending under S. 105 of the Bengal Tenancy Act for enhancement of rent on the ground of excess in area. The rent was shortly after the sale raised to Rs. 270 without the plaintiff being made a party to the proceedings:

Held (1) that as the plaintiff had not shown that he was not aware of the proceedings for enhancement of rent at the time of his purchase, he was bound by the result of the proceedings;

(2) that, even if the plaintiff had proved that he did not know of the proceedings for enhancement of rent at the time of his purchase, his right would be to have the whole sale set aside, but he could not hold that property and at the same time refuse payment of rent at the enhanced rate. *Rasik Chandra Mukhopadhyaya v. Shyama Kumar Tagore*, 46 Ind. Cas. 186.

FLETCHER and SHAMSUL HUDA, JJ.

- (5) *Landlords, joint letting by several, to one tenant—Tenant, Dispossession of, by one landlord—Suspension of.*

In case of joint letting of tenancy to one tenant by several landlords, when one of the landlords committed a breach of the contract of tenancy by dispossessing the tenant, during the time the tenant was kept out of possession owing to that act of the landlord the entire rent was suspended. *Framatha Nath Mukhopadhyaya v. Chandra Sekhar Banerjee*, 46 Ind. Cas. 599.

FLETCHER and SMITHER, JJ.

- (6) *Kabuliyat fixing, at 52 aris paddy or in default Rs. 15 per year—Default in payment—Landlord if entitled to recover market price of 52 aris of paddy or only Rs. 15.*

The tenancy of the rent sued for was created under a registered *patta* which provided that 52 aris of paddy were to be delivered by the tenant as yearly rent. There was a stipulation that in default of delivery of the paddy fixed, the paddy, or its price Rs. 15 would be realised according to law with costs and interest:

Held, that under the terms of the *Kabuliyat* the landlord was, in case of non-delivery of the paddy, not entitled to get anything more than Rs. 15 as the price of the paddy. *Ran Krishna Nath v. Mohesh Chandra Choudhury*, 47 Ind. Cas. 184.

CHATTERJEA and SHAMSUL HUDA, JJ.

(7) *Enhanced rent, Agreement to pay, for garden crops raised by ryots with aid of their own wells—Enforceability of—Nature of consideration necessary for—Custom, Value, and*

Rent—(Concluded).

relevancy of, in payment of enhanced rent—Acquiescence, Effect of, where plea of custom to charge enhanced rate, was negatived. See *MAD. ACT VIII OF 1885 (RENT RECOVERY)* (1918) M.W.N. 732 (P.G.).

- (8) *Sale proclamation, Wrong statement in, of—If precludes recovery of rent at a higher rate.* See *ESTOPPEL*, No. 4, 46 Ind. Cas. 474.

(9) *Suit for, by a co-sharer landlord—Rent, Decree for, obtained by another co-sharer—Admissibility of decrees to prove holding and rent, under S. 13, Evidence Act (1872).* See *EVIDENCE ACT*, No. 3 a, 23 C.W.N. 304.

(10) *Mokurrari tenure—Lessor dispossessing, tenure-holder—Right to withhold entire rent.* See *LANDLORD AND TENANT*, No. 31, 44 Ind. Cas. 688.

(11) *Suit for arrears of—Decree in, if could be passed with limitation not to be executed personally.* See *LANDLORD AND TENANT*, No. 41, 45 Ind. Cas. 702.

(12) *Suit for—Rent, settled under Bengal Tenancy Act, 1885, Ss. 104-A—105 F, correctness of, if can be questioned in.* See *LANDLORD AND TENANT*, No. 50, 46 Ind. Cas. 287.

(13) *Presumption as to fixity of, under S. 50 (2) of the Bengal Tenancy Act (1885)—Tenure, Sub-division or amalgamation of, Presumption if destroyed by—Fresh *Kabuliyat*, Execution of, if rebuts presumption.* See *LANDLORD AND TENANT*, No. 52, 46 Ind. Cas. 433.

(14) *Excess area, Calculation of, of—Mode of—Bengal Tenancy Act (1885), S. 52 (5).* See *LANDLORD AND TENANT*, No. 52-a, 46 Ind. Cas. 544.

(15) *Rate of, change in—If operates to extinguish original grant of a lease.* See *LEASE*, No. 11-c, 46 Ind. Cas. 794.

(16) *Arrears of, Suit for—Receiver of insolvent tenant's estate, if necessary party to.* See *RECEIVER*, No. 4, 46 Ind. Cas. 395.

(17) *Enhancement of rent contrary to the provisions of law—Effect.* See *REGISTRATION ACT* (1908), No. 3, 44 Ind. Cas. 688.

(18) *Agreement to hypothecate the whole crop until payment of rent—Agreement liable to stamp duty.* See *STAMP ACT*, No. 12, 44 Ind. Cas. 109.

Rent Act.

See *OUDE ACT XIX OF 1868*.

See *OUDE ACT XXII OF 1866*.

Rent Court.

Declaratory relief, Discretion of Court re grant of—Ejectment through Rent Court—Adverse order of, Necessity of. See *DECLARATORY RELIEF*, 46 Ind. Cas. 680.

Rent Decree.

(1) *Purchaser in execution of—Subsequent purchaser in execution of mortgage decree—Former if can oust latter, even when no notice given under Bengal Tenancy Act (1885), S. 167—Rights of latter. See AUCTION PURCHASER No. 4-a, 46 Ind. Cas. 921.*

(2) *Sale in execution of—Effect of sale on encumbrances. See EXECUTION SALE, No. 4, 35 M.L.J. 448.*

Rent, Enhancement of.

See **ENHANCEMENT OF RENT.**

Rent-free Land.

Grant of village lands rent-free by talukdar—Attachment of village by Government for non-payment of a assessment—Right of Government to recover proportional assessment from holders of rent free lands. See BOM. ACT V OF 1879 (LAND REVENUE CODE), No. 7, 20 Bom. L.R. 748.

Rent Sale

Bengal Tenancy Act (1885), S. 174, Amount to be deposited under, to set aside a—Decree amount with costs—Execution sale, Amount to be deposited to set aside a—Amount in sale proclamation with five per cent. of purchase-money—Civ. Pro Code (Act V of 1908), O. XXI, r. 89

*To set aside a rent sale, a judgment-debtor has, under S. 174 of the Bengal Tenancy Act, to deposit the amount recoverable under the decree with costs and not the amount specified in the sale proclamation together with five per cent. on the purchase-money, which a judgment-debtor has to deposit under r. 89 of O. XXI of the Civ. Pro Code to set aside an execution sale. *Mukra Rai v. Sarjug Pershad Misser*, 47 Ind. Cas. 654.*

IMAM and THORNHILL, JJ.

Rent Suit.

(1) *Rent decree—When, res judicata*

*Where, in a rent suit, the plaintiff does not contain a prayer for a declaration as to the rate of rent as part of the substantive relief claimed, an ex parte decree in such suit granting the rent prayed for does not operate as res judicata for the determination of the rate of rent in a subsequent rent suit. *Brajendra Kumar Ray Chowdhury v. Sarajendra Nath Saha*, 45 Ind. Cas. 416.*

TEUNON and NEWBOULD, JJ.

Reference.—16 O. 300 (F.B.), F.

(2) *Co sharer. Suit by one—Maintainability of—Special contract, Existence of, Proof of, for—Private partition, if takes case out of Agra Tenancy Act (II of 1901), S. 194.*

A private partition of a vague nature is certainly not enough to take a case out of S. 194 of the Agra Tenancy Act.

To entitle a co-sharer to sue separately for rent, there must be a special contract clearly

Rent Suit—(Concluded):

*setting out the opposition to law as stated in S. 194 (1) of the Agra Tenancy Act. *Gohardhan v. Padam Singh*, 46 Ind. Cas. 652.*

KNOX, J.

(3) *Relationship of landlord and tenant at issue—Second appeal if lies. See APPEAL (SECOND APPEAL), No. 10-d, 47 Ind. Cas. 105.*

(4) *Three persons having interest in a holding—Rent suit against only one tenant—Decree in money decree and not in rent decree. See LANDLORD AND TENANT, No. 27, 43 Ind. Cas. 748.*

(5) *Rent suit between mortgages of landlord and tenant—Adverse decision against mortgagee's title—Res judicata in a subsequent rent suit by the same plaintiff. See RES JUDICATA, No. 18 44 Ind. Cas. 129.*

(6) *Finding in—Kabuliyat valid and effective—Declaratory suit that kabuliyat null and void, if barred by—Res judicata. See RES JUDICATA, No. 22 b, 47 Ind. Cas. 8*

(7) *Prior suit for rent—Decree, effect of, on rate of rent—Subsequent rent suit—Decree in prior suit if operates as res judicata. See REVIEW, No. 7, 3 Pat. L.J. 372.*

Rent, Suit for.

(1) *Bengal Cess Act, Forms prescribed under, Part I, Sch. A of, wrong entry in, as to holding—Suit for rent, if barred by—Bengal Cess Act (IX B.C. of 1880), S. 30.*

*A suit for rent in respect of the holding under S. 20-a of the Cess Act is not barred by its being wrongly entered in part I, instead of in part II, Sch. A, of the forms prescribed for returns to be made under the Act. *Ram Gobind Choudhuri v. Thakur Dayal Jha*, 43 Ind. Cas. 501=2 Pat. L.J. 653=2 Pat. L.W. 41.*

CHAMIER, C.J. and SHARFUDDIN, J.

References.—27 Ind. Cas. 304; 43 Ind. Cas. 497=2 Pat. L.W. 42, Not F. 15 C. 424, 41 Ind. Cas. 404=2 Pat. L.W. 88, Not F.

(2) *Amount claimed less than Rs. 100—Second appeal, if lies—C.P. Tenancy Act (IX of 1898), S. 81 (b)—Conditions to bring a case under.*

To bring a case under cl. (b) of S. 81 of the C.P. Tenancy Act it is necessary that there should be an adjudication as between persons impleaded as parties to the suit and having conflicting interests (a).

Plaintiff, the Malguzar of a village, sued the defendants for arrears of rent, the amount of which was less than Rs. 100. The defence was that by a compromise they have relinquished their share in favour of their nephew and that they have therefore ceased to be liable for rent.

Held, that, the nephew not being a party to the suit and the defendants and the nephew not having conflicting claims with regard to the tenancy, the case did not fall under cl. (b) of S. 81 of the C.P. Tenancy Act (1898) and as

Rent, Suit for—(Concluded).

the amount claimed was less than Rs 100 no second appeal lies. *Diadaya! Sheodutta v. Sukha*, 47 Ind. Cas. 540.

MITTRA, A J C.

Reference.—(a) 14 C.P.L.R. 31, F

(3) By mortgagee of *para*—Revenue sale of proprietary right, Purchaser at, Payment of rent to, Plea of, Admissibility of, under S. 60, Bengal Tenancy Act (1885)—S. 72, Applicability of. See LANDLORD AND TENANT, No. 25 a, 43 Ind. Cas. 182.

Representative.

(1) *Non transferable occupancy holding, Purchaser of, a representative of judgment debtor—Execution sale entitled to object to—Civ. Pro Code (Act V of 1908), S. 47, O XXI, r. 100—Proceedings under r. 100, Not entitled to maintain*

A purchaser of the whole or part of a non-transferable occupancy holding is a representative of the judgment debtor and is entitled to object to the sale under S. 47. He is not, therefore, entitled to maintain proceedings under O XXI, r. 100 of the Civ. Pro Code. *Panchratna Koeri v. Ram Sahay Singh*, 43 Ind. Cas. 969—3 Pat. L.J. 579—4 Pat. L.W. 129.

ROE and JWALA PRASAD, JJ.

(2) Purchaser of non transferable occupancy holding if a, of judgment debtor under S. 47, Civ. Pro. Code (1908). See EXECUTION SALE, No. 4 a, 3 Pat. L.J. 579.

(3) Meaning of—in Civ. Pro. Code (1908), S. 144, Assignee if entitled to benefit of S. 144. See RESTITUTION, No. 4, 46 Ind. Cas. 465.

Representative Suit.

(1) *Civ. Pro Code (Act V of 1908), O I, r. 8—Representative suit—Notices, omission to serve—Suit to establish a public right—Adjudication on merits.*

In a representative suit to establish a public right, viz., the right of the Mahomedan community of a place to a plot of land as appurtenant to their mosque, where, although the necessary amount for service of the notice, under O. I, r. 8, had been paid into Court, no such notice had been served, it is not open to the Court to adjudicate on the merits.

The notices should be first served and then alone the Court should proceed to try the suit. *Eharuddin v. Jijaraddin*, 42 Ind. Cas. 543.

FLETCHER and NEWBOULD, JJ.

(2) Suit by leading Mirasdar in respect of common forest land—De leration, injuration, damages and scheme of management—Objection to suit by 19 out of 200 Mirasdar leading Mirasdar if entitled to represent other Mirasdar, Combination of claims, Validity of. See CIV. PRO. CODE (1908), No. 204-a, 8 L.W. 160.

(3) By person on behalf of himself and others having same interest—Suit in representative capacity—Distinction between these two kinds

Representative Suit—(Concluded).

of suits. See HINDU LAW (REVERSIONERS), No. 6, (1918) M.W.N. 888.

(4) Declaratory suit by one worshipper if lies. See MAHOMEDAN LAW (WAKF), No. 4, 23 C.W.N. 116.

Rescission of Contract.

Company — Liquidation — Shareholder's right to be removed from the list of contributors, principles governing—Liability as contributory how far affected by fraud or misrepresentation—Shareholder when can have his contract to take shares set aside—Reputation. See CONTRIBUTORY, No. 2, 42 P.R. 1919.

Res Judicata.

(1) *Civ. Pro Code (1908), S. 11, Expi. (5), O XX, r. 12—Suit for possession and mesne profits—Decree silent regarding future mesne profits—Fresh suit for such profits not barred*

Notwithstanding the provisions of Ss. 18 and 43 of Act XIV of 1882 a subsequent suit for mesne profits *pendente lite* and from the date of the decree to delivery of possession could be maintained when the Court had omitted to adjudicate upon the claim in the suit for possession of immoveable property and for mesne profits, past and future, and the changes in Act V of 1908 do not bar such a suit for the mesne profits accruing due after the institution of the former suit. The change embodied in O. XX, r. 12 of the present Civ. Pro Code, is that it is the Court which bears the suit which is to ascertain the mesne profits whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards up to the date of the delivery of possession, and it is this Court which is to pass the final decree for mesne profits which has to be executed by the Court executing the decree, and further than this there is no alteration in the nature of the claim as to future mesne profits. *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan*, 16 A.L.J. 181—40 A.292—44 Ind. Cas. 88.

RICHARD, O J. and BANERJI, J.

References —21 A. 425 (F.B.), 33 M.L.J. 699, F

(2) *Muafi Zabt Sarkari—Mortgage—Mortgagor claiming proprietary interest—Suit for sale on mortgage decreed—Formal possession obtained by mortgagee after purchase—Mortgagor recorded as tenant—Mortgagor's application for entry of name rejected by Revenue Court—Suit for possession—Whether mortgagor entitled to plead that his interest not saleable according to law—Mortgagor barred*

A owned some land known as *Muafi Sarkari*. This was resumed and became *muafi sabb sarkari*. He sold half of it and the other half passed to his heir B. B sold half of his share to plaintiff and made a mortgage to him of the remaining half. A admittedly claimed proprietary interest in the land. Plaintiff brought

Res Judicata—(Continued).

a suit on his mortgage and obtained a decree for sale. He applied in execution for sale of his property and B pleaded that it was ancestral. It was accordingly sold by the Collector and purchased by the plaintiff. The plaintiff obtained formal delivery of possession. In the *khatquni jamabandi* B was recorded as a tenant the entry being in the words "sir khud." The plaintiff then applied to the Court of Revenue for the entry of his name in place of B. B successfully pleaded there that the land was his *sir* and he had become ex-proprietary tenant. The plaintiff having failed there brought this suit claiming to be maintained in possession or in the alternative for recovery of possession. He treated Basa proprietor and this was denied. B also pleaded in the alternative that the land was his *sir* and he had become an ex-proprietary tenant:—*Held* that the plea that B's original interest in the land was not saleable ought to have been raised in the course of the previous litigation and not having been so raised B was precluded from raising it in the present litigation. *Deodatt Singh v. Ram Charrittar Jati*, 16 A.L.J. 557 = 46 Ind. Cas. 897.

TUDBALL and RAOOF, JJ.

- (3) *Land Law of Bengal—Patni Taluks—Power of Zamindar to bring to sale for arrears—Bengal Patni Taluks Regulation, 1819 (Bengal Reg. VIII of 1819), S. 14—Money had and received—Money paid under a claim in legal proceedings—Not ordinarily recoverable—Chota Nagpur Encumbered Estate Act, 1876 (Act VI of 1876)—Has no application to immoveable property outside of Chota Nagpur.*

In proceedings under S. 14 of the Bengal Patni Taluks Regulation, 1819 (Bengal Reg. VIII of 1819), the Collector acts not in a judicial but in a ministerial capacity. Those who pay money under such proceedings are not in the same position as persons who pay a claim brought against them in an ordinary suit in which they had a full opportunity of resisting and who, not having availed themselves of such opportunity then, are debarred from doing so hereafter. Whether or not he contests the claim, a talukdar to stop a sale under S. 14 has to deposit the full amount claimed; and such deposit does not preclude him from thereafter raising the question of title in an ordinary suit.

The Chota Nagpur Encumbered Estates Act, 1876 (Act VI of 1876) has no application to immoveable property outside the limits of Chota Nagpur. *Jyoti Prashad Singh v. Kamad Nath Chatterjee*, 16 A.L.J. 569 = 28 C.L.J. 165 = 8 L.W. 186 = 30 Bom. L.R. 856 = 35 M.L.J. 847 = (1918) M.W.N. 441 = 24 M.L.T. 66 = 22 C.W.N. 1009 = 5 Pat. L.W. 64 = 45 Ind. Cas. 827 (P.C.).

VISCONT HALDANE, LORD DUNEDIN,
SIR JOHN EDGE and MR. AMEER ALI.

References:—16 C.L.J. 527, *Appl.*

- (4) *Code of Civil Procedure (Act V of 1908), S. 11, Expt. 5—Mortgages—Suit on mortgage bond—Person claiming paramount*

Res Judicata—(Continued).

title—Not a necessary party—Issue as to paramount title cannot be litigated.

In a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit.

A person was impleaded as a subsequent mortgagee in a suit upon a mortgage. The subsequent mortgagee claimed a title to a portion of the mortgaged property as owner. He, however, did not enter appearance in that suit. The mortgagors asserted that he was entitled as owner to a portion of the property. The Court held that the mortgagors were estopped from raising that plea and ordered the whole property to be sold. In a subsequent suit by the subsequent mortgagee for a declaration of his right in respect of the portion in controversy in the former suit, *held* that he was not precluded from raising the question, inasmuch as, in the former suit, he filed two capacities, *vis.*, (1) as a subsequent mortgagee in which capacity he was entitled to raise such defence as was open to the mortgagors, and (2) as claiming a paramount title in which case he could not raise the question in that suit. *Gobardhan v. Manna Lal*, 16 A.L.J. 639 = 40 A. 584 = 46 Ind. Cas. 559.

BANERJI and A. RAOOF, JJ.

References:—35 Ind. Cas. 292, *Appl.*; 31 A. 11; 33 C. 425, R.

- (5) *Mortgage, Suit on—Person in possession holding up as shield payments made towards prior mortgages—Suit decreed subject to his lien—Final decree made without mention of the lien—Property sold and purchased by mortgagee—Dispossession of the person in possession—Suit by such person to recover money paid for the prior mortgages—Suit not maintainable—Code of Civil Procedure (Act V of 1908), Ss. 11, 47.*

One B held two mortgages, dated respectively 20th February, 1895 and 27th June, 1895, over certain property belonging to K. There was a prior usufructuary mortgage over the same property for a sum of Rs. 290. In execution of a decree, one, M, bought the equity of redemption. B brought a suit on his first mortgage for sale of the property and he impleaded M. B mentioned the prior usufructuary mortgage and offered to pay the amount due thereon. He obtained a decree and paid in the amount of the prior mortgage, which money was withdrawn by that mortgagee. The property, however, was not sold, M having come to terms with B. Between 1901 and 1904, M paid in the sums of money till the whole amount which was Rs. 787 odd was paid off. B then sued on foot of his second mortgage and asked for sale of the property. M, who was a defendant, held up as shield his rights by virtue of the payment of the two prior mortgages. The Court held that he could hold this up as a shield and made a decree for sale subject to his lien. At the time of drawing up the final decree, however,

Res Judicata—(Continued).

no mention was made of the lien in favour of M. The property was sold and bought by B. B did not deposit any sum for payment to M and B obtained possession of the property. M objected that he could not be dispossessed till he was paid off, but the Court refused to go into this question in execution proceedings and directed M to bring a separate suit. M, thereupon, brought the present suit claiming Rs. 737 with interest from B, by sale of the property.—*Held* that the suit was not maintainable being barred by the principle of *res judicata* and the provisions of S 47 of the Code of Civil Procedure. *Moti Ram v. Banke Lal*, 16 A.L.J. 685—47 Ind. Cas. 954.

TUDBALL and RAOOF, JJ

- (6) *Code of Civil Procedure (Act V of 1909), S 11—Cross appeals—Two decrees—One decree become final—Effect on appeal from the other—Previous suit deciding question of title of the nature cognizable by a Small Cause Court—No appeal from the decision.*

The plaintiff brought a suit in the Court of the Munsif to recover possession over a half share in two groves numbered 123 and 2 respectively. The suit was dismissed in respect of No. 2, and it was decreed in respect of No. 123. There were two appeals to the lower appellate Court, the plaintiff assailing the decree in respect of No. 2 and the defendants that in respect of No. 123. Both the appeals were tried together and disposed of by one judgment, but two decrees were passed, whereby the plaintiff's appeal was dismissed, and the defendant's appeal was allowed, the case being remanded. The plaintiff appealed against the second decree to the High Court. In regard to grove No. 123, the plaintiff sued the defendants for damages for cutting down two trees. The suit was of the nature cognizable by a Court of Small Causes, but it was instituted in the Court of a Munsif. In that suit, the defendants denied the plaintiff's title, and the issue as to the title was decided in the plaintiff's favour. In the present suit instituted in the same Court, the plaintiff again set up his title, which the defendants denied. The Munsif held that the decision in the former suit operated as *res judicata*. The lower appellate Court reversed the finding:—*Held* (1) that the fact of the decree in regard to the grove No. 2 having become final did not operate to bar the plaintiff's appeal in respect of grove No. 123 on any principle of *res judicata*; (2) that the present suit was barred by the rule of *res judicata* by virtue of the decision on the question of title in the previous suit, irrespectively of the fact that the decree in that suit was not appealable to the High Court, the suit being of a Small Cause Court nature. *Ram Faqr v. Bindheshri Singh*, 16 A.L.J. 782—47 Ind. Cas. 837.

PIGGOTT and WALSH, JJ.

References:—12 A. 578; 12 A.L.J. 858, *Dist.*; 10 A.L.J. 106, *F.*

- (7) *Civ. Pro. Code (1908), Sec. 11, 47—First suit for redemption of mortgage—Second*

Res Judicata—(Continued).

suit for redemption cannot lie—Execution of decree.

In a suit to redeem a mortgage of 1859, the Court passed a decree for redemption and ordered payment of the mortgage amount in instalments under the Dekkhan Agriculturists' Relief Act, on 8th April 1899. The decree was not executed, and the possession of the property remained as before with the mortgagor. On 26th May, 1899, the mortgagor mortgaged the property to the plaintiff. In 1912, the plaintiff sued to enforce his mortgage against the original mortgagor and mortgagor. The mortgagor-defendant pleaded the decree of 1899 as a bar to the suit.

Held, (1) that the suit was barred under S 11 of the Civ. Pro. Code, if it be treated as a suit for redemption of the mortgage of 1859,

(2) that it was barred under S 47 of the Code, if it be treated as based on the decree of 1899 taken along with the subsequent conduct of the parties in not executing the decree and in allowing the possession to remain with the mortgagor as before (a) *Bapuji Ramchandra Kulkarni v. Guja Mhadu Dhaugar*, 20 Bom. L.R. 164—42 B. 246—44 Ind. Cas. 908.

HEATON and SHAH JJ.

References:—(a) 10 B. 461 (P.C.); 40 B. 494, *R.*

- (8) *Property belonging to estate B erroneously decreed to be in estate A—Tenants under B under permanent leases if bound by decree—Tenants entitled to hold under their own leases under A—Co sharer zemindar purchasing tenure—Possession disputed by tenant of neighbouring zemindar—Suit as both purchaser and zemindar to establish title in property purchased—Zemindar's title if properly in issue—Litigating under the same title*

A and B are neighbouring zemindars. The 4/5ths proprietor of A purchased in execution of a decree for his share of the rent a defaulting tenure G in A. A tenant of B having set up title as such to a portion of the land thus purchased, the purchaser sued the claimant and the zemindars of B to establish his title both as landlord and as purchaser to the tenure G. In the course of that suit, a Commissioner fixed a boundary between A and B, which, in a subsequent investigation, was found to have erroneously included in estate A lands which really formed part of estate B, as part of the defaulting tenure G and this was confirmed by the Court.

Held—That the plaintiff in that suit was interested in establishing his title both as zemindar and purchaser, and the zemindari title having, upon the pleadings, been directly put in issue, the decision, so far as plaintiff's 4/5ths zemindari title was concerned, was as between the rival zemindars *res judicata*.

The defaulting tenure holder having, prior to the sale of the tenure, mortgaged his properties, the tenure (amongst other properties) was sold in execution of a decree obtained on the mortgage and a part of it was purchased by the

Res Judicata—(Continued).

mortgagee and the rest by a stranger who later on sold it to the mortgagee. The mortgagee-purchaser was no party to the suit of the 4/5th zemindar of A, who had purchased only the equity of redemption at the sale in execution of his rent decree.

Held—That the decision in that suit was not *res judicata* against the mortgagee-purchaser, who was entitled to show that he held certain portions of the land purchased by him under permanent leases granted to the mortgagor by the proprietors of B on certain terms.

That as regards such lands the 4/5th zemindar title being found to be in the proprietors A by *res judicata* in the present suit in which both the proprietors of B and the mortgagee-purchaser are parties, the mortgagee-purchaser is entitled to hold them under the 4/5th proprietor of A as to that same on the terms of the permanent leases granted by the proprietors of B Shri Chandra Ray Choudhry v. Harindra Lal Ray Choudhury, 22 C.W.N. 741 = 48 O.L.J. 223 = 47 Ind. Cas. 315 (F.B.).

WOODROFFE, CHITTY and SHAMSUL HUDA, JJ.

(9) *Public right of way — Obstruction — Special damage — Village pathway, Obstruction of — Special damage, if need be proved*

Where in a suit by the plaintiff for the declaration of a public right of way, alleging special damage, it appeared in a previous suit for a similar declaration and been dismissed on the ground that the plaintiff did not disclose any cause of action (there being no allegation that plaintiff had suffered special damage) but in dismissing the suit the Court had expressly stated that the plaintiff was not debarred from bringing a fresh suit properly framed.

Held—That the second suit was not barred by *res judicata*. Proof by the plaintiff that he and his servants had been compelled to go by a longer route and thereby incur additional expense was sufficient proof of special damage.

Infringement of a village pathway in which plaintiff had got a right with other villagers by reasons of a grant implied from long user does not require proof of special damage to give the plaintiff a cause of action. Harihar Das v. Chandra Kumar Guha, 23 C.W.N. 91.

FLETCHER and SHAMSUL HUDA, JJ.

(10) *Civ. Pro. Code, S. 11—Decision in previous suit as to annual rent payable—Subsequent suit.*

The question as to what is the rent payable for the holding was directly raised and decided in a previous suit. The present suit is for the period immediately succeeding that for which the previous suit was brought.

Held that the decision in the previous suit operates as *res judicata*. Jogesh Chandra Roy v. Ram Kabi Nath, 40 Ind. Cas. 460.

CHATTERJEA and SMITH, JJ.

Res Judicata—(Continued).

(11) *Civ. Pro. Code (Act V of 1908), O. II, r. 2 (3)—Plaint in previous suit, construction of, for purposes of.*

For the purpose of *res judicata* or Civ. Pro. Code, O II, r. 2 (3) the plaint in the previous suit must be construed in the same way that the Court that decided that suit construed it. Christenson v. Commotto, 42 Ind. Cas. 518.

ORMOND, O C J. and PARLETT, J.

(12) *Civ. Pro. Code (Act V of 1908), S. 11, Expt. V and O XLI, r. 33—Res judicata—Suit claiming relief alternatively against two defendants—Decree against one—Appeal—No cross objection against the other defendant—Powers of the appellate Court—Appeal allowed—Subsequent suit against the other defendant—No bar—Limitation—Suit based on failure of consideration and fraud—Findings in the previous suit not conclusive.*

Where a person transferred for valuable consideration certain rents alleged to be due to him and in arrears and the transferee instituted a suit making the person from whom the arrears were said to be due and the transferor parties claiming reliefs against them in the alternative and the Court of first instance gave a decree against the 1st defendant, **held** that, in an appeal by that defendant it is no incumbent on the plaintiff respondent to file a cross-objection against the other defendant and seek in that appeal itself to make that other defendant liable in case the appealing defendant succeeded in showing that there was no arrears due from him. The Court under O. XLI, r. 33, Civ. Pro. Code, had power to decide the liability of the first defendant in that appeal itself or leave it undecided, and if it left undecided a subsequent suit by the plaintiff against that defendant seeking to make him liable is not barred by *res judicata*.

The limitation for the subsequent suit would not begin to run until after the decision of the appeal in the former suit as it is a case of fraudulent concealment of the fact that the rent had already been received which became known only on the decision of the appeal.

The facts held to have been proved by the appellate Court in the former suit and the judgment thereon are not conclusive against the defendant in such a subsequent suit as there was no adjudication or contest as between them in the previous appeal and the defendant is entitled to go behind the judgment in the former appeal and to require the facts to be proved against him. Sarat Chandra Bose v. The Kharara Mesajula Zamindari Syndicate Ltd., 42 Ind. Cas. 548.

FLETCHER and NEWBOULD, JJ.

(13) *Rent of a holding—Subsequent suit for rent for another period—Res judicata.*

When a question as to what is the amount of rent payable annually for a certain holding is put in issue and finally decided, it is *res judicata* in a subsequent suit between the same

Res Judicata—(Continued).

parties where the same holding is concerned, **Amjad Ali Sikdar v. Mahmuddin**, 42 Ind. Cas. 598.

TRUNON and HUDA, JJ.

References:—16 C.L.J. 89; 16 C.L.J. 41, F.

(14) Civ. Pro. Code (Act V of 1908), S. 11—

Res judicata—Previous suit holding adoption of plaintiff to be invalid—Subsequent suit to recover property as adopted son—Claim for mesne profits added—Amount of mesne profits greater than the pecuniary limit of jurisdiction of the Court which tried the previous suit—Hyderabad Assigned Districts Courts Law, 1889—Assistant Commissioner—Transfer of Subordinate Judge—Previous suit contested by one of the widows the other acting as next friend of the plaintiff—Subsequent suit against both the widows.

The term "Subordinate Judge" was not a term recognised by the Courts Act then in force in Berar, i.e., the Hyderabad Assigned Districts Courts Law, 1889. An Assistant-Commissioner's jurisdiction to try suits up to the value of Rs. 5,000 was not taken away by reason of his being posted as Subordinate Judge at a place where suits of the value of more than Rs. 1,000, were not triable.

In determining the question whether the Court which tried the previous suit had the power to try the subsequent suit, we must look to the suit as it could have been framed but for the option given in the Civ. Pro. Code in the way of joinder of causes of action.

A plaintiff cannot evade the provisions of the Civ. Pro. Code regarding *res judicata* by joining several causes of action against the same defendants in the subsequent suit and instituting it in a Court of superior jurisdiction. A previous decision that plaintiff was not validly adopted bars the institution of a fresh suit for the recovery of possession of the estate. A claim for mesne profits is only subsidiary and must fail with the claim for possession and the joinder of a claim for mesne profits to an amount exceeding the pecuniary limits of the jurisdiction of the Court which tried the previous suit does not save the suit from being barred by *res judicata*.

Where in the previous suit one of the two widows of the last male owner alone opposed the claim of the plaintiff as adopted son and the other acted as next friend and in the subsequent suit both of them were contesting defendants held that nevertheless the previous decision was *res judicata* since it must be held that in the previous suit the widow who contested must be deemed to have represented the estate of the last male owner, the other widow for the time being disclaiming all interests in it. **Sakhdeo v. Bulal**, 42 Ind. Cas. 667.

MITTRA, A.J.C.

References:—12 C.P.L.R. 97; 29 C. 78, F.

(15) *Suit against widow to recover properties—Widow adopting pendente lite—Adopted son not made a party to suit—Subsequently*

Res Judicata—(Continued).

adopted son suing for declaration that he is entitled to the property left by the deceased husband of the widow—Res judicata—Adoption having the effect of divesting a vested estate—Validity.

B and N brothers, died leaving two widows L and B H respectively. S sued the widows L and B H on the ground that he was the illegitimate son of N and obtained a decree. During the pendency of the suit, L adopted G (plaintiff) for B under an authority given by B and G was not made a party to S's suit. Subsequently G sued for a declaration

(1) that he was the adopted son of B and entitled to the property left by the latter;

(2) that he was entitled to the property of N, after the death of B H, widow of N;

(3) that the decree obtained by S in respect of properties of B and N was not binding on him.

Held (1) that G was bound by the decree obtained by S, though he was not made a party to the suit, and, therefore, G's present suit was barred as *res judicata*;

(2) that S having inherited the suit properties as N's illegitimate son, G's adoption by L, having the effect of divesting a vested estate, is invalid in law. **Ganpatrao v. Laxmi Bai**, 43 Ind. Cas. 64.

BATTEN, PRIDEAUX and MITTRA, A. J. CS.

References:—16 C. 40; 9 M.I.A. 539, F.; 3 M.I.A. 229; 5 B 630, R.; 11 M. 408; 11 B. 469; 21 W.R. 109, Dist.

(16) S. 11, Expl. IV—*Previous suit in respect of several bits of land—Partial dismissal of suit—Subsequent suit in regard to lands previously dismissed—Res judicata.*

Where a suit was brought in respect of several bits of lands and the suit was decreed in respect of some lands and dismissed in respect of others, a subsequent suit in respect of lands previously dismissed is barred by the law of *res judicata*, as the plaintiff "might" have claimed and "ought" to have claimed these lands in the previous suit. **Takarunnissa Chowdhurani v. Tarini Charan Sarkar**, 43 Ind. Cas. 211.

CHATTERJEE and RICHARDSON, JJ.

References:—20 C. 79, F.; 22 W. R. 464, Appl.; 24 C. 711, Disappr.; 35 C. 979; 25 B. 189, R.

(17) Civ. Pro. Code (1908), S. 11, Expl. 4—*Prior suit for possession of house on the ground of gift—Subsequent suit for possession of land on the ground of succession—No bar as res judicata.*

Where a plaintiff brought a former suit for possession of a house on the ground that it was a gift made to his mother by his maternal grandfather and the suit was dismissed, and subsequently he brought a suit for possession of a field on the allegation that it belonged to his maternal grandfather, after his death to his widow, and after her death to plaintiff's mother

Res Judicata—(Continued).

to whom he succeeded; *held* that the subsequent suit is not barred as *res judicata* under Civ. Pro. Code (1908), S. 11, Expt. 4. *Bhagwanrao v. Maroti*, 48 Ind. Cas. 395.

MITTRA, J.C.

- (18) *Rent suit between mortgagee of landlord and tenants—Adverse decision against plaintiff's title—Res judicata in a subsequent rent suit by the same plaintiff*

In a previous rent suit between the plaintiffs as mortgagee of the landlord and the tenants an issue which covered the consideration of the question of title of plaintiff as mortgagee of landlord was considered and a decision adverse to plaintiff's title was given *held* that that decision proved a *res judicata* in a subsequent rent suit between the plaintiff after getting his name registered under the Land Registration Act, and the tenants. *Sheo Charan Dhobi v. Banal Singh*, 44 Ind. Cas. 129.

SIR ALI IMAM, J.

- (19) *Suit for profits of lands—Previous decision granting profits at a particular rate—Whether operates as res judicata in a subsequent suit claiming higher rate of profits.*

In a suit for profits of lands, a previous decision granting profits at a certain rate, does not operate as *res judicata* in a subsequent suit claiming profits at a higher rate. *Baldeo Baksh v. Pahlad Singh*, 45 Ind. Cas. 218.

LINDSAY, J.C.

- (20) *Suit by one co-mortgagor to redeem his share—Decree in the suit does not operate as res judicata on a subsequent suit by other co-mortgagors to redeem their share—Court-fee payable.*

A suit was brought by one of several co-mortgagors to redeem his share of the property and the other co-mortgagors were made party defendants. A decree was passed in favour of the plaintiff to redeem the property within a fixed period and the plaintiff failed to redeem within the fixed period. Subsequently, other co-mortgagors brought a suit to redeem their share of the property.

Held that the principle of *res judicata* cannot operate to bar the subsequent suit.

Where the right of plaintiff is to redeem only a share of the mortgaged property, the Court-fee payable is to be calculated on the amount of the mortgaged debt which is chargeable on the share of which the plaintiff is entitled to ask for redemption. *Bhalron Baksh Singh v. Baghubansa Gunwar*, 45 Ind. Cas. 300.

LINDSAY, J.C.

References:—11 A.L.J. 844, *Dist.*; 16 M 326; 9 A. 438; 6 B. 324, *Appr.*

- (21) *Rent suit—Decision as to rate of rent in particular year—Whether res judicata.*

A decree in a rent suit is not *res judicata* as to the rate of rent payable for years other than the years covered by the decree.

Per Mulla, J.—The question whether a decision as to the rate of rent operates as *res*

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judicata depends on the frame of the issues. *Kishan Deyai Rai v. Kuipati Kuar*, 45 Ind. Cas. 316.

MULLICK and ATKINSON, JJ.

- (22) *Addition of persons who were not necessary parties to suit as parties—Decree in suit, no res judicata in subsequent suit by such persons*

Where persons were added as parties in a suit not as really necessary parties therein nor because any relief was claimed against them but because they might assist the Court in the adjudication of the claim against the real defendant, the decision in such a suit does not operate as *res judicata* as against such persons in any subsequent suit which they might bring on the subject matter of the original suit. *Sugriva Misser v. Jogi Misser*, 45 Ind. Cas. 318.

MULLICK, J.

Reference.—27 A. 59, *Appr.*

- (22 a) *Matter which might and ought to have been made ground of attack, only if it would have affected result of suit—Civ. Pro. Code (1908), S. 11, Expt. IV*

Where it is not certain that a matter if proved would have affected the result of a suit, it cannot be said that the matter ought to have been made a ground of attack within the meaning of Expt. IV to S. 11 of the Civ. Pro. Code. *Sah Deo Narain Deo v. Kusum Kumari*, 46 Ind. Cas. 929.

CHAPMAN and ATKINSON, JJ.

- (22 b) *Rent suit—Kabuliyat valid and effective, finding as to, in—Declaratory suit that kabuliyat null and void, if barred by.*

Whether in a rent suit on any matter, excepting the relationship of landlord and tenant, is *res judicata*, depends on what were the issues raised between the parties and decided in the rent suit.

A finding on a judicial determination in a rent suit that a *kabuliyat* was valid and effective as against the tenant and was also properly executed bars a subsequent suit by the tenant for a declaration that the *kabuliyat* is null and void. *Beal Madhab Chackrabarty v. Bholu Nath Majila*, 47 Ind. Cas. 9.

FLETCHER and SMITHER, JJ.

- (22 c) *Courts, Concurrent jurisdiction of—Pecuniary limits and subject-matter. Necessity of—Accounts, Adjudication of—Mortgagor, Suit by, for accounts without asking for redemption, Maintainability of—Usufructuary mortgage, Presumption against, where accounts suppressed or are not kept—Civ. Pro. Code (Act V of 1908), S. 11.*

In order to constitute *res judicata* the two Courts must be of "concurrent jurisdiction, as regards the pecuniary limits as well as the subject-matter."

Apart from a special Statute, accounts cannot be adjudicated upon by a Court when no further relief can be granted. "Ordinarily a suit for

Res Judicata—(Continued).

an account upon a mortgage cannot be maintained by the mortgagor unless he also asks for redemption."

An adjudication which cannot be the basis of any relief is not binding on the parties.

Every reasonable presumption should be made against an usufructuary mortgagee who either has kept no regular accounts or is suppressing them. *Mukand Ram Sukul v. Sheo Narain*, 47 Ind. Cas. 21.

BATTEN and MITTRA, A.J.CS.

(22 d) *Pro nota* Suit on Decision in, as to genuineness of the note—Malicious prosecution, Suit for, if barred by—Cause of action different—Appellate Court Power of to let in additional evidence—Civ. Pro. Code (Act V of 1908), S. 1, O. XLI, r. 27.

In a suit brought for recovery of money on the basis of a promissory note, the promissory note was found to be not genuine and the suit was dismissed. In a suit brought for damages for malicious prosecution, if a finding on a charge of forgery.

Held, that the finding as to the genuineness of the promissory note in the previous suit was not *res judicata* in the suit for malicious prosecution, as it was not founded on the same note and as the question of the genuineness of the hand note was a matter only incidentally in issue.

It is not open to a Court of appeal to order additional evidence to be taken except to cure an inherent defect or *lacuna* in the evidence already recorded. *Teju Bhagat v. Deoki Nandan Prasad*, 47 Ind. Cas. 14.

MULLICK and IMAM, JJ.

(22 c) Plea of, a question of law—Second appeal, if can be raised—Question decided by trial Court, left open and undecided by appellate Court, how far—Civ. Pro. Code (Act V of 1908), S. 11.

The plea of *res judicata* is a question of law and can be raised at any stage even in second appeal.

The principle of *res judicata* cannot apply where a question decided by the trial Court is left open and undecided by an appellate Court, since the appellate Court's judgment takes the place of and supersedes the decision of the trial Court. *Gobind Misser v. Behari Gope*, 47 Ind. Cas. 685.

JWALA PRASAD, J.

(23) Civ. Pro. Code (Act V of 1908), S. 11—Actual adjudication in prior suit—If necessary—Implied adjudication—How far *res judicata*—Both parties defendants in prior suit—Conflict of interest—inter se in prior suit—Whether necessary to constitute *res judicata*.

In order to constitute the decision in a prior suit *res judicata* on an issue in a subsequent suit, it is not necessary that there must have been an actual adjudication on the issue in the prior suit. It is sufficient if the decision come to in the prior suit impliedly decides the point subsequently in issue (a).

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Where the parties to a suit were both defendants in a prior suit and there was nothing to show that there was a clear conflict of interest between them *inter se* in the prior suit.

Held that the prior decision cannot be *res judicata* (b) *Poyyalil Naleker v. Subba Naleker*, 8 L. W. 206=24 M. L. T. 205=(1918) M.W.N. 567.

SESHAGIRI AIYAR, J.

References—(a) 40 B. 210; 13 M. L. J. 740, F. (b) 11 B. 216; 33 M. 112, F., 23 M. 515, R., 37 M. 270, Dist.

(23 a) Civ. Pro. Code (1908), S. 11—Finding in a prior suit—Co defendants—Question raised *inter se* between co defendants and a finding given—Decree in spite of finding—Not *res judicata*—Estoppel—Indiv. Evidence Act S. 115 No change of position.

Where in a prior suit in which the present contending parties were co defendants, the question now in controversy was controverted and a finding was given but the decree in the former case was in spite of the finding which in that case became immaterial so far as the plaintiff therein was concerned in view of the findings on other points; such a finding does not operate as *res judicata* in the present suit.

The mere fact that the same question was raised by the present defendant in the former suit and the party was led to adduce on the point is not sufficient to make out an estoppel as there is no change of position or prejudice due to the conclusion of the present defendant. For the decision in a suit to operate as *res judicata* between co defendants there should not only have been active controversy between them but decision should be necessary to lead to the decree passed in the suit (a) *Sankaramahalingam Chetti v. Muthulakshmi*, 33 M. L. J. 740=43 Ind. Cas. 860.

SPENOER and SESHAGIRI AIYAR, JJ.

References—(a) 37 M. 25, D., 9 M. L. T. 450; 21 C. W. N. 693, F., *Collins v. Walters*, L. R. 17 Eq. 252, 6 W. R. 66; 11 C. L. J. 461; 11 C. W. N. 284, D.

(24) Suit by co-heir plaintiff against alienee for recovery of his share of reversion, another co-heir being made defendant—Support of plaintiff's case by defendant co-heir and prayer for decree in his favour for his share offering to pay requisite Court-fess—Dismissal of suit as barred by limitation by first Court on certain finding of fact—Appeal by plaintiff to make defendant co-heir respondent—No appeal or objections filed by defendant-respondent—Death of respondent pending appeal, legal representatives not being brought on record—Suit held by appellate Court not barred on opposite finding of fact and decree for plaintiff of his share but no mention made by it of respondent's rights—Assignment by respondent's legal representatives of his share to plaintiff co-heir—Subsequent suit by plaintiff co-heir for recovery of assigned.

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share is barred by rule of res judicata—Civ. Pro. Code (1908), S. 11, Expl. 6.

The plaintiffs, as the sons of a daughter of G, instituted a suit for the recovery of their share of the reversion to G's estate from an alliance of such estate, making also R, the son of another daughter, a party defendant. R, supporting the plaintiffs' case, asked for a decree for his share also, offering to pay the requisite Court-fees. The question for trial was thus common both to the plaintiffs and R. The trial Court, arriving at a particular finding of fact, dismissed the suit as barred by limitation. The plaintiffs appealed, making R a respondent. R did not file any appeal or memorandum of objections, and died pending the appeal, his legal representatives not having been brought on the record. The appellate Court, arriving at a finding different from that of the trial Court, held that the suit was not barred and gave the plaintiffs a decree for their share, but made no mention of the rights of R. Afterwards the legal representatives of R assigned his rights to the plaintiffs, who brought the subsequent suit for the recovery of the assigned share from the alienee. Held that the subsequent suit of the plaintiffs was not barred by the rule of res judicata, because R was a party to the appeal in the former suit, the trial Court's finding of fact and its decision on such finding were reversed by the appellate Court, and therefore there was no decree and no subsisting decision on the question of limitation to operate as a bar but that, on the other hand, the decision of the appellate Court in the former suit was res judicata, in favour of the plaintiffs debarring the same question of limitation being raised again by the alienee in the subsequent suit. **Lingappaya v. Shankarnarayana Bhatta**, 35 M.L.J. 625.

ABDUR RAHIM and NAPIER, JJ.

References:—(1911) 2 M.W.N. 306, F.; 28 M. 457—14 M.L.J. 404, Dist.

(25) *Transfer of Property Act*, Ss. 86, 89 and 93 (2)—*Mortgage de rebus—Puisne mortgage, execution by—Res judicata.*

When in a suit upon a prior mortgage a puisne mortgagee is made a party defendant with the mortgagor and a decree is made according to Form 7, Appendix D of the Civ. Pro. Code, the puisne mortgagee's right to share in the surplus sale-proceeds is contingent on the property being brought to sale for non-payment of the sum found due to the plaintiff prior mortgagee. The decree cannot be read as requiring the mortgagor to redeem the puisne mortgagee nor is the latter entitled to have the property sold for non-payment of the sum due to him.

Therefore a subsequent suit by the puisne mortgagee on his own mortgage is competent and is not barred by res judicata. **Yedavysa Aiyar v. Madura Hindu Labha Nidhi Company**, 35 M.L.J. 639—24 M.L.T. 473—(1918) M.W.N. 898.

PHILLIPS and KUMARASWAMY SASTRY, JJ.

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References:—10 C.L.J. 150, F.; 1 C.L.J. 81, Appr.

(26) *British Baluchistan Reg. IX of 1896, S. 10—“Heard and finally decided”—Proceedings in a former suit—Practice.* **Abdullah Ashgar Ali Khan v. Ganesh Das**, 22 M.L.T. 451—22 C.W.N. 131—19 Bom. L.R. 972—3 Pat. L.W. 381—15 A.L.J. 889—26 C.L.J. 668—7 L.W. 62—128 P.W.R. 1917—34 M.L.J. 12—(1918) M.W.N. 7—45 C. 442. See Final Part, 1917 Col. 807.

(27) *Decree against person impleaded as legal representative of deceased defendant—Binding character against others claiming through same defendant.*

A suit was brought for specific performance of a contract to sell certain property against the owner; and on his death pending the suit, his widow, daughter-in-law and mother were impleaded as legal representatives. The daughter-in-law did not appear or contest the suit which was decreed by ordering the widow as legal representative to execute a conveyance. The other defendants being exonerated, the suit was dismissed as against them. In a subsequent suit for mesne profits of the property which remained in the possession of the daughter-in-law after the date of the first suit, she contended that she was in possession as legatee under a will of the owner and that as the first suit was dismissed as against her she was not liable.

Held that having been a party to the first suit the daughter-in-law should have raised her contentions in that suit; and also that the decree passed in that suit against the widow as legal representative of the owner was binding on all who claimed through him (a). **Pisupati Venkata Rangayya v. Gaudavarapu Narasamma**, 23 M.L.T. 209—(1918) M.W.N. 195—8 L.W. 19—44 Ind. Cas. 852.

ABDUR RAHIM and NAPIER, JJ.

References:—(a) 26 M. 230, Appl.; 32 C. 296, D.

(28) *Code of Civil Procedure, 1908 (Act V of 1908), S. 11—Hindu Law—Decree against the widow, when binding on the reversioner—Representation of the estate by the widow—Estoppel against the widow, Effect of—Reversioner.*

Where the estate of a deceased Hindu has been vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir; and where in a suit the merits are tried and the trial is fair and honest, a Hindu lady does not cease to be so qualified merely owing to a personal disability or a disadvantage as a litigant.

A Hindu widow sued for a declaration that she had not validly adopted the defendant as a son to her deceased husband. Both Courts in India dismissed the suit holding that by her own acts she was personally estopped from denying the validity of the adoption. The Privy Council affirmed that decision and also

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held that she had authority from her deceased husband to make the adoption in question and that the defendant had been validly adopted. On the death of the widow the next reversioner sued to eject the adopted son on the ground that inasmuch as the widow had no authority from her deceased husband to make an adoption the defendant had not been validly adopted.

Held, that though the rule of *res judicata*, as enacted in S. 11 of the Code of Civil Procedure, 1908 (Act V of 1908) was not strictly applicable, the principle of *res judicata*, as stated above, applied, and that the decision in the widow's suit on the question whether the defendant had or had not been validly adopted, barred the suit of the reversioner. **Risal Singh v. Balwant Singh**, 21 M. L. T. 361 = 28 O. L. J. 519 = 9 L. W. 51 = 40 A. 593 (P. C.).

LORD SUMNER, SIR JOHN EDGE,
MR. AMER ALI and SIR WALTER
PHILLIMORE BART.

Reference.—9 M. I. A. 539, R.

(29) O. XX, r. 12 and S. 11—*Civ. Pro. Code* (1882), Ss. 211, 212, 244—*First suit for possession and mesne profits, past and future—Future mesne profits not decreed—Second suit for future mesne profits—If res judicata*. **Doraisami Aiyar v. T. Subramania Aiyar**, (1917) M. W. N. 847 = 6 L. W. 784 = 22 M. L. T. 484 = 33 M. L. J. 699 = 41 M. 188 (F. B.). See *Final Part*, 1917, Col. 808.

(30) *Civ. Pro. Code* (1908), S. 11, *Expl.* (6) and S. 91—*Res judicata—Dispute over a public pathway—Previous suit dismissed for want of special damage—Subsequent suit in a representative capacity—Whether the finding in the prior suit operates as res judicata—Estoppel*.

Where, in a previous suit instituted by the 1st plaintiff's father against the defendants, it was found that the suit path was a public one, but the suit was dismissed on the ground that no special damage was alleged, and the present suit was brought by the plaintiff along with three other members of the public after obtaining the requisite sanction under S. 91, *Civ. Pro. Code*, and the defendants pleaded that the pathway in dispute was a private right of way.

Held—That the finding in the previous suit operated as *res judicata* in the present suit and that it was not open to the defendants to go behind that finding.

A party who has been defeated on a particular view of the facts put forward by him should not be allowed to refile from that position and to raise a defence inconsistent with his original contention and should be held estopped from questioning the judgment to which he was a party. (a) **Khajl Sayyid Yusuf Sahab v. Mdiga Narasimhappa**, (1918) M. W. N. 175 = 8 L. W. 377 = 44 Ind. Cas. 867.

SENAGIRI AİYAR and NAPIER, JJ.

References.—(a) 86 M. 141, R.; (1916) 2 M. W. N. 258, *Appl.*

Res Judicata—(Continued).

(81) *Civ. Pro. Code* (Act V of 1908), S. 11—*Erroneous decree—Ignorance of a ground of plea—No ground for re-opening the question—Evidence to show former decision wrong irrelevant—Applicability of doctrine of res judicata amongst co-defendants—Conditions of—Conflict of interests and a judgment defining real rights and obligations of the defendants inter se necessary—Active contest if essential*.

Oldfield J.—Where it was not shown that the evidence sought to be let in, in the subsequent suit, could not have been adduced in the prior suit, if ordinary diligence had been used, the matter could not be reopened, and the decision in the prior suit operates as *res judicata* in the subsequent suit.

Where the plaintiff in a prior suit neither expressly nor impliedly sued on behalf of any sharer except himself and the judgment contained no decision as to the rights of the co-sharers who were party-defendants but took no active part in the litigation, S. 11, *Civ. Pro. Code*, cannot be applied; and the claim of the co-sharers in a subsequent suit will not be *res judicata* by reason of the prior decision. (a).

Sadasiva Aiyar, J.—An erroneous decree establishing rights is as much *res judicata* between the parties as a just decree; and evidence offered to prove that the former decision was erroneous is irrelevant.

A party's ignorance of a ground of plea during the former litigation, and that ground itself, even if established, could not be permitted to take away from the binding effect of the former decision so far as it established the then rights of the parties.

(*Obiter*)—Subsequent facts showing that the rights established by the former decree have been legally modified since, can be alleged and proved in the subsequent suit.

To constitute *res judicata* between co-defendants, the authorities lay down that "there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*." "Without necessity a judgment will not be *res judicata* amongst the defendants" (b).

Where in a suit brought by a co-sharer, the other co-sharers were co-defendants with the contesting defendants and did not pray to the Court that a decree similar to the one passed in favour of the plaintiff should be passed in their favour also and it was therefore not necessary to decide their rights their claim would not be *res judicata* in the subsequent suits brought by them as plaintiffs, though in deciding the rights of the plaintiff, in the former suit, it was necessary to find that they had a common right with the then plaintiffs. (c). **Syed Mohideen Ali Sahib v. Syed Osman Sahib**, (1918) M. W. N. 580 = 8 L. W. 478.

OLDFIELD and SADASIVA AİYAR, JJ.

References.—(a) 12 A. 506; 22 M. 494; 23 M. 457 and 18 C. 353, R. (b) 11 B. 216; 26 C. 198, R. (c) 28 M. 457 (F. B.), F.; 26 M. 337 = 25 B. 74, R.; 14 M. 324, *Not F.*

Res Judicata—(Continued).

(82) *Oth. Pro. Code, Ss. 11 and 47—Suit by prior mortgagee—Puisne mortgagee party—Decree and order absolute—Fresh suit by puisne mortgagee—If barred.*

Where a puisne mortgagee was a party to the suit by prior mortgagee and a decree was passed under S. 88, Transfer of Property Act, which made no mention of the puisne mortgagee's right to redeem, and the properties were sold privately after order absolute, and the puisne mortgagee brought the present suit for redemption: *Held*, the suit is not barred by S. 47, as the prior decree did not provide for the working out of the rights of the puisne mortgagee (a).

Obiter.—Even if the decree provided for redemption of the puisne mortgage, S. 47 will not be a bar.

Held, also, S. 11 will be no bar to the present suit (b). *Brahmandam Venkata Lakshmi Narayana Row v. Allamaneni Yenkeyya*, (1918) M.W.N. 909

AYLING and KRISHNAN, JJ.

References:—(a) 27 A. 325 (P.C.), F.; (1918) M.W.N. 898; *Appr.* (b) 80 M. 853, *Not F.*; 40 M. 77 (Observations of Srinivasa Aiyangar, J.) at p. 92, *doubted*; 37 C. 907; 1 C.L.J. 31; 11 C. 563; 10 C. 150; 24 A. 429; 8 M. 246; 29 M. 84; 39 M. 896; (1911) 2 M.W.N. 323; 16 A.L.J. 607, R.

(83) *Subordinate Judge not exercising Small Causes Court jurisdiction, Decision by—Subsequent suit in Small Causes Court—Same point substantially raised in both Courts—Previous decision of Subordinate Judge, if operates as res judicata in Small Causes Court.*

In a suit before a Small Causes Court, the defendant's plea was substantially the same as that in a previous suit before a Subordinate Judge, not exercising the jurisdiction of a Small Causes Court, who had decided the issue relating to such plea in the defendant's favour. The plaintiff contended that such decision was not *res judicata* as the Subordinate Judge was not competent to decide the Small Causes Court suit in consequence of his not then exercising the jurisdiction of a Small Causes Court. *Held* that the inability of the Subordinate Judge to entertain a claim of a Small Cause Court nature arose not from incompetence but from the existence of another Court with a preferential jurisdiction and that the Subordinate Judge's decision was *res judicata* with regard to the claim in the Small Causes Court. *Madhorao v. Amritrao*, 14 N.L.R. 115.

P. S. KOTWAL, A.J.C.

References:—28 B. 338 (340), F.

(84) *Bengal Tenancy Act, Ss. 105-A, 107 and 109—Decision of Revenue Court in proceeding under S. 105-A as to absence of relationship of landlord and tenant—Suit by landlord on basis of such decision for ejectment of defendants—Decision of Revenue Court under S. 105-A of bars defendants from litigating same question—“Shall be final” in amended S. 107, Bengal Tenancy Act, Effect of, on decisions of Revenue Court.*

Res Judicata—(Continued).

The decision of a Revenue Court passed in a proceeding under S. 105-A of the Bengal Tenancy Act to the effect that the relationship of landlord and tenant does not subsist as between the parties thereto operates as *res judicata* in a subsequent suit, instituted on the basis of such decision for ejectment of the defendants, so as to prevent the defendants from re-arguing or re-opening that issue which has been the subject of the Revenue Court's decision. The words “shall be final” imported in 1898 into S. 107 of the Bengal Tenancy Act purport to give the finality of decrees of Civil Courts to decisions arrived at by the Revenue Courts or by the Special Judge on appeal; the effect being to bar for all time the possibility of raising any issue once settled in a dispute under S. 105-A of the Bengal Tenancy Act between the same parties, and to make it incapable of being re-opened and incapable of being challenged. *Mahendra Narayan Ray v. Girish Chandra Kar*, 3 Pat. L.J. 379—46 Ind. Cas. 125.

MULLICK and ATKINSON, JJ.

References:—19 C.L.J. 457, R.; 30 C. 339; 29 C. 707, *Dist. and Expt.*

(34-a) *Dismissal of suit by trial Court—Appeal by plaintiff—Leave to withdraw appeal obtained by plaintiff on ground of inability to adduce necessary evidence to support case—Effect of withdrawal on subsequent suit between same parties about same question—Dismissal of suit for want of evidence and dismissal of suit as constituted, Effect of.*

If a suit is dismissed on the ground that, as constituted, it could not succeed, the dismissal is not *res judicata*, however erroneous may be the idea that the frame of the suit barred a decision. If it is dismissed for want of evidence, the decision is final. A Court of appeal has no jurisdiction to dispose of a suit properly constituted otherwise than on the merits.

Where the appellant, in an appeal in a previous action dismissed upon its merits, petitioned the appellate Court asking leave to withdraw the appeal on the ground that he had not been able to adduce evidence necessary for the substantiation of his case and such leave was granted, with permission to bring a fresh suit, but it was not definitely stated in the order that the defects referred to in the petition were to be regarded as formal defects, *held* that the petition was a clear admission that the decision of the lower Court could not on the merits be assailed, that the appeal had been heard, that the decision of that appeal was that the evidence on the record was not sufficient to support the plaintiff's case and that a subsequent suit between the same parties substantially about the same question was barred as *res judicata*. *Satyabadi Gountia v. Badladhar Bar Panda*, 3 Pat. L. J. 404—45 Ind. Cas. 392.

CHAPMAN and ROE, JJ.

References:—13 M.T.A. 160; 24 I.A. 50; 11 C.L.J. 45; 11 C.L.J. 512; 21 A. 505; 23 C.L.J. 489, B.

Res Judicata—(Continued).

(35) *Minor—Decision in former suit brought by guardian on behalf of minor how far binds him—Neglect of guardian, prevents previous decision from becoming res judicata—Custom—Right of donor's family to property gifted when donee's daughter survives.* Ismail v. Mus sammat Sultan Bibi, 103 P. R. 1917=155 P. W. R. 1917=6 P. L. R. 1918=43 Ind. Cas. 354. See Final Part, 1917, Col. 809.

(36) *Decision of Revenue Court that defendant and plaintiff were landlord and tenant—Subsequent suit by plaintiff in Civil Court for declaration of proprietary title in him—Subsequent suit of res judicata—Jurisdiction of Civil Court to entertain such suit.*

Held that the decision of a Revenue Court in a former ejectment suit to the effect that the relationship of landlord and tenant existed between the present defendant and plaintiff, did not operate as *res judicata* in a subsequent suit by the plaintiff for a declaration to the effect that he had acquired a proprietary title in the suit land by adverse possession and that a Civil Court had jurisdiction to try and determine it. Billa v. Sultan Ali, 45 P. R. 1918=84 P. L. R. 1918=77 P. W. R. 1918=46 Ind. Cas. 13.

SHAH DIN, J.

References.—26 A. 468, 70 P. R. 1893; 83 P. R. 1913, *Appr.*; 24 Ind. Cas. 223, *F.* 29 A. 601; 33 A. 453 (*F. B.*), *R.*

(37) *Civ. Pro. Code (1908), S. 11—Decision in application for letters of administration—Scope of—Matter directly and substantially in issue—Judgment whether operates as res judicata.*

Held that in an application for letters of administration the Court merely has to decide in a preliminary way whether the applicant is an heir to the whole or part of the estate of the deceased and whether he is a fit person to whom the letters of administration should be granted. Such a decision does not operate *res judicata* in a subsequent suit for possession of the property as an heir.

One A died leaving a widow and one M who claimed to be his nephew. The widow applied for letters of administration which were granted to her. M appealed and the case was remanded for re decision after a finding as to whether M was a nephew of the deceased or not. The letters were eventually granted to the widow, the Court holding that M had failed to prove that he was the nephew of the deceased. Subsequently M brought the present suit for declaration that he was the nephew of A and as such entitled to share of the property left by him.

Held, that the question whether M was the nephew of the deceased was not directly or substantially in issue in the previous proceedings and, therefore, the judgment of the probate Court did not operate as *res judicata* in the present suit. Mogbul Shah Ahmad v. Muhammad Azmatullah, 49 P. R. 1918=46 P. L. R. 1918=34 P. W. R. 1918=43 Ind. Cas. 723.

SHAH DIN and SCOTT SMITH, JJ.

Res Judicata—(Continued).

References.—15 O. W. N. 1091 (1094)=13 O. L. J. 547=10 Ind. Cas. 434, *F.*; 38 B. 329=16 Bom. L. R. 5=23 Ind. Cas. 325, 6 Ind. Cas. 301=11 O. L. J. 623, *Dist.*

(37-a) *Revenue Officer, Decision of, in partition proceedings—Measure of parties' rights in Shamlat, As to—How far res judicata in subsequent suit—Punjab Land Revenue Act (XVII of 1887), S. 117*

A decision by the Revenue Officer in a partition proceedings as to the measure of the parties' rights in a Shamlat is not *res judicata* in a subsequent suit, where the Revenue Officer's proceedings are neither in essence or in form proceedings taken under S. 117 of the Punjab Land Revenue Act (1887). Fazl Bakht v. Niamat Khan, 105 P. R. 1918.

RATTIGAN, C. J. and LE-ROSSIGNOL, J.

(37 b) *Question raised but not decided in previous litigation between the same parties—Civ. Pro. Code (Act V of 1908), S. 11.*

Held, that a question though raised in the previous suit between the same parties does not become *res judicata* if it has not been adjudicated upon but on the other hand has been left open. Shamar v. Musht Gurjo, 149 P. L. R. 1917=6 P. W. R. 1918.

LE-ROSSIGNOL, J.

(38) *Civ. Pro. Code (Act V of 1908), S. 11—Matter left undecided—Registration Act (XVI of 1908), S. 17 (d)—Lease for term exceeding one year—Oral lease—Letter containing memoranda of fact accompli—Landlord and tenant—Contumacious possession by tenant—Damages*

It would be a contradiction in terms to say that the Court finally decided a matter which it expressly left untouched and undecided. In adjudicating upon point of *res judicata* the question is not whether the previous judgment was right but whether the Court had or had not finally decided the matter in dispute in the subsequent case.

Letters confirming the terms of a lease for a period exceeding more than one year entered into orally by the party are not compulsorily registrable as they can only be regarded as merely memoranda of a *fact accompli*. A tenant holding over contumaciously is usually assessed at double the ordinary rent (*a*). Madan Mohan Lal v. Borooah and Co., 11 P. L. R. 1918=70 P. R. 1918=71 P. W. R. 1918=44 Ind. Cas. 859.

SCOTT SMITH and SHADI LAL, JJ.

References.—(a) 33 P. R. 1898 and 5 P. R. 1904, *F.*

(39) *Civ. Pro. Code (1908), S. 11—Suit by widow against daughter-in-law for share of estate—Previous suit by collaterals compromised by widow, effect of.*

In a suit by a Hindu widow against her daughter-in-law for possession of a moiety of the estate alleged to have been left by the former's husband or in the alternative for

Res Judicata—(Continued).

maintenance, it appeared that the collaterals of the plaintiff's deceased son (the husband of the defendant) had sometime previously sued for the possession of the entire estate on the allegation that the defendant having become unchaste had forfeited her widow's estate. The present plaintiff, who was impleaded as a defendant in that suit, resisted the claim and eventually effected a compromise with the plaintiffs, according to which she agreed to relinquish her rights in their favour in lieu of certain property to be given to her as absolute owner in the event of the collaterals' suit succeeding. In the event of their defeat, she was to receive the property on the death of the defendant.

Held that this compromise could not and did not, affect the rights of the two widows, *inter se*, and that so far as the plaintiff's claim against her daughter in law was concerned, there had been neither an adjudication nor any agreement which could be set up as a bar to the suit, and that therefore the rule of *res judicata* had no applicability to the case. **Bholi Bai v. Ghimni Bai** 23 P.L.R. 1918=45 P.W.R. 1918=44 Ind. Cas. 92.

SCOTT-SMITH and SHADI LAL, JJ.

(40) *Mortgage by conditional sale—Enclosure—Decree in favour of mortgagee against widow—Redemption, suit for, by reversioners, maintainability of.*

One D mortgaged in 1889 the land in suit to defendants by a document of a conditional sale. In 1898, the mortgagee served a foreclosure notice on D's widow, who was in possession and, in 1908, brought a suit for possession as full owner and obtained a decree. On the widow's death, the collaterals of D brought the present suit for redemption.

Held, that inasmuch as there had been a fair and square trial between the widow and the mortgagee, and the widow had done all she could to protect the property, the decree in favour of the mortgagee put an end to the original owner's proprietary rights and consequently to the reversionary right also, and that, therefore, the plaintiff's suit must fail. **Duni Chand v. Thunian**, 44 P.L.R. 1918=32 P.W.R. 1918=43 Ind. Cas. 523.

LE-ROSSIGNOL, J.

Reference —29 P.R. 1898, Dist.

(40-a) *Civ. Pro. Code (Act V of 1908), S. 11—Question of, how determined—Decision on point not necessary for, decision of suit, whether res judicata—Effect of final order of the Probate Court as to due execution of Will—Competency to contest its validity otherwise—No effect of simple omission to appeal of minor's guardian—Presumption of jointness—When once not material—Effect of partition—Registration Act (XV of 1908), S. 17, (1) (b)—Acknowledgment of partition, whether compulsorily registrable—Rule 4 of O. XIII of Civ. Pro. Code, 1908, to be followed.*

Res Judicata—(Continued).

Held, that in order to determine the question of *res judicata* it is necessary to ascertain what matters were in dispute between the parties, and this should be done not merely by looking at the decree but also by examining the pleadings and the judgment (a).

One J.R. with his sons owned several business concerns in Delhi, Calcutta and Cawnpore. On his death in 1903 a partition took place between his sons J. N. and S. R. and the business was divided half and half. Later on disputes arose between the descendants of J. N. and one H. B. his great grandson, brought a suit for his share in the property. This suit was instituted at Cawnpore on 7th August 1909. Various pleas were raised by the defendants, the principal one being that the family was not joint, there having been a complete disruption since Sambat 1900=1903 A. D., when the partition between J. N. and S. R. took place. One B. D., son of J. N., was joined as a defendant to the suit and a written statement was filed on his behalf on the 30th November 1909. As, however, he had not signed the verification, an adjournment was made and time given up to 11th December, 1903, and the written statement was refiled on the 6th December but B. D. had died on the 5th. The case proceeded on a question of jurisdiction and eventually the plaint was returned to the plaintiff for presentation to the proper Court, as it was held that the Cawnpore Court had no jurisdiction to try the suit. It was also found that the Delhi concerns had no connection with Cawnpore and that B. D. and his descendants alone were concerned with the Cawnpore business. The plaint was consequently presented at Delhi. It was contended that the judgment in the former suit operated as a bar to this suit.

Held, (1) that the question whether the Cawnpore suit was or was not a part of the joint property was directly and substantially in issue in the Cawnpore Court and was concluded by the decision of that Court; the mere fact that the question of jurisdiction was also decided on other grounds as well, did not prevent the decision in the former suit operating as *res judicata* (a).

During the pendency of this suit the defendant B. L. a son of J. N. by his second wife, applied for and obtained Probate of the Will executed by B. D. on 26th November 1909, and in these proceedings it was held that B. D. had executed the Will as a free agent and not under influence and had a disposing mind. It was urged that the plaintiff being a minor, his guardian *ad litem* was guilty of gross negligence in not appealing against this decision and that, therefore, it should not be treated as *res judicata* so far as the minor was concerned.

Held, that the question as to the disposing mind and the due execution of the Will by B. D. could not be re-agitated and must be regarded as having been finally settled as the mere omission to appeal did not amount to gross negligence of the guardian *ad litem* (c).

But validity of the will on other grounds can be contested in a regular suit. Although

Res Judicata—(Continued).

but the presumption is in favour of jointness, but where both parties have exhausted their evidence the question of *onus* becomes immaterial (d).

Held, that, the Courts should comply with the provisions of r. 4 of O XIII of Civ. Pro. Code, 1908 (e).

Held also, that when once a partition of a joint family has been shown the presumption is in favour of a total disruption (f).

Held, further, that a document which professes to be nothing more than an acknowledgment that a partition was effected at a certain time before does not create any right in any property and is not compulsorily registrable. *Babu Lal v Hari Bakhsh*, 122 P.W.R. 1917=19 P.R. 1918.

SHAH DIN, C.J. and BROADWAY, J.

References—(a) 30 C. 155 (193)=6 C. W. N. 737, F (b) 24 C. 900, F; 12 P.R. 1907=92 P.W.R. 1907; 64 P.R. 1892=56 P.R. 1904, D; 11 C. 301=12 I.A. 23, R. (c) 38 B. 309=16 Bom L.R. 5; 38 B. 272, F; 22 C. 8; 19 B. 571, D. (d) 5 B. 46, 13 C. 167, R. (e) 38 A. 637 (P.C.), F. (f) 35 B. 293; 32 M. 198, R.

(41) *Decision of an issue not necessary for disposal of suit—Its re-trial—S. 11 and O. II, r. 2 of Act V of 1908.*

Where a suit is disposed of on the ground that it is not maintainable in a certain form and at the same time another issue not necessary for its disposal has also been decided, the decision thereon does neither become *res judicata* under S. 11, nor is its re-trial barred by O. II, r. 2 of the Code of Civil Procedure, 1908.

G had mortgaged some land to R for Rs. 900, out of which the sum of Rs. 160 was carrying interest. Under the Punjab Act II of 1913, G was allowed to redeem on payment of the principal only. K then brought a regular civil suit for getting back possession of the land and declaring that charge on it was Rs. 1,305 including interest. It was dismissed on the ground that it was not maintainable in that form and that no interest was recoverable.

K's fresh suit brought for recovering interest was held neither *res judicata* under S. 11 nor barred by r. 2 of O II of the Civ. Pro. Code, 1908. *Ranjit Shah and Lorinda Shah v. Ghulam*, 33 P.W.R. 1918=44 Ind. Cas. 983.

LESLIE JONES, J.

References.—47 P.R. 1884, R.

(42) *Company in liquidation—Liquidator taking pro-note for the sum due on account of shares—Suit as regards the pro note thus executed—Dismissal of the suit on merits—Liquidator cannot fall back on the original contract—Incompetency of the Liquidation Court to go into that again—Novation of contract—Merger of the original contract into the promissory note.*

A owed Rs. 8,000 to the Popular Bank on account of shares. It was made up of 3 items, i.e., (1) Rs. 1,000 on account of premium, (2) Rs. 1,000 on account of application money

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and (3) Rs. 1,000 on account of allotment money, and the Bank accepted a promissory note of Rs. 2,000 as regards items (1) and (2). The Bank afterwards went into liquidation and the liquidator brought the suit on the strength of the promissory note, but failed. After this he moved the Liquidation Court: *Held*, that there was a novation of contract to pay the application and premium money and that, when the company accepted the promissory note in lieu of the liability, the shareholder must be deemed to have paid the premium and the application money and that the original liability merged in the liability on the promissory note. *Held*, also, that, when a Court of competent jurisdiction has already adjudicated upon the liquidator's claim on the strength of the promissory note, the same matter cannot be re-agitated in the Court conducting the liquidation. *Held*, further, that, as the suit was dismissed on the merits and not on any technical ground (as for instance in the event of the promissory note being inadmissible in evidence on account of want of proper stamp), the rule that a creditor can fall back on his original cause of action does not apply in this case. *Mathra Das v. Llg. Popular Bank*, 87 P.W.R. 1918=86 P.L.R. 1918=46 Ind. Cas. 586.

SHADI LAL, J.

(43) *Estoppel not res judicata—Suit for possession of land—Agreement by plaintiff in previous suit to give up land—Relinquishment—Plaintiff, whether estopped from bringing second suit—S. 115 of Act I of 1874 and S. 11 of Act VIII of 1908.*

In a suit for possession of land, it appeared that the plaintiff had, in an earlier suit brought against him by the present defendant agreed to give up possession of the land in the suit to the defendant (the then plaintiff) by a deed of compromise and the suit was dismissed:

Held, that the deed of compromise executed by the plaintiff in the earlier suit operated as a relinquishment of his right, title and interest in the land and that he was estopped from alleging that he still had a subsisting title to it, but his suit is not *res judicata*. *Ohhanga v. Phumman Shah*, 121 P.W.R. 1918=46 Ind. Cas. 7.

SHAH DIN, J.

(44) *Civ. Pro. Code (Act V of 1908), S. 11, O. II, r. 2—Res judicata, plea of, depending on finding of fact, whether maintainable in second appeal—Plea of relinquishment—Duty of defendant—Evidence Act (I of 1872), Ss 11 (b), 13, 57—Documents not inter partes, Admissibility of—“Matter of public history” meaning of—Historical works, Admissibility of.*

A plea of *res judicata* depending on a finding of fact, which has not been challenged in the lower appellate Court, cannot be maintained in second appeal to the Chief Court.

It is the duty of a defendant, who seeks to avail himself of the bar created by O. II, r. 2; Civ. Pro. Code, not only to put forward that

Res Judicata—(Continued).

defence, but also to establish it to the satisfaction of the Court.

Documents containing recitals that a particular plot of land belongs to a particular well are admissible in evidence, either under S. 11 (b) or S. 13 of the Evidence Act, although they are not between parties to the suit.

The question of title between the trustee of a mosque, though an old and historical institution, and a private person cannot be deemed to be a "matter of public history" within the meaning of S. 57 of the Evidence Act, and historical works cannot be used to establish title to such property. *Farzand Ali v. Zafar Ali*, 192 P.W.R. 1918=46 Ind. Cas. 119.

SHADI LAL and WILBERFORCE, JJ.

References:—5 O.L.J. 55, *F.*; 19 Ind. Cas. 515, *Not F.*

(45) *Foreign judgment how far res judicata in British India—Civ. Pro. Code, Ss. 11, 13, 14.*

A Court in British India cannot question the finality of the decision of a competent Foreign Court properly arrived at as to any matter, but that decision would only bind the Court in British India if the Foreign Court is competent to try the suit in which such matter has been subsequently raised. *S. P. S. Chokkappa Chetty v. S. P. S. R. M. Raman Chetty*, 9 L.B.R. 103=43 Ind. Cas. 551.

ORMOND, O.C.J. and PARLETT, J.

References:—6 Bom. L. R. 98; 20 C. W. N. 1213, *R.*

(46) *Letters of administration, Grant of—Administration suit—Dismissal of, on ground of limitation—Art. 123, Limitation Act, 1908—Subsequent application for revocation of letters, if barred as res judicata—Probate and Administration Act, 1881, S. 50.*

After the dismissal of a son's suit for the administration of his father's estate on the ground of its having been barred by limitation under Art. 123, Limitation Act, the son applied for the revocation of the letters of administration granted to the administrator.

Held that the decision in the administration suit that the son's right to claim his share had been barred by limitation operated as *res judicata* precluding the determination of the question whether he had any interest to support his application for the revocation of the letters of administration. *Abdul Rahman v. Maung Min*, 9 L.B.R. 273.

TWOMEY, C.J. and ORMOND, J.

(47) *Low rate of rent by contract with predecessor-in-title—How far successor bound—Absolute interest in suit property to be shown in previous holder to make him predecessor-in-title. See MAD. ACT I OF 1909 (ESTATES LAND), No. 10, (1918) M.W.N. 188.*

(48) *Subject-matter of two suits to be same—Matter must also have been heard and decided—Decision, when to be considered to be, by necessary implication. See OUDH ACT I OF 1869 (ESTATES), No. 1, 21 O.C. 1.*

Res Judicata—(Continued).

(49) *No res judicata on the opinion of appellate Court on matters where no appeal lies. See BHEER LAND REVENUE CODE, No. 3, 44 Ind. Cas. 723.*

(50) *One of many plaintiffs present—General attorney for absent plaintiffs held by plaintiff appearing—Dismissal of suit for want of prosecution—Dismissed on merits—Second suit on same cause of action barred. See CIV. PRO. CODE (1908), No. 254, 16 A.L.J. 462.*

(51) *Applicability of the bar of res judicata against pro forma defendants. See CIV. PRO. CODE (1908), No. 26, 44 Ind. Cas. 546.*

(52) *Previous decision erroneous in law—Whether the decision res judicata for subsequent suit. See CIV. PRO. CODE (1908), No. 15, 45 Ind. Cas. 27.*

(53) *The principle of res judicata—Refusal by Court to decide issue, effect. See CIV. PRO. CODE (1908), No. 14, 45 Ind. Cas. 326.*

(53-a) *Civ. Pro. Code (1908), S. 11—Question which Court deliberately abstained from deciding if cannot operate as—Declaratory suit for title by survivorship, Decision on—Declaratory suit that alienations made not binding on reversioner, if barred by. See CIV. PRO. CODE (1908), No. 15-a, 47 Ind. Cas. 2.*

(54) *Payment into Court under preliminary decree—Final decree passed—Subsequent suit for mesne profits between date of payment and date of suit. See CIV. PRO. CODE (1908), No. 33, 7 L.W. 269.*

(55) *Erroneous decision on question of custom when is, and when not. See CUSTOMS (PUNJAB—SUCCESSION), No. 4, 82 P.R. 1918.*

(56) *Dismissal of application to set aside ex parte decree on specified grounds—Subsequent suit to set aside the ex parte decree on the same specified grounds—Res judicata. See DECREE, No. 4, 45 Ind. Cas. 250.*

(57) *Claim in Revenue Court of occupancy tenure—Disallowance of claim and ejectment of claimant—Suit for proprietary right in Civil Court by claimant—Suit if barred. See ESTOPPEL, No. 7, 75 P.L.R. 1918.*

(58) *Execution application—Plea of limitation not adjudicated upon—Res judicata. See EXECUTION OF DECREE, No. 17, 44 Ind. Cas. 220.*

(59) *Objection not taken in prior execution proceedings cannot be taken in subsequent proceedings—Res judicata. See EXECUTION OF DECREE, No. 21, 45 Ind. Cas. 401.*

(60) *Application for execution of surety bond—Dismissal of application and reference to separate suit—Dismissal of such separate suit on ground of execution application being proper remedy and for non-joinder of parties—Fresh application to execute surety bond if barred by rule of res judicata. See EXECUTION OF DECREE, No. 24, 21 O.C. 188.*

Res Judicata—(Concluded).

(61) *Res judicata* in execution proceedings. See EXECUTION PROCEEDINGS, No. 1, 44 Ind. Cas. 664.

(62) Compromise decrees when becomes *res judicata*. See FISHERY, No. 2, 14 N.L.R. 35.

(63) Reversioners how far bound by decrees, compromise decrees or award decrees against Hindu widows—Principles governing discussed. See HINDU LAW (WIDOW), No. 7, 20 Bom. L.R. 947.

(64) Contract to pay rent capable of variation—Presumption. See LANDLORD AND TENANT, No. 28, 43 Ind. Cas. 753.

(65) Mortgagee, Decision against, *re* proprietary right, if binding on mortgagor. See LANDLORD AND TENANT, No. 43, 45 Ind. Cas. 849 = 6 O.L.J. 121.

(66) Issue found against party—Suit dismissed against him—No appeal—*Res judicata*, rule of, if applies. See LIMITATION ACT (1908), No. 174, 7 L.W. 482.

(67) Withdrawal of application under S 105, Bengal Tenancy Act—No liberty to make fresh application—Subsequent suit, whether barred. See LANDLORD AND TENANT, No. 5, 28 O.L.J. 254, *infra*.

(68) First suit for partition—Subsequent suit to recover specific items—No *res judicata*. See RECEIVER, No. 6, (1918, M.W.N. 683.

(69) Rent decree—When *res judicata*. See RENT SUIT, No. 1, 45 Ind. Cas. 416.

(70) Reversal by High Court of decree for possession—Application for possession by defendant without claiming mesne profits—Application for restitution of mesne profits, made subsequently if barred. See RESTITUTION, No. 5, 3 Pat. L.J. 367.

(71) Prior rent decree if operates as bar in subsequent rent suits upon rate of rent—Value of rent decree upon such rate. See REVIEW, No. 7, 8 Pat. L.J. 372.

(72) As between co-defendants. See TRANSFER OF PROPERTY ACT, No. 20, 7 L.W. 104.

Restitution.

(1) Auction purchaser not impleaded in proceedings to set aside execution sale or in appeal from order refusing to set it aside—Application for restitution against such auction purchaser—Auction purchaser not representative of decree holder—Civ. Pro. Code, Ss. 144, 151, O. XXI, r. 90.

An auction-purchaser, in an execution sale, was not made a party to an application made under Civ. Pro. Code, O. XXI r. 90, to set aside the sale, nor to the appeal in which the order of the first Court refusing to set aside the sale was reversed by the appellate Court. In an application for restitution against the auction-purchaser, held that S. 144, Civ. Pro. Code, could not in terms apply as no decree was varied or reversed, but only an order under

Restitution—(Continued).

O. XXI, r. 90, refusing to set aside a sale in execution was reversed in appeal, that, even assuming that S. 151, Civ. Pro. Code, allows an order for restitution in appropriate cases not covered by S. 144, Civ. Pro. Code, such an order could not be made on the analogy of S. 144, Civ. Pro. Code, unless the auction-purchaser was a party to the appeal before the appellate Court which set aside the sale; and that the mere fact that the decree-holder was a party to those proceedings would not suffice, as the Court auction-purchaser is not the representative of the decree-holder (a). *Subbamma v. Chennayya*, 41 M. 467 = 47 Ind. Cas. 618.

SADASIVA AIYAR and BAKEWELL, JJ.

References—(a) 34 M. 417, R; 30 M. 507, *Disappr.*

(2) Preliminary decree for partition, set aside—Final decree, effect of—Sum levied in execution of final decree

When a preliminary decree for partition has been set aside on appeal, no effect remains in the final decree which is passed pending appeal from the preliminary decree (a). If any sum is levied on the basis of the final decree in execution by A against B, the latter is entitled to restitution of the sum so levied, if his claim is not barred by limitation.

The doctrine of restitution applies not only where a decree has been set aside directly on review or by way of appeal but also where a decree ceases to be operative by reason of cancellation of another decree or decree which forms its foundation (b). *Atul v. Kunja*, 27 C.L.J. 451 = 43 Ind. Cas. 775.

MOOREJEE and BEACHCROFT, JJ.

References—(a) 18 C.L.J. 223, F. (b) 24 C.L.J. 467, F.

(3) Purchaser in execution of mortgage decree against plaintiff in a suit for possession, if representative—Possession given by decree—Decree subsequently reversed

The plaintiff, who was out of possession at the date of the institution of a suit for possession, obtained a decree in the primary Court. That decree was executed and they were placed in possession. Meanwhile, an appeal preferred by the unsuccessful defendant was decreed by the lower appellate Court and the decree for possession made by the trial Court in favour of the plaintiffs was therefore discharged. The decree of the appellate Court was confirmed by the High Court, and an appeal therefrom under cl. 15 of the Letters Patent proved infructuous. In the interval, the present petitioner had purchased the disputed property in execution of a mortgage decree obtained against the plaintiffs and was placed in actual possession of the purchased property by the Court. On reversal of the decree of the trial Court, the opposite party applied to be restored to possession by way of restitution.

Held, that, for the purpose of transference of possession from the plaintiffs to the petitioner, the latter was a representative of the plaintiffs.

Restitution—(Continued).

and the doctrine of restitution was applicable. *Sheodarsanal v. Jages*, 27 C. L. J. 489-46 Ind. Cas. 168.

MOOKERJEE and BEACHCROFT, JJ.

References :—26 A. 447; 28 A. 337, R.

- (4) *Claim for—Assignee, in case of assignment after appellate decree, is entitled to benefits of S. 144, Civ. Pro. Code (1908)*—*Parties in section, Meaning of—Representatives, Meaning of—Civ. Pro. Code (1908), Ss. 47, 144, scope of.*

Ss. 47 and 144 of the Code of Civil Procedure must be read together and the word "parties" in S. 144 includes their representatives.

Representative does not mean only a party's legal representative, but it means his representative-in-interest, and includes a purchaser of his interest, who, so far as such interest is concerned, is bound by the decree.

When an assignment has taken place even after the appellate decree which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144 of the Civ. Pro. Code. *Kamuddudin Mandal v. Raja Thakur Batnam* 46 Ind. Cas. 465

MULLICK and THORNHILL, JJ.

Reference —33 C. 867=4 C L J. 192, F.

- (5) *Nature of restitution proceedings—Suit or execution proceeding or miscellaneous proceedings—Omission of party seeking restitution to claim mesne profits if bars subsequent application for restitution of mesne profits—Civ. Pro. Code (1908), Ss. 144, 141, O II, r. 2—Limitation for application for restitution—Limitation Act (1908), Art. 161, Scope of.*

A proceeding, in which relief under S. 144, Civ. Pro. Code (1908) is claimed, is neither a suit nor an execution proceeding, it is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. S. 141 of the present Code does not require that the provisions of O. II, r. 2, of the Civ. Pro. Code, should be applied to restitution applications. Where therefore a plaintiff under a decree for recovery of possession of immovable property, took possession of it on the 24th September 1910, but on the reversal of decree by the High Court the defendant took back possession of the same on the 4th December 1913, and on the 2nd June 1916, applied under S. 144, Civ. Pro. Code, for restitution of mesne profits of the property for the period during which the plaintiff was in possession, i. e., from the 24th September 1910 to the 4th December 1913, *held* that the fact that the defendant in applying for possession of the property in 1913 did not also apply for restitution of mesne profits, did not debar him from subsequently claiming mesne profits by reason of the provisions of O. II, r. 2 of the Code, and that the defendant would be entitled to mesne profits for the period between the 4th December 1910 to the 4th December 1913.

Restitution—(Concluded).

Art. 181, Limitation Act (1908) does not in any way control the period during which mesne profits shall be allowed to accumulate and whatever the number of years during which the party liable to make restitution was in possession the party entitled to such restitution is entitled to be compensated in respect of the whole of that period, provided he applies within three years of the date on which the right to relief accrued. *Krupasindhy Roy v. Mahanta Balbhadra Das*, 3 Pat. L. J. 867=47 Ind. Cas. 47.

MULLICK and ATKINSON, JJ.

References .—17 A. 106, 41 C. 1, R., 40 M. 780, F.

- (6) *Application for restitution whether an application for execution—Civ. Pro. Code (Act XIV of 1882), S. 583; (Act V of 1908), S. 144—Limitation Act (IX of 1908), Arts. 181 and 181.*

Held, that an application for restitution made in a case decided at the time the old Code of Civil Procedure (Act XIV of 1882) was in force is an application for execution of a decree within the meaning of Art. 184 of Act IX of 1908 (a).

Held also, that an application for restitution, unless such is expressly ordered by the appellate Court, made after the new Code of Civil Procedure (Act V of 1908) has come into force is not an application for execution, but a miscellaneous application in the nature of an execution application under S. 144 of the said Code and is consequently governed by Art. 181 of the said Limitation Act (b). *Ram Singh v. Sham Farshad*, 15 P. L. R. 1918=67 P. R. 1918=36 P. W. R. 1918=44 Ind. Cas. 301.

RATTIGAN, C J and LE ROSSIGNOL, J.

References —(a) 217 P. W. R. 1913=273 P. L. R. 1913=10 P. R. 1914, 20 M. 448; 8 A. 645; 49 P. R. 1896, 29 Ind. Cas. 380, R.; 11 A. 372; 28 C. 113, 10 M. 66, *Dist. from.* (b) 30 Ind. Cas. 680, 20 M. 448, F.

(7) Revenue, Power of—Civ. Pro. Code (1908), S. 144. See JURISDICTION OF REVENUE COURTS, No. 4, 46 Ind. Cas. 475.

Restitution of Conjugal Rights.

- (1) *Suit for—Discretion of Court—Court, whether can refer entire suit to arbitration.*

Held that it is entirely within the discretion of the Court to grant or refuse a decree for restitution of conjugal rights, but the Court cannot delegate the decision of the entire suit to arbitrators, although it is open to it to refer any particular matter to arbitration.

Where, therefore, in a suit for restitution of conjugal rights, the Munsif delegated the entire suit to persons appointed by the parties as their arbitrators, *Held*, that the Court could not delegate its function to arbitrators and the case should be tried on its merits. *Musammamat Kalabatu v. Prabh Dial*, 78 P. L. R. 1918=80 P. W. R. 1918=45 Ind. Cas. 169.

SHADI LAL, J.

Reference :—37 P. R. 1895, R.

Restitution of Conjugal Rights—(Continued).

- (3) *Decree for, discretionary—Discretion how to exercise—Circumstances under which restitution of conjugal rights can be granted or refused.*

Held, that a Judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife in refusing to return to live with her husband (a).

Some of the reasons which would justify the Courts in refusing their assistance to the husband are:—

- (1) The conduct of the husband, who has knowingly permitted or connived at his wife's adultery for a considerable period; or,
- (2) has otherwise grossly neglected his marital duties towards his wife; or,
- (3) has been guilty of cruelty; or,
- (4) in the case of a Muhammadan, has failed to pay prompt dower.

But where the marriage had taken place with the free consent of the woman, the following reasons were considered quite insufficient for withholding the help which the husband is by law entitled to get from the Court.—“Plaintiff does not allege that she lived with him as his wife and the evidence shows that she was in hiding in another village after a clandestine marriage and as the plaintiff's object in marrying her was obviously to get hold of the property of which she had been left in possession by her deceased husband.” *Niaz Ali v. Mt. Said Jan*, 67 P.W.R. 1918=46 Ind. Cas. 112.

SCOTT-SMITH, J.

Reference:—21 B. 610, F.

- (3) *Husband and wife—Restitution of conjugal rights, suit for—Disagreement between families of husband and wife, whether ground for refusing relief—Discretion of Court.*

Held, that a mere disagreement between the families of the husband and wife is not by itself a sufficient cause for refusing relief to the husband in a suit for restitution of conjugal rights.

In a suit for restitution of conjugal rights, it was found, that the marriage had not been consummated, that there was bad feeling between the families of the husband and of the wife and that the wife refused to go to her husband at the dictation of her parents.

Held, that, under these circumstances relief could not be refused to the plaintiff *Bajid v. Mussammat Satto* 182 P.W.R. 1918.

WILBERFORCE, J.

References.—187 P.W.R. 1912=17 Ind. Cas. 254; 82 P.R. 1908=147 P.W.R. 1908, 46 P.R. 1916=134 P.W.R. 1916=34 Ind. Cas. 538, Dist

- (4) *Claim for—Husband, Liability of, to provide suitable residence for wife to proceed in.* See HUSBAND AND WIFE, No. 1, 46 Ind. Cas. 401.

Restitution of Conjugal Rights—(Concluded).

- (5) *Suit for—Husband and wife, Disagreement between, if ground for refusing relief—Discretion of Court.* See HUSBAND AND WIFE, No. 3, 182 P.W.R. 1918.

(6) *Post-nuptial agreement by husband not to take another wife and delegation to her of power of divorce on breach, Validity of—Breach of agreement followed by husband's suit, for restitution of conjugal rights—Divorce given after suit by wife, if valid.* See MAHOMEDAN LAW (DIVORCE), No. 1, 22 O.W.N. 924.

(7) *Suit for—Legal cruelty—Danger to wife's health and safety.* See MAHOMEDAN LAW (HUSBAND AND WIFE), No. 1, 16 A.L.J. 182.

Restoration.

(1) *Bengal Revenue Sales Act (XI of 1859), S. 25, Appeal under, dismissed for default—Power of Commissioner to restore such appeal.* See BEN. ACT XI OF 1859 (REVENUE SALES), No. 4, 46 Ind. Cas. 621.

(2) *Appeal, Dismissal of, for default—Application for—Sufficient cause—Civ. Pro. Code (1908), O. XLI, rr. 17 and 19.* See APPEAL (GENERAL), No. 23-s, 46 Ind. Cas. 881.

(3) *Application under O. XXI, r. 100—Non-appearance of the applicant on the hearing date—Restoration of the application, whether valid.* See CIV. PRO CODE (1908), No. 369, 43 Ind. Cas. 951.

Restoration of Appeal.

Appeal transferred before fixed date to Subordinate Judge—Transfer order not communicated to parties—Dismissal of appeal for default on fixed date—Restoration of appeal—Sufficient cause. See APPEAL (GENERAL), No. 31, 3 Pat. L.J. 218.

Restoration of Suit.

Civ. Pro. Code (Act V of 1908), O. IX, r. 9; O. XVII, r. 3 and S. 115—Application for adjournment of suit on ground of plaintiff's illness—Application rejected and suit dismissed—Petition to restore suit—Duty of the Court—O. XVII, r. 3, inapplicable.

Where, on the day fixed for hearing of a suit, an application was made for adjournment on the allegation that plaintiff was ill, but the application was refused and the Court dismissed the suit and then plaintiff applied to have the suit restored, **held** that O. XVII, r. 3 had no application to the case as no evidence had been recorded and no pleadings had been opened. The learned Judge of the Primary Court could not have decided the suit forthwith as mentioned in O. XVII, r. 3, Civ. Pro. Code. The application was clearly an application under O. IX, r. 9, and it must be disposed of on the evidence after it has been properly recorded. Whether the procedure of the Court is to take the evidence *viva voce* or by affidavit, the Court must deal with an application like this after the evidence is taken. *Durga Kanta Sarma v. Anto Kosh*, 43 Ind. Cas. 849.

FLETCHER and NEWBOULD, JJ.

Restraint on Alienation.

(1) Term in award restraining alienation of property for indefinite period, validity of. See **AWARD**, No. 11, '87 P.L.R. 1918.

(2) Gift by Raja to Ranis of Joutak Ranian Britti reciting similar previous grants—Condition restraining alienation by future Ranis and gift to them of right to enjoy profits only—Validity of such gift. See **GRANT**, No. 1, 45 C. 896.

(3) Stipulation in darpatni lease that under-tenures created by lessee should become extinct on sale of darpatni for arrears of rent—Stipulation if absolute restraint or alienation or cures for benefit of lessor—Stipulation if void. See **LESSOR AND LESSEE**, No. 1, 45 C. 940.

(4) Conditions imposed in will prohibiting alienation, construction of. See **WILL**, No. 15, 8 Pat. L.J. 199.

Resulting Trust.

Partial intestacy due to absence of person being alive to claim under will or voidness of will—Effect—Resulting trust in-favour of heir-at-law. See **WILL**, No. 14, 21 O.C. 874.

Resumption.

(1) *Grants of land—Grants of land burdened with services—Grants of office to which lands are annexed by way of remuneration.*

For the purposes of resumption grants fall into two main categories; grants of land burdened with service, and grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services, or at his own will to discontinue the services and resume the lands. Grants under the second category are always resumable, unless the grantees can show that they have been specially conditioned otherwise so as to prevent their resumability. In every case, the burden of proof is upon the grantor seeking to resume to show that either the grant was of a kind falling under the second category, or, if a grant of the kind, falling under the first category, that it was specially conditioned. **Chandrapa Baswantrao Desai v. Bhima Dasappa Manikeri**, 20 Bom. L.R. 779—47 Ind. Cas. 330.

BEAMAN and HEATON, JJ.

References:—39 B. 68; 18 Bom. L.R. 695, R.

(3) *Jaghir, Portions of, Transfer of, if sale or grant of tenure—Resumability, Burden of proof as to, on whom lies.*

The original Jagirdars sold all their rights in certain villages to certain Chowdhris, who in turn sold all their rights in those villages to the ancestor of the plaintiff. The defendants, the descendants of the original Jagirdar, contended that they knew nothing of the alleged sale to the Chowdhris and that their ancestors had granted the villages in *daidari* tenure according to which only heirs male of the grantee could succeed and that, at the last

Resumption—(Concluded).

holder of the tenure had left no male issue, the plaintiff being his daughter's son, they were entitled to resume the villages. It was found that the plaintiff's ancestors had been in possession of the villages for generations and that the words used in respect of the transfers were *bikri* and *farokht*, which mean sale and nothing else.

Held that it was for the defendants to prove their right to resume both as against the Chowdhris and as against the ancestors of the plaintiff. **Rameshwar Lal Bhagat v. Girwar Prasad Singh**, 45 Ind. Cas. 888—5 Pat. L.W. 316.

CHAMIER, C.J. and SHARFUDDIN, J.

(3) *Muafi land—Right to resume belongs to whom—Holder of perpetual lease reserving to lessor right to receive annual payment and re-enter on default—Resumption right transferred to lessee.* See U.P. ACT II OF 1901 (**AGRA TENANCY**), No. 13, 16 A.L.J. 619.

(4) *Forming in non-navigable river flowing through or by side of Permanently Settled Estates, if resumable and assessable with Government revenue* See **ALLUVION AND DILUVION**, No. 1, 22 C.W.N. 872.

(5) *Of rent-free grant—Suit therefor to be instituted in Revenue Courts only.* See **JURISDICTION (OF REVENUE COURTS)**, No. 1, 16 A.L.J. 881.

Resumption of Grant.

Land—Resumption of land—Valuation of land to be fixed by a Committee appointed by Government—Valuation fixed by majority of the Committee binding on both parties. **Mahomedali v. The Secretary of State**, 19 Bom. L.R. 618—41 Ind. Cas. 264—42 B. 668. See Final Part, 1917, Col. 813.

Re-trial.

Conviction of pleader for keeping common gaming house—Proceedings under Ss. 13 and 14 of Legal Practitioners' Act drawn up by District Judge and pleader heard on charges framed—Power of High Court to re-try case—High Court to consider only if offence shows defect of character. See **LEGAL PRACTITIONERS' ACT (1879)**, No. 1, (1918) M.W.N. 847.

Retrospective Operation of Acts.

Illusory wakf created before passing of Act—Such wakf whether validated by any retrospective operation of Act. See **MAHOMEDAN LAW (WAKF)**, No. 2, 16 A.L.J. 841.

Return of Plaintiff.

(1) *By first Court—Filing of same in Subordinate Court—Return by such latter Court—Appeal against order of first Court, if forfeited by filing plaint in Subordinate Court.* See **APPEAL (GENERAL)**, No. 25, 34 M.L.J. 307.

(2) *For presentation to proper Court—Devolution of interest arising during pendency of proceedings in first Court, if devolution in course of later suit.* See **CIV. PRO. CODE** (1909), No. 190, 8 L.W. 21.

Revenue Assessment.

Assessment of, to be based on "the actual produce" See REG. I OF 1801 (BENGAL LAND REVENUE ASSESSMENT), No. 1, 23 C.W.N. 149 (P.C.).

Revenue Courts.

(1) Inherent power of, as a final Court, to rectify errors and mistakes—Bengal Revenue Sales Act (XI of 1859), S. 25, Appeal under, dismissed for default—Commissioner, Power of, to restore appeal, See ACT XI OF 1859 (BENGAL REVENUE SALES), No. 4, 46 Ind. Cas. 621.

(2) Restitution, Power of, of — Revenue Court's order relating to moveable property, mode of enforcement of — Civ. Pro. Code (1908), S. 144. See JURISDICTION (OF REVENUE COURTS), No. 4, 46 Ind. Cas. 475.

Revenue Officer.

(1) Mutation proceedings—Power of, to eject third party in possession — Punjab Land Revenue Act (1887), S. 26 (2), Applicability of — Power of, to order entry as to ownership under S. 36 (1)— Order, if order of competent Court under S. 146 (1), Crim. Pro. Code. See MUTATION PROCEEDINGS, 43 Ind. Cas. 216.

(2) Decision of, in partition proceedings as to measure of parties' rights in *shamilat*, how far *res judicata*. See RES JUDICATA, No. 37-a, 105 P.R. 1918.

Revenue Record.

(1) Suit for declaration of proprietary title correcting entry in revenue record—Cause of action accrued when plaintiff prayed for entry in his favour and defendant denied his title. See LIMITATION ACT (1908), No. 163, 72 P.L.R. 1918.

(2) Entry in revenue records in Barar—Its value as evidence. See POSSESSION, No. 3, 45 Ind. Cas. 217.

Revenue Recovery.

See MAD. ACT II OF 1864.

Revenue Register.

Register of *minhaidari* (Revenue free) villages, Admissibility of, as evidence under S. 35, Evidence Act, to show nature of holding. See EVIDENCE ACT (1872), No. 14, 20 Bom. L.R. 712.

Revenue Sale.

(1) Evidence—Mal land — Purchaser of an entire estate—Property taken by purchaser. The purchaser of an entire estate at a revenue sale takes the estate as created at the time of the Permanent Settlement. Merely because the lands are situated within the geographical limits of the estate purchased, it cannot be said that they were mal lands and formed part of the *semindari* at the time of the Permanent Settlement. The auction-purchaser must prove that the revenue was

Revenue Sale—(Continued).

assessed on the basis of the assets of those lands (a). Abdul Rahaman Kazi v. Balkantha Nath Roy Chowdhury, 27 C.L.J. 123.

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 14 M.I.A. 152=8 B.L.R. 566; 1 C. 378; 8 C. 230, R.

(2) Revenue Sales Act (XI of 1859), S. 58—Collector's peon starting the bidding according to custom by bidding one rupee—Subsequent bids falling short of arrears—Collector if may legally buy property for the highest bid—Irregularity or illegality—Ss. 6 and 7—Notices signed by Sub-Deputy Collector, if vitiate sale.

Where a revenue-paying estate in arrears having been put up for sale, the peon, a Government official, started the bidding according to custom as a matter of form by bidding Rs. 1, and, thereafter other people having bid for the property, the highest bid came up for Rs. 58, which being less than the amount in arrears, the Collector purporting to act under S. 58 of Act XI of 1859 purchased the property for the highest amount bid:

Held—(By the majority)—That this was a different case from 31 C. 1036=8 C.W.N. 280, and the purchase by the Collector was not in contravention of the letter or the spirit of S. 58 of the Revenue Sales Act.

The fact that notices under Ss. 6 and 7 of the Act were signed not by the Collector or other officer authorised to hold sales but by a Sub-Deputy Collector on behalf of the Collector did not vitiate the sale. *Amrita Lal Roy v. Secretary of State* 22 C.W.N. 769=28 C.L.J. 51=46 Ind. Cas. 447 (F.B.).

WOODROFFE, CHITTY and SHAMSUL HUDA, JJ.

References:—31 C. 1036, Dist.; 21 C. 70; 10 C.W.N. 137, R.

(3) Permanent tenure, Of — Howla under the tenure, if affected by sale—Bengal Land Revenue Sales Act (XI of 1859), S. 52.

A *nim-osat taluq* (i.e., a permanent tenure) in a resumed *khas mahal*, of which the last settlement had taken place in 1908, was sold in 1912 at a revenue sale under Act XI of 1859.

Held that the *howla* under this *nim-osat taluq* which had existed from 1883, that is, from long before the last settlement, could not be affected by the sale of the taluk. *Sristidhar Ghose v. Kedareswar Biswas*, 45 Ind. Cas. 892.

CHITTY and SMITHER, JJ.

(4) Bengal Land Revenue Sales Act (XI of 1859), S. 33, under—Suit to set aside a, Appeal to Commissioner, grounds not specified—in, if can be urged in suit.

It is not open to a plaintiff to set aside a revenue sale upon any grounds other than those urged before the Commissioner. *Bukiah Baniya v. Bidhu Misra*, 47 Ind. Cas. 422.

CHATTERJEE and NEWBOULD, JJ.

Revenue Sale—(Continued).

- (5) *Mad. Regs. I and II of 1803—Mad. Revenue Recovery Act (II of 1864), Ss. 38, 59—Mad. Reg. (VII of 1828)—Cancellation of revenue sale by order of Board of Revenue.—Suit to set aside order, maintainability of*

Plaintiff bought a piece of land belonging to the defendant, at a revenue sale held for arrears of revenue under the Revenue Recovery Act. A petition under S. 37 A of the Act to set aside the sale was dismissed and also a petition under S. 38 of that Act. These two orders were passed by the Deputy Collector and his order of confirmation of sale was approved of by the District Collector under S. 3 of Mad. Reg. VII of 1828. Later on, however, the Board of Revenue directed the Collector to cancel the sale and he cancelled it accordingly. Plaintiff brought a suit to set aside the last order and recover possession of the property purchased by him at the revenue sale.

Held—Plaintiff is entitled to recover.

When a certain power is given to an officer by Statute, it is not open to the authority having only general powers of revision over him, to direct him to pass a special order contrary to what he had already done.

The order under S. 38 (2) of the Revenue Recovery Act confirming the sale having been passed by the Deputy Collector and confirmed by the District Collector, became a final order within the meaning of S. 38 (3), and neither of them could pass any further order in the matter.

The order setting aside sale was in effect a review of the previous order confirming the sale and was therefore wholly without jurisdiction and consequently the suit is not barred even if brought after the period of six months prescribed by S. 59 of the Revenue Recovery Act. *Sundaram Aiyangar v. Ramasamy Aiyangar*, 35 M.L.J. 177=24 M.L.T. 207=8 L.W. 289=41 M. 955=47 Ind. Cas. 692.

PHILLIPS and KRISHNAN, JJ

- (6) *Bengal Land Revenue Sales Act (XI of 1859), Ss. 3, 5, 6, 33—Sale for arrears of Government revenue not published also in Vernacular Gazette—Official Gazette, publication in—Failure to publish sale in Vernacular Gazette, if vitiated sale.*

In a suit to set aside a sale for arrears of Government revenue conducted under Bengal Act, XI of 1859, it was alleged that by reason of the sale not having been published also in the Vernacular (Uriya) Government Gazette, a defect of procedure amounting to, not merely an irregularity but an illegality, vitiated the sale. **Held** that no case of any substantial injury attributable to the non-publication having been put forward, the essential conditions for setting aside the sale did not exist. *Sharfuddin v. Samanta Radha Charan Das*, 35 M.L.J. 644=16 A.L.J. 915=47 Ind. Cas. 995 (P.C.).

LORD SHAH, SIR JOHN EDGH, MR. AMHER
ALI and SIR WALTER PHILLIMORE.

Revenue Sale—(Concluded).

- (7) *Suit for declaration as to invalidity of a, and for confirmation or restoration of possession—Court fee payable in respect of—Court Fees Act (1870), S. 7 (4) (c).*

In a suit by a holder of an eight anna *Mukarrari* interest in an estate sold for arrears of Government revenue for a declaration as to the invalidity of the sale and for confirmation or restoration of possession, an *ad valorem* Court fee on the value of the whole estate must be paid under S. 7 (4) (c) of the Court Fees Act (1870) and not an *ad valorem* fee on ten times the Government revenue. *Raja Dhakeswar Prasad Singh v. Jivo Chaudhry*, 3 Pat.L.J. 448=46 Ind. Cas. 885.

ROE and JWALA PRASAD, JJ.

References:—6 C.W.N. 157 38 M. 922, *Ref. to.*

- (8) *Mortgages in possession—Undertaking to pay land revenue—Wilful default—Collusive sale for arrears—Effect of, on mortgagor's right of redemption See MORTGAGE (REDEMPTION), No. 10, 45 Ind. Cas. 735.*

Reversioners

Suit for declaration that alienation of land was not binding on reversioners except to the extent of legal necessity—Pre-emptors if bound by such decree in favour of reversioners. See CUSTOMS (PUNJAB—ALIENATION), No. 4, 54 P.R. 1918.

Review.

- (1) *Letters Patent, S. 10—Review of judgment—Decree under that section.*

Held that no application for a review of judgment is allowable where the decree was given in an appeal under S. 10 of the Letters Patent. *Kalyan Singh v. Aliba Diya*, 16 A.L.J. 964.

RICHARDS, C.J. and BANERJI, J.

Reference:—1 A.L.J. 509, *F.*

- (2) *'Strict proof'—Civ. Pro. Code (Act V of 1908), O. XLVII, r. 4, proviso cl. (b)—Limitation—Sufficient cause for extension. 'Strict proof' in cl. (b) of the proviso to r. 4, O. XLVII of the Code of Civil Procedure, means proof according to the formalities of law and does not refer to sufficiency of proof in securing a particular conviction (a).*

A judgment was pronounced on the 23rd May, 1918, but the decree was not signed till the 30th May, 1918. An application for review on the ground of discovery of new evidence was made on the 18th December, 1918. The new evidence was not available to the petitioner for review till the 9th December, 1918.

Held that there was sufficient cause for not making the application for review before the expiry of the period of limitation prescribed therefor. *Chandra v. Lakhan*, 37 C.L.J. 540.

MOOKERJEE and CUMING, JJ.

Reference:—(a) 42 C. 880, *R.*

Review—(Continued).

(3) *Principle on which a review ought to be granted when new facts are alleged to have been discovered*—Civ. Pro. Code, O XLVII r. 1 (w), O. XLVII, rr. 4, 7, 8—"Strict proof," meaning of—Conclusions whether to be based on mere comparison of handwriting—*Nundoo Lal Mullick v. Panchanan Mukerjee*, 21 C.W.N. 1076=26 C.L.J. 187=42 Ind. Cas. 484=25 C. 60. See Final Part, 1917, Col. 814.

(4) *Civ. Pro. Code (Act V of 1908), O. XLVII, r. 5—Application for review heard by one of a Bench of two Judges, the other having gone on a month's leave—Jurisdiction—Appeal under the Letters Patent*

Where one of a Bench of two High Court Judges, who had disposed of an appeal, having left the Court on a month's leave, an application for review of the judgment was heard and dismissed by the remaining Judge.

Held—That the learned Judge had no jurisdiction to dispose of the application, by reason of r. 5 of O. XLVII of the Civ. Pro. Code and an appeal lay against that order (a). *Jagat Chandra Acharya v. Shyama Charan Bhattacharya*, 22 C.W.N. 550.

SANDERSON, C.J. and N.R. CHATTERJEA, J.

References—21 C.W.N. 652, *Dist.*; 10 I.A. 4=9 C. 482, *Bel. on*

(5) *Pleader instructed to appear, appearance of plaintiff, Necessity of, when—Dismissal of suit in presence of pleader, if for default—Review of order*—Civ. Pro. Code (Act V of 1908), O. III, r. 1, O. IX, r. 9

Where a plaintiff had instructed a pleader to appear in his behalf for the purpose of conducting the suit, his personal appearance was not necessary, and if the pleader was present on the day that the decree of dismissal was made, the order would not be subject to review in accordance with the procedure laid down in O. IX of the Civ. Pro. Code *Mowar Raghubar Singh v. Gouri Charan Singh*, 46 Ind. Cas. 492.

MULLICK and THORNHILL, JJ.

(6) *Rent appeal—Court of Judicial Commissioner, Power of, to review its decision in rent cases*—Civ. Pro. Code.

The Court of the Judicial Commissioner of Oudh has power, under the Code of Civil Procedure, to review its own decision given in a rent appeal. This power is not affected by the provisions of Act XXII of 1886, which gives authority to the Board of Revenue to review its decisions. *Partab Bahadur Singh v. Badli*, 21 O.C. 254.

STUART, J.C.

(7) *Civ. Pro. Code (1908), O. XLVII, r. 2—Later rent suit decision of—Subsequent decision of earlier rent suit between same parties in second appeal by High Court with valuable observations—Such observations if new matter affording ground for*

Review—(Continued).

review—Value of 'rent decrees as to rate of rent—Rent decrees if res judicata or rate of rent in later rent suits.

A certain rent suit in which there was a dispute as to the rate of rent, the plaintiff claiming a higher and the defendant a lower rate, was decided on 29-5-1917. On 11-7-1917 the High Court decided a second appeal in a prior rent suit of 1912 between the same parties confirming the decree of the lower appellate Courts which awarded the higher rate claimed by the plaintiff in that suit also. But the High Court observed that its judgment was only for the rent of the years in suit and no more; that a judgment in a rent suit did not amount to an estoppel or *res judicata* unless the rent was payable at a rate stipulated by contract and that great weight should be attached to an order of a Settlement Officer in a former proceeding under S. 106 of the Bengal Tenancy Act to the effect that the rate of rent actually payable was the lower rate alleged by the defendant in the present suit.

After this judgment of the High Court the defendants unsuccessfully applied to the first Court for a review of its judgment of 29-5-1917. *Held* that the judgment of the High Court of 11-7-1917 was a new and important matter within O. XLVII, r. 2 of Civ. Pro. Code which the first Court should properly consider with a view to ascertaining whether or not it afforded sufficient ground for reconsidering the judgment which had previously been passed on 29-5-1917. The High Court set aside the Original decree on 29-5-1917, and directed the first Court to rehear the whole case having due regard to the order of the Settlement Officer which had crystallised into a binding decree between the parties and also hearing in mind that a rent decree was not *res judicata* upon the question of the rate of rent payable in respect of the years other than those covered by the decree, unless the rent was fixed by contract.

Per Mullick, J.—The question whether a decision as to the rate of rent operates as *res judicata* depends on the frame of the issue. *Kishun Deyal Rai v. Musst. Kulpati Kuer*, 3 Pat. L.J. 372.

MULLICK and ATKINSON, JJ.

(8) *Order erroneously made, Of—Execution sale—Delivery of possession, Order for, if order in execution proceedings—Order passed in review, Appeal, if lies from—Civ. Pro. Code (1908), S. 47, O. XLVII.*

A Court can, in review, correct its own order erroneously made and make it in accordance with law.

Proceedings for delivery of possession are not proceedings in connection with execution of a decree and where therefore an order for delivery of possession of property purchased at an execution sale is set aside in review on the ground that the application for delivery was barred by limitation, no appeal lies from the

Review—(Concluded).

order of cancellation. *Dhaninder Das v. Bakhshi Haythar Prasad Singh*, 8 Pat. L.J. 571

ROE and IMAM, JJ

References :—19 C.W.N. 885, *Expl.*, 2 O 131 (140), *Ref. to*.

- (9) *Civ. Pro Code* (1908), O. XLVII, r 7—
• Order granting application for review—
Right of appeal against such order if unrestricted or limited by r. 7.

O. XLII, r 1 (w) of the Civ. Pro. Code does not give a general or unrestricted right of appeal from an order granting an application for review. The right of appeal against such an order is restricted by the terms of r 7 of O. XLVII and an appeal is permissible only on the grounds mentioned in that rule. *Ramdat Kurme v. Parutan*, U B R. 1918, 3rd Qr., 104.

SAUNDERS, J. C.

Reference —41 C. 746, R

(9 a) Appeal heard by two Judges of a High Court, Power of a single Judge to hear review—Such order of single Judge, if appeal lies from, under cl. 15, Letters Patent. See *APPHAL*, (LETTERS PATENT), 44 Ind Cas 999

(9 b) Review—When not to grant it—Mistake of law arising out of the conduct of petitioners—Whether review may be granted See *CIV. PRO. CODE* (1909), No. 535, 44 Ind. Cas. 161.

(10) Discovery of new matter—Strict proof of absence of negligence—Sufficient cause for filing application beyond time. See *LIMITATION ACT* (1908), No. 21, 20 Bom. L R. 434.

(11) Time spent in prosecuting, when and whether can be deducted from period allowed for appeal. See *LIMITATION ACT* (1908), No 11, 125 P.W.R. 1918.

(12) Refusal by liquidating Court to give preference to certain debt—Appeal from refusal order dismissed by Chief Court—As barred by limitation—Review of order of refusal if can be made by liquidating Court after dismissal of appeal. See *LIQUIDATION*, 40 P.R. 1918.

(13) Decree right when made—Review if authorised by Civ. Pro. Code. See *PRE-EMPTION*, No. 28, 111 P.W.R. 1918.

(14) When a sufficient cause under S 5—*Limitation Act*. See *PROVINCIAL INSOLVENCY ACT*, No. 86, 88 P.W.R. 1918.

(15) Discretion of lower Court as to whether it should or should not review judgment—Interference with such discretion in revision. See *REVISION*, No. 18, 40 Ind. Cas 463.

(16) Notice of, issued by Subordinate Judge acting as Small Cause Judge—Appointment of special Small Cause Judge thereafter—Transfer of case by District Judge to special Small Cause Judge—Validity of transfer. See *TRANSFER OF CASE*, No. 1, (1918) M.W.N. 291.

Revision.

- (1) *Code of Civil Procedure (Act V of 1908)*, O. XLIV, r. 1, S 115—Application for leave to appeal in forma pauperis—Application rejected—Appellant praying permission to pay Court-fee on memorandum of appeal—Court refusing permission—Failure to exercise jurisdiction.

An application was presented with the memorandum of appeal for permission to appeal as a pauper. The appellate Court rejected the application. The appellant then prayed permission to put in the necessary Court fee on his memorandum of appeal. This petition was rejected on the ground that the petitioner's appeal had been rejected. —*Held* that the Court had rejected the application for leave to appeal in *forma pauperis* and not an appeal and it had failed to exercise jurisdiction in refusing to allow the petitioner to pay in the Court-fee for his memorandum of appeal. *Muhammad Farzand Ali v. Rahat Ali*, 16 A.L.J. 309—40 A. 381—45 Ind. Cas 29

• TUDBALL and RAFIQ, JJ.

- (2) *Code of Civil Procedure (Act V of 1908)*, S 115—Revision—Mistake of law made by lower Court—Jurisdiction.

Where a Court has jurisdiction to determine a particular matter, and in the exercise of its jurisdiction, it makes a mistake in law, this does not entitle the party against whom the decision is made to apply to the High Court in revision.

A suit was brought on a promissory note. The defendant pleaded minority at the date of execution. The Court of first instance dismissed the suit. On appeal the lower appellate Court held that the defendant having knowingly misrepresented his age, he was estopped from pleading infancy and was bound in equity to refund the money and the suit was decreed. Inasmuch as a second appeal did not lie to the High Court, the suit being of the nature cognisable by a Court of Small Causes, the defendant applied in revision against that decree. —*Held* that no revision lay, the lower Court having merely made a mistake of law in deciding the case. *Dhara Singh v. Gayan Chand*, 16 A.L.J. 441—45 Ind. Cas. 761.

RICHARDS, C. J. and BANERJI, J.

- (3) *Civ Pro Code (Act V of 1908)*, S. 115, O. XXIII, r 1—Trial of suit—Evidence concluded—Application by plaintiff to withdraw suit with leave to bring a fresh one—Application made during or after arguments—Leave granted to bring fresh suit—Exercise of jurisdiction—Revision.

A suit was instituted in the Court of the Munsif. After the evidence had concluded and either during or after arguments the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit. He based his application upon the fact that he had failed to give formal proof of a plaint which was essential to the plaintiffs' success. The Court granted leave to bring a fresh suit. Upon an application in revision against the order, *Held* the Court had

Revision—(Continued).

jurisdiction to grant the leave, and the fact that in so acting the Court came to a wrong decision was not sufficient to bring the case within the purview of S. 115 of the Code of Civil Procedure. *Jhunku Lal v. Bisheshar Das*, 16 A L J. 495—40 A. 612—46 Ind. Cas. 71.

RICHARDS, C J. and BANERJI, J. ..

References —40 M. 793, *Rel. on*, 13 M.I. A. 160, 11 A.L.J. 738, 87 B. 682, R.

- (4) *Civ. Pro. Code (Act V of 1908), S. 115—Plaint returned by Munsif for presentation to proper Court—Decision affirmed—Revision—Erroneous decision of question of law*

Where a Munsif returned a plaint for presentation to the proper Court on the ground that the cause of action had not arisen within his jurisdiction and his decision was affirmed by the appellate Court *held* that the decision was not open to revision by the High Court, it being only an erroneous decision of a question of law which the Courts below had jurisdiction to determine. *Jwala Prasad v. East Indian Railway Company*, 16 A L J. 535—46 Ind. Cas. 99.

BANERJI and RIVES, JJ

- (5) *Provincial Small Cause Courts Act (IX of 1897), Art. 31—Rent of house paid to one person—Suit by another to recover his share—Money had and received—Jurisdiction of Small Cause Court—Question of jurisdiction not raised in Court below—Revision—High Court not to interfere*

A nephew sued his uncle in the Court of Small Causes for his half share of the rent of a house, which the latter had realised from the tenant of the house. It appeared that the entire rent used to be paid to the uncle. No question of jurisdiction was raised. The Court tried the suit and gave the plaintiff a decree for the amount claimed. *Held* that the suit was due for money had and received, and the Court of Small Causes had jurisdiction to try it. *Held*, also, that the question as to the Court's jurisdiction not having been raised by either party and the Court having tried the case and it being doubtful whether the suit was not one for money had and received, the High Court refused to interfere in the exercise of its discretion as justice had been done. *Sukh Lal v. Nancon Prasad*, 16 A.L.J. 679—40 A. 666—46 Ind. Cas. 647.

RYVES, J.

References —23 A. 437, 37 Ind. Cas. 671; 8 Ind. Cas. 270, *Dist*; 25 A. 185; 37 Ind. Cas. 991; 29 Ind. Cas. 566, *Rel. on*.

- (6) *Code of Civil Procedure (Act V of 1908), S. 115—Jurisdiction of High Court—Question of law or fact bearing on jurisdiction of Court—High Court may interfere when such question wrongly decided.*

In execution of a decree, a house belonging to a minor was advertised for sale. An application was put in for the adjournment of the sale. The *vakalatnama* under which the application was filed had been executed by one

Revision—(Continued).

Gaya Prasad; it did not appear on the face of the *vakalatnama* that he was executing it as guardian of the minor. An affidavit was also filed in support of the application, and the two together made it clear that he was acting as the guardian of the minor. The adjournment was granted for six days, and, after the expiry of the period, the sale was held and the property was sold for very much less than its proper value. An application was made under O. XXI, r. 89 of the Code of Civil Procedure, by the *vakil* who had applied for the adjournment. It purported to be tendered on behalf of the minor. The Court of first instance rejected the application on the ground that the minor had not been represented by a next friend. This order was affirmed by the lower appellate Court. *Held*, in revision, that when a question of jurisdiction was involved, the High Court was competent to revise a finding of law or fact bearing on a question of jurisdiction. (a) *Behari Lal v. Baldeo Narain*, 16 A.L.J. 717—40 A. 674.

RYVES, J

References —(a) 40 M. 793, *F*; 16 A L J. 438, 493, 535, *Dist*.

- (7) *Code of Civil Procedure (Act V of 1908), O. XXXII, rr. 1, 2, 12—Suit filed by minor without next friend—Minor obtaining majority during pendency of suit—Application by minor to be allowed to proceed with suit as major—Plaint ordered to be struck off—Order illegal*

A minor filed a suit without a next friend. It was reported that the minor would come of age two days after the date when the suit was filed. On the date fixed for deciding this question, an application, signed by the plaintiff and his pleader, was filed, in which it was denied that the plaintiff was a minor, and it was also stated that, if he was so on the date of the suit, he had, in the interval, come of age, and he prayed for permission to go on with the suit. The plaint was registered and notice was issued to the defendant. Upon the defendant objecting, the Court ordered the plaint to be taken off the file.

Held, in revision, that the order was bad inasmuch as the Court had refused to exercise jurisdiction, which was vested in it by law, and the High Court could interfere in revision. *Nasir-uddin Husain v. Ashfaq Husain*, 16 A L J. 737—46 Ind. Cas. 747.

BANERJI and PIGGOTT, JJ.

- (8) *Provincial Small Cause Courts Act (IX of 1887), S. 25—Suit for compensation for breach of contract—Issue as to whether suit properly instituted decided—Whether case decided—Jurisdiction—Revision.*

A suit for compensation for breach of a contract was brought in the Court of Small Causes at Agra. The defendant pleaded (1) that the suit did not lie at Agra, the contract having been broken at Allahabad; (2) that there was no breach of contract on the part of the defendant. On the first issue as to jurisdiction, the Court took evidence and held that the suit had been properly instituted at Agra. Upon an

Revision—(Continued).

application in revision, held that no revision lay, as the case had not been disposed of within the meaning of S. 25 of the Provincial Small Causes Courts Act. *Makhan Lal v. Channil Lal*, 16 A.L.J. 777=47 Ind. Cas. 610.

RAOOF, J.

References:—25 Ind. Cas. 648; 15 C.W.N. 866, R.

(9) *Ejectment suit under S. 58, Agra Tenancy Act—Landlord and tenant—Appeal to District Judge dismissed—Power of High Court.*

A suit for ejectment was filed in the Revenue Court. The defendant pleaded that no relationship of landlord and tenant existed between him and the plaintiff. The suit was decreed by that Court. An appeal to the District Judge was dismissed on the ground that no appeal lay to him:—*Held*, that no revision lay to the High Court. *Jamna Prasad v. Karan Singh*, 16 A.L.J. 859=46 Ind. Cas. 338.

RAOOF, J.

References:—6 A.L.J. 552, F.; 14 A.L.J. 281.

(10) *Civ. Pro. Code (Act V of 1908), Ss. 115, 151—O. XLI, r. 23—Remanding a case in appeal—Refund of Court-fees—Court Fees Act (VII of 1870), S. 13—Order declining refund can be examined in revision—High Court.*

In remanding a case under O. XLI, r. 23, Civ. Pro. Code (1908), the lower appellate Court declined to order refund of Court-fee paid on the memorandum of appeal, which it was bound to do under S. 13 of the Court Fees Act. The appellant having applied to the High Court.

Held that, though the application did not fall within the scope of S. 151 of the Civ. Pro. Code, yet as the lower appellate Court had acted with illegality or with material irregularity; the application should be allowed under S. 115 of the Code.

Per *Beaman, J.*—"S. 151 of the Civ. Pro. Code is intended to empower Courts to deal with their own decrees and orders and was not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by S. 115." *Bhausing Ragho v. Chaganram Harchand*, 20 Bom. L.R. 348=42 B. 363=45 Ind. Cas. 552.

BEAMAN and HEATON, JJ.

(11) *Order made by District Judge in administrative capacity—Bengal Civil Courts Act (XII of 1887), S. 33—Government of India Act, 1915, S. 107.*

The High Court, cannot under S. 107 of the Government of India Act, 1915, set aside an order made by a District Judge under S. 33 of the Bengal Civil Courts Act.

An order made by a District Judge under S. 33 of the Bengal Civil Courts Act, in his administrative capacity is not clothed with a judicial character, merely because it is based on evidence taken by him. *Is re Atul Chandra Gupta*, 27 O.L.J. 477.

MOOKERJEE and BRACHOFF, JJ.

Revision—(Continued).

(12) *High Court's power of revision—Civ. Pro. Code (Act V of 1908), S. 115—Government of India Act of 1915, S. 107—Difference of opinion in a Divisional Bench in disposing of a Rule—Appeal under S. 15, Letters Patent, if lies.*

Judgment-debtor whose two-thirds share of a *putni* was sold in execution of his landlord's decree for rent and purchased by the owner of the remaining one-third of the *putni* applied to have the sale set aside under O. XXI, r. 90, alleging, *inter alia*, that the value of the property sold was deliberately under-estimated and the property sold at an inadequate value. The Munsif upheld both objections to the sale and set it aside, but the District Judge on appeal restored it holding that the value fetched was not seriously inadequate. To this conclusion the District Judge was led by assuming that what was sold was only one-third and not two-thirds of the *putni* and that the purchaser was a stranger. On an application for revision, the Judges of the Division Bench (*N. R. Chatterjee and Mullick, JJ.*) differing in opinion, the order of the senior Judge setting aside the order of the District Judge and remanding the case prevailed.

Held, per curiam.—That a further appeal lay under S. 15 of the Letters Patent:

Held (by the majority, *Teunon, J.*) *contra*, (affirming *Mullick, J.*)—That this was not a case for interference in revision, for, although the District Judge made a grave mistake of fact, the failure of justice was not due to a fault of procedure such as is contemplated by S. 115, cl. (c) of the Civ. Pro. Code, nor was it a case for interference under S. 107 of the Government of India Act, as this mistake could have been corrected by an application for review.

Per *Teunon, J.* (agreeing with *N. R. Chatterjee, J.*)—The District Judge having in this case set himself to value not the property sold but an entirely different property the error was not one of fact only and the High Court should interfere (a). *Kumar Chandra Kishore Roy Choudhury v. Basarat Ali Choudhury*, 22 O.W.N. 627=14 Ind. Cas. 763=27 O.L.J. 418 (F.B.).

SANDERSON, C.J., TEUNON and WALMSLEY, JJ.

References:—(a) 15 C. 446; 41 C. 323 (338), R.

(13) *Civ. Pro. Code, S. 215—Review—Discretion of lower Court—Revision—High Court, power of.*

The High Court cannot interfere in revision with the discretion of the lower Court as to whether it should or should not review its judgment. *Bhabasludhu Halder v. Kesab Chandra Halder*, 40 Ind. Cas. 463.

FLETCHER and NEWBOULD, JJ.

(14) *Civ. Pro. Code (Act V of 1908), S. 115—Limitation Act (IX of 1908), S. 3 and Sch. I, Arts. 30, 31—Damages for non-delivery by carrier—Point of limitation taken only in the revision petition—No material irregularity on the part of the*

Revision—(Continued).

appellate Court in not dismissing the suit as time-barred.

S. 3 of the Limitation Act does not lay the duty on appellate Courts of dismissing suits filed out of time in the original Court. An appellate Court cannot be said to have acted with material irregularity in not adjudicating on a plea of limitation which had not been pressed before it. *British India Steam Navigation Company v. Hussain Kasim Shett*, 42 Ind. Cas. 536

PHILLIPS, J.

References:—8 B. 535; 3 L.W. 176, F.; 22 O.L.J. 589, Dist.

(15) *Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), S. 33—Order under the section—Administrative order—High Court's power of superintendence—Interference by High Court—Government of India Act (5 and 6 George V, c. 61), S. 107.*

An order under S. 33 of the Bengal Civil Courts Act, 1887, is not an order which can be set aside by the High Court under S. 107 of the Government of India Act, 1915. The District Judge when he exercises the power vested in him under S. 33 of the Bengal Civil Courts Act is not a Court subject to the appellate jurisdiction of the High Court, as the order made by him is made by him in his administrative capacity. *In re Atul Chandra Guha*, 42 Ind. Cas. 619.

MOOKERJEE and BEACHCROFT, JJ.

(16) *Serving notice of the date of hearing on counsel—Sufficiency.*

Where a party engages a counsel and the notice of the hearing date was served upon the counsel, held that the notice sufficient. *Bani Madho v. Kanhaiya Lal*, 43 Ind. Cas. 481—4 O.L.J. 561.

LANDSAY, J.C.

(16-a) *Interlocutory orders, Interference with, in—Civ. Pro. Code (Act V of 1908), S. 115.*

S. 115 of the Code of Civil Procedure, authorises the Court to call for the record of any case, which has been decided, but where there has been no decision and the case is still pending, interlocutory orders passed during the course of the hearing cannot be made the subject of revision, unless those orders have the effect of determining the case, so far as the party applying for revision is concerned, or concluding the claim otherwise in a manner not open to appeal. *Brij Indra Bahadur Singh v. Deputy Commissioner, Kheri*, 47 Ind. Cas. 676.

STUART and KANHAIYA LAL, A.JOS.

(17) *Civ. Pro. Code, S. 115, O. XXI, rr. 91, 93—Government of India Act, 1915, S. 107—Order setting aside auction sale without notice to persons holding orders for rateable distribution—Order cancelling sale if binds latter persons—Court passing order that they are not bound if commits error relating to jurisdiction to justify interference of High Court.*

Revision—(Continued).

Where an auction-purchaser applying to have the sale set aside under O. XXI, r. 91, Civ. Pro. Code, fail to make parties to the proceeding, the persons who had obtained orders for rateable distribution of the sale-proceeds prior to the application for the cancellation of the sale and got an order cancelling the sale and subsequently on the motion of those persons the Court held that they were 'persons affected' entitled to notice under O. XXI, r. 92, Civ. Pro. Code, and no notice having been issued to them, they were not bound by the order setting aside the sale.

Held (on an application to revise the latter order) that there was no question of failure to exercise jurisdiction vested in the Court by Law so as to call by interference in revision.

Obiter.—The persons who have obtained orders for rateable distribution prior to an application for setting aside a Court sale would be parties 'materially affected' by the application within the meaning of O. XXI, r. 92, Civ. Pro. Code. *Komandur Krishnamachari v. Danoji Rao*, 35 M.L.J. 604—8 L.W. 592—24 M.L.T. 482—(1918) M.W.N. 716.

ABDUR RAHIM, J.

(18) *Interlocutory orders of Revenue Courts in suits from final decree in which appeal lies—Revision of such orders; if can be made by Revenue Board or only by High Court—Madras Estates Land Act, 1908, Ss 192, 205—Civ. Pro. Code (1908), S. 115, O. XXII, r. 5—Legal representative. Dispute as to—Duty of Court to decide such dispute.*

Per *Ayling, J.*—S. 205 of the Madras Estates Land Act relates, not to incidental orders in suits, the final decision in which is appealable, but to such proceedings as are specified in Part B of the schedule to the Act, as those in which no appeal lies (Nos. 12-20). It is not, and cannot be, intended to affect the revisional powers of the High Court, in suits which are made appealable to the District Court and the High Court under Part A of the schedule.

The High Court, not the Board of Revenue, has jurisdiction to revise an interlocutory order of a Revenue Court made in a suit under S. 77 of the Madras Estates Land Act.

Per *Krishnan, J.*—Even if the Revenue authorities should be considered to have co-ordinate jurisdiction with the High Court in the matter, it is certainly more convenient and proper that the High Court, at least in order to avoid the anomaly of a conflict of decision in the same matter that might otherwise result from the Revenue authorities revising orders passed in rent suits from the final decree in which an appeal lies to the Civil Court, should not in the exercise of its discretion leave it to the Revenue authorities to revise the order in question, but should itself exercise its jurisdiction in the matter, though, if a party has already elected his remedy by applying to the Revenue authorities under S. 205 of the Act, it may be a question whether interference under S. 115, Civ. Pro. Code, should not be refused by the High Court (2).

Revision—(Continued).

A Revenue Court, in a suit under S. 77 of the Estates Land Act, added the widow of the deceased plaintiff as his legal representative, dismissing the claim of the deceased's father, setting up a will of the deceased, to be brought on the record without taking evidence on the point, as it was of opinion that the validity of the will being a very contentious matter, it might be left for settlement in another Court. *Held*, in revision, that the Court was bound, under O. XXII, r. 5, Civ. Pro. Code, to enquire and determine on the evidence which the rival claimants might adduce, who was entitled to be brought on the record as legal representative of the deceased plaintiff (b). *Parameswami Aiyangar v. Alamu Nachiar Ammal*, 35 M.L.J. 692.

AYLING and KRISHNAN, JJ.

References:—(a) C.R.P. No. 945 of 1916 (Unrep.), Diss., 12 A. 198, Dist. (b) 39 M. 1918=29 M.L.J. 505=31 Ind. Cas. 81, R.

(19) *Provincial Small Cause Courts Act (IX of 1887)*, S. 25—*Limitation, question of—High Court's power to interfere.*

Held, that the High Court exercising jurisdiction under S. 25 of Act IX of 1887 is not precluded from interfering with an erroneous decision on a question of limitation. *Madho Singh v. Badli Singh*, 21 O.C. 139=46 Ind. Cas. 804.

LINDSAY, J. C.

References:—13 A. 277, 15 O.C. 319, R. 39 O. 473, 15 A. 139, 3 O.L.J. 714, Dist.

(20) *Wrong decision that restoration petition was barred by limitation—Such decision if error in exercise of jurisdiction—S. 115, Civ. Pro. Code (1908).*

Held that an error be it of law or fact, alleged to have been committed by a Subordinate Court in deciding that a petition for restoration was not barred by limitation was not an error in the exercise of jurisdiction under S. 115, Civ. Pro. Code (1908). *Thota Lal Ghose v. Ganouri Sahu*, 3 Pat. L.J. 376.

ROE and IMAM, JJ.

(21) *Application for revision against appellate decree presented within time—Conversion of such application into second appeal memoandum long after time—Extension of time if claimable—Limitation Act, Ss. 2, 5 Resal Singh v. Shadi*, 90 P.R. 1917=174 P.W.R. 1917=13 P.L.R. 1918=43 Ind. Cas. 317 See Final Part, 1917, Col. 818.

(22) *Punjab Courts Act (III of 1914)*, Ss. 41, 43, 44—*Application for certificate under S. 41 (3)—Refusal of by District Judge—Order, if open to revision.*

Where a District Judge erroneously refused to grant a certificate for second appeal under S. 41 (8) of the Punjab Courts Act on the ground that no question of custom really arose, *held* that the order was open to revision under S. 44, Punjab Courts Act, as the lower appellate Court

Revision—(Continued).

failed to exercise a jurisdiction vested in it (a). *Sarup Singh v. Musammam Jowahri*, 18 P.R. 1918=44 Ind. Cas. 782.

SCOTT-SMITH, J.

References:—(a) 68 P.L.R. 1915, F.; 6 P.R. 1917, Dist.

(23) *Civ. Pro. Code (1908)*, O. XXI, r. 58 and S. 151—*Property ordered to be sold under mortgage decree—Applicability of O. XXI, r. 58, thereto—Jurisdiction of Court to entertain application claiming right to such property—Unnecessary attachment.*

Civ. Pro. Code, O. XXI, r. 58, applies only to attachments in execution of a decree but does not apply where the property in dispute is directed to be sold under a mortgage decree notwithstanding the fact that there has been an unnecessary attachment. In such a case, a Court has no jurisdiction to entertain any application for claim or to pass any order upon it, and if it does so, the High Court will interfere under S. 115 notwithstanding the provisions of S. 151 of the Civ. Pro. Code. *Ratan Lal v. Bala Parshad*, 58 P.R. 1918=113 P.L.R. 1918=23 P.W.R. 1918=44 Ind. Cas. 986.

LESLIE JONES, J.

References:—4 B. 515, R., 18 B. 98; 14 C. 631, 18 Ind. Cas. 215, F.

(24) *Civil cases—Act XIX of 1841, Ss. 3 and 4—Order passed without jurisdiction—Material irregularity—Remedy by suit—Revision refused.*

The petitioner applied for revision of an order passed under S. 3, Act XIX of 1841. He at the same time filed a regular suit to recover possession of the property of the deceased. The order was passed by the Additional District Judge and it was contended that the Court had acted without jurisdiction, inasmuch as the case had not been made over to him for disposal. It also appeared that the provisions of Ss. 3 and 4 were ignored by the Court and it was pleaded that the order was therefore bad in law.

Held, that although the lower Court had no jurisdiction to pass the order and had committed material irregularity and there were grounds for interference, the revision must be rejected on the ground that not only the petitioner had another remedy open to him but that he had already availed himself of it by instituting a suit for the property in question (a). *Ganga Sahai v. Babu Lal*, 31 P.L.R. 1918=72 P.R. 1918=148 P.W.R. 1918=46 Ind. Cas. 589.

BROADWAY, J.

References:—15 P.R. 1901 S.C. 80 P.L.R. 1901, F.; 38 P.R. 1917; 7 P.R. 1904; S.C. 37 P.L.R. 1904, 198 P.R. 1306, 11 P.R. 1915, 17 P.L.R. 1915; 6 Ind. Cas. 629, 84, 929; 10 M. 68; 24 M. 361, 12 M. 341; 7 B. 341; 8 P.R. 1903, 31 P.L.R. 1903; 82 P.R. 1905; 199 P.L.R. 1905; 128 P.R. 1906; 119 P.L.R. 1908; 66 P.R. 1915, R.

Revision—(Continued).

(25) *Punjab Courts Act* (III of 1914), S. 44—*Civil cases—Interlocutory order—Remand order under O. XXI, r. 25, Civ. Pro. Code—Case '—Decided.*

It is under very exceptional circumstances that the Chief Court will interfere in the exercise of its revisional jurisdiction with interlocutory orders (a).

The appellate Court, having reversed judgment of the trial Judge on a preliminary point, is under no legal obligation to remand the case for re-decision. *Gopi Mal v. Ishar Das*, 58 P.L.R. 1918=184 P.W.R. 1918=46 Ind. Cas. 552.

SHAH DIN, J.

References:—(a) 26 P. R. 1917=31 P.W.R. 1917=40 Ind. Cas. 1008, F.

(26) *Punjab Courts Act* (III of 1914), S. 44—*Civil cases—Question of law—Application of wrong article of Limitation Act—Limitation Act (IX of 1908), Art. 83—Contract Act (IX of 1872), S. 222—Suit by commission agent against principal.*

A suit by a commission agent against his principal is governed by Art. 83 of the Limitation Act.

A case falls within the purview of S. 44 of the Punjab Courts Act, when it can be shown that a suit has been erroneously held to be either within time or barred by limitation owing to the application to it of an article of the Limitation Act which cannot apply to the facts (a).

The contention of the respondents had no force that the relationship in question terminated when the goods were sent by the plaintiffs to the defendants and a demand was made by plaintiffs for price of the goods supplied (b). *Firm of Sarb Dial-Ishar Das v. Devi Ditta Mal-Gordhan Das*, 59 P.L.R. 1918.

RATIGAN, C. J.

References:—(a) 39 C. 473 and 20 A. 78, R. (b) 28 P. R. 1915=40 P.W.R. 1915=30 Ind. Cas. 781, R.

(27) *Decree based on arbitration award—Material irregularity affording ground for revision of decree, nature of.*

A revision lies against a decree based upon an arbitration award on the ground of material irregularity, yet that material irregularity must have reference to the proceedings of the lower Court and not to those of the arbitrators. *Allah Din v. Mubet Badshah Begam*, 90 P.W.R. 1918=45 Ind. Cas. 647.

SCOTT-SMITH, J.

Reference:—92 P.R. 1918.

(28) *Civ. Pro. Code* (Act V of 1908), S. 115, O. XXIII, r. 1—"Sufficient grounds," meaning of—*Permission to withdraw suit with liberty to bring fresh one—Revision, whether lies.*

Held, that, an order passed under O. XXIII, r. 1, Civ. Pro. Code, giving the plaintiff permission to withdraw the suit with liberty to

Revision—(Continued).

bring a fresh one, is open to interference by the High Court in revision.

The words "sufficient grounds" in O. XXIII, r. (2) (b), Civ. Pro. Code, are *ejusdem generis* with the defect referred to in r. 1 (2) (a) of the Code, so that permission to withdraw a suit with liberty to bring a fresh suit cannot be granted except on grounds which are of the same nature as the grounds specified in cl. (a) and that non-registration of a sale-deed on which the suit is based is a ground of this nature. *Munna Lal v. Chhabil Das*, 117 P.W.R. 1918=46 Ind. Cas. 181.

SCOTT-SMITH, J.

References:—41 C. 632=26 Ind. Cas. 203, dissented from; 26 Ind. Cas. 57=1 L.W. 726=16 M.L.T. 253=27 M.L.J. 480=(1914) M. W.N. 832; 35 Ind. Cas. 843; 14 Ind. Cas. 33=16 O.L.J. 103=16 C.W.N. 1027; 30 Ind. Cas. 351=2 O.L.J. 461; 44 C. 454=25 C.L.J. 456=39 Ind. Cas. 969, 25 C.L.J. 454=39 Ind. Cas. 963, F.

(29) *Interlocutory order—Appeal from final decree competent—Material irregularity—Wrong decision, whether illegal exercise of jurisdiction—Civ. Pro. Code (Act V of 1908), S. 115.*

Held, that a Court that has decided a suit, over which it had jurisdiction, cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally or with material irregularity (a).

Held, also, that the Chief Court will not interfere with an interlocutory order made in a suit, over which the trial Court has jurisdiction, when an appeal is allowed from the final decree, or the applicant has another remedy open to him whereby he may obtain the relief sought by him.

In a suit for recovery of money due on account, the trial Court overruled the plea of the defendants that the award set up by them operated as *res judicata*. The defendants moved the Chief Court in revision:

Held, that the order was not open to revision, inasmuch as an appeal would lie from the final decree and the defendants would be entitled to impeach the decision of the trial Court on the question of *res judicata* as well as on other points (b). *Louis Dreyfus & Co. v. Khilla Ram*, 120 P.W.R. 1918=46 Ind. Cas. 189.

SHADI LAL, J.

References:—(a) 11 C. 6=11 I.A. 237=4 Sar. P.C.J. 559, R. (b) 51 P.R. 1899 and 81 P.R. 1902, F.

(30) *Proper grounds for, what are—S. 115, Civ. Pro. Code (1908).*

The question for consideration in cases coming up for revision resolves itself into this:—Was the method irregular by which the conclusion of fact arrived at or of law was arrived at? If the Judge arrives at a conclusion of law or of fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statements,

Revision—(Continued).

of pleaders or witnesses, the method of arriving at such conclusion is illegal and irregular and is a ground for revision provided the irregularity is material and the petitioner has suffered an injury thereby *Goridat Bagla v. Rookmanand*, 9 L.B.R. 263—47 Ind. Cas. 781.

• TWOMBIE, C.J. and ORMOND, J.

References:—22 C.W.N. 50 (P.C.), *Expl*; 2 L.B.R. 839, *Appr.*

(31) *Consent order for taking accounts—Application to bring formal order into conformity with judgment—Annulment of such order, if valid—Revision of order of annulment—Civ. Pro. Code (1908) Ss. 152 and 415*

Upon an application to bring a formal order of consent for the taking of accounts by commissioners into conformity with the judgment, a District Judge set it aside. Held that the District Judge had acted without jurisdiction in annulling the consent order in such an application and that the consent order could be restored *Goridat Bagla v. Rookmanand*, 9 L.B.R. 263—47 Ind. Cas. 781.

TWOMBIE, C.J. and ORMOND, J.

References—22 C.W.N. 50; 2 L.B.R. 333, *Cons.*, 27 O.L.J. 418, *Disappr.*

(32) Lower Court's decision erroneous in law—High Court's interference declined. See *CARRIERS ACT (III OF 1865)*, No. 3, 27 O.L.J. 294.

(33) Civ. Pro. Code, S. 115—*Onota Nagpur Tenancy Act*, S. 217—*Powers of High Court—Revision*, See C.P. ACT VI OF 1903 (*OHOTA NAGPUR TENANCY*), No. 3 43 Ind. Cas. 933

(34) Defendant's appeal dismissed as not duly presented—Cross objections filed by defendant in plaintiff's appeal—Dismissal of cross objections—Defendant's right to file cross objections—Defendant's remedy. See *APPEAL (SECOND APPEAL)*, No. 16, 40 P.R. 1918.

(35) Direction to rehear a dismissed cross appeal at the hearing on a remand. See *APPEAL (SECOND APPEAL)*, No. 21, 62 P.L.R. 1918.

(36) Direction to sell property not under attachment before first attaching it—Direction one without jurisdiction and liable to revision. See *ATTACHMENT BEFORE JUDGMENT*, No. 1, 45 C. 780.

(37) Omission to hold enquiry on application to enter satisfaction of decree—Allowing application to be withdrawn—Material irregularity in exercise of jurisdiction—Injustice a ground for revision—Civ. Pro. Code, O XXI, r. 2, S. 115. See *BURDEN OF PROOF*, No. 7, 35 M.L.J. 253.

(38) Application to set aside *ex parte* decree—Plaintiff held by appellate Court to be bound to show defendant's knowledge of decree—Error of appellate Court in so holding subject to revision. See *BURDEN OF PROOF*, No. 10, 126 P.W.R. 1918.

Revision—(Continued).

(38-a) See *CIV. PRO. CODE (1908)*, S. 115.

(39) Another remedy open to applicant—Revision if permissible—Conditions for revision. See *CIV. PRO. CODE (1908)*, No. 363, 16 A.L.J. 150.

(40) Matter decided within jurisdiction of Court—But conclusion erroneous—No revision. See *CIV. PRO. CODE (1908)*, No. 344, 16 A.L.J. 438.

(40-a) Dismissal for default, Order of, application to set aside under Civ. Pro. Code (1908), O. IX, r. 9, Summary dismissal of, with recording evidence—Revision of, under Civ. Pro. Code (1908), S. 115. See *CIV. PRO. CODE (1908)*, No. 260 a, 22 C.W.N. 671.

(41) Partition suit—Profits prior to plaint and after it—Failure to give clear notice regarding enquiry as to profits after filing plaint. See *CIV. PRO. CODE (1908)*, No. 170, 43 Ind. Cas. 458.

(42) Return of plaint for presentation to proper Court—Long delay of plaintiff in filing revision petition—Effect. See *CIV. PRO. CODE (1908)*, No. 161, 43 Ind. Cas. 470.

(43) Interlocutory orders—When can be interfered with in. See *CIV. PRO. CODE (1908)*, No. 162, 43 Ind. Cas. 684

(44) Plaintiff and defendant present in Court—Non prosecution of case by plaintiff—Dismissal for default—Rejection of application for restoration—Rejection if not failure to exercise jurisdiction justifying interference in revision. See *CIV. PRO. CODE (1908)*, No. 269, 3 Pat. L.J. 355.

(45) Company being plaintiff in suit—Appeal or revision arising from such suit—Leave of Court unnecessary. See *COMPANIES ACT (VII OF 1913)* No. 3, 32 P.L.R. 1918.

(46) Costs of appeal not considered by lower appellate Court—Jurisdiction not exercised—Revision lies against failure to so consider. See *COSTS*, No. 4, 8 L.W. 219.

(47) Revision during interlocutory stage—Powers of High Court. See *COURT FEES*, No. 1, 44 Ind. Cas. 891

(48) Disposal of suit on point taken by appellate Judge—Illegality—Revision. See *DOCUMENT*, No. 1, 43 Ind. Cas. 488

(49) Decree fixing date for payment of money—Further provision that suit be dismissed if money not paid on fixed date—Refusal of Court passing decree to extend time—Revision, if lies. See *ENLARGEMENT OF TIME*, No. 1, 16 A.L.J. 625

(50) High Court, Interference by, in—Guardian, Appointment of, Error in, On ground of—Civ. Pro. Code (1905), S. 115, O XXXII, r. 4 (2) See *GUARDIAN AND MINOR*, No. 4, 46 Ind. Cas. 816.

Revision—(Concluded).

(51) Delay in applying for permission to continue suit under Civ. Pro Code, O XXII, r 9, Excuse of, by lower Court—Delay in applying for review, Excuse of lower Court—High Court if will interfere with discretion so excusing See **HINDU LAW (REVERSIONERS)**, No 6, (1918) M W N. 888

(52) Decree modified by High Court in—Execution of decree, computation of time for See **LIMITATION ACT (1908)**, No 224, 22 C W N. 158.

(53) Suit erroneously held to be either within time or barred by limitation through application of wrong article of limitation—Revision, if lies. See **LIMITATION ACT (1908)**, No 138, 129 P.W.R. 1918.

(54) Receiver appointed to recover property—Suit by Receiver to so recover—Adjournment of suit by Court pending trial of suit in which Receiver appointed—Refusal to exercise jurisdiction—Revision lies. See **RECEIVER**, No 5, 8 L.W. 386.

(55) Giving false information to Cantonment Magistrate exercising small causes jurisdiction on civil side—Cantonment Magistrate as Small Causes Court sanctioning prosecution therefor—Power of High Court to interfere See **SANCTION TO PROSECUTE**, No 2, 16 A.L.J. 921.

(56) Parties to suit, Non-joinder of, Objection on ground of, if can be taken for the first time in. See **SUCCESSION CERTIFICATE**, No. 2, 46 Ind. Cas 648.

(57) Gross under-valuation of one item in suit—Permission to withdraw claim if can be given—Grant of permission if proper exercise of jurisdiction—Duty of Court See **WITHDRAWAL OF SUIT**, No 3, 35 M.L.J. 27

(58) Leave granted in appeal to plaintiff to withdraw from suit with liberty to bring fresh suit—Power of High Court to interfere with this order in revision See **WITHDRAWAL OF SUIT**, No. 6, 9 Pat L J 690

Revival of Suit.

Suit, revival of—Ex parte decree, setting aside of—Fraud, specific proof of—Parties, position of—Civ Pro Code (Act V of 1908), O XXIII, r 3—Adjustment of suit

A suit brought for recovery of arrears of rent and for ejectment, was decreed *ex parte* The defendant thereupon instituted a suit to set aside the *ex parte* decree on the ground of fraud. The specific fraud alleged was to the effect that the plaintiff agreed on receipt of Rs. 44 from the defendants to withdraw from the suit, but that he had not intimated this arrangement to the Court and had, on the other hand, taken advantage of the absence of the defendants to secure an *ex parte* decree against them. This allegation was fully established and the *ex parte* decree was set aside on the ground of fraud.

Held, that the original suit was revived by the setting aside of the *ex parte* decree, the

Revival of Suit—(Concluded).

parties restored to the position they occupied on the day the *ex parte* decree was made, and the arrangement between the parties, namely, that the plaintiff do withdraw from the suit, should be carried into effect by a decree under O XXIII, r 3 of the Code of Civil Procedure, without fresh investigation **Nitarini Das v Mohendra Nath Kar**, 28 O L J. 158—47 Ind. Cas. 535

MOOKERJEE and WALMSLEY, JJ.

Reference —2 C 184, F.

Right of Suit

(1) *Special Manager of Court of Wards sues on behalf of ward and others—Whether entitled to maintain suit—Purchase at auction sale—Profits to accrue from date of sale.*

Where the Manager of the Court of Wards brought a suit for the recovery of profits of lands on behalf of the ward and in a way as trustee for persons who were not wards of the Court, *held* that the defendant cannot resist the suit on the ground that the ward was not the sole owner of the land and as such the plaintiff was not entitled to bring the suit.

Where lands are purchased at a Court-auction, the profits accrue to the benefit of the auction purchaser from the date of the sale and not from the date on which mutation was obtained **Hashmat Ali v The Special Manager of the Court of Wards**, 45 Ind. Cas. 248.

LINDSAY, J. C.

(2) Alien enemy, of—Suspension of, owing to war if a disability under S. 9, Limitation Act (1908) S. 9—Disability and inability, Difference between—Limitation Act, S. 15, applies to judicial orders or injunctions, not to Royal proclamation See **ALIEN ENEMY**, 47 Ind. Cas. 122

(3) Execution of promissory by two persons to plaintiff—Plaintiff being benami for one of the two executants—Right of plaintiff to sue executants See **BENAMI TRANSACTIONS**, No 5, 24 M L T. 602

(4) Temple—Open for public worship—Proper administration of trust—Who may sue. See **CIV. PRO. CODE (1908)**, No 122, 45 Ind. Cas. 213

(5) Judgment obtained by false evidence and suppression of evidence—Suit to set aside such decree if lies See **JUDGMENT**, No. 3, 34 M L J. 590;

(6) Right to enforce forfeiture of lease—Transfer of same if valid. See **LEASE**, No 4, 20 Bcm. L R. 767.

(7) Death of residuary legatee of testatrix after making application for grant of letters with copy of will annexed—Right to sue, if survives to son of such legatee See **LETTERS OF ADMINISTRATION**, No. 1, 45 C 862

(8) Alien enemy's right to sue on promissory note, if suspended during war. See **LIMITATION ACT (1908)**, No. 27, 28 C.W.N. 157.

Right of Suit—(Concluded).

(9) Declaratory suit by one daily worshippet—Representative suit, if lies. See MAHOMEDAN LAW (WAKF), No. 4, 23 C.W.N. 115.

(10) Collection by agent of money due to plaintiff as principal—Death of agent while money still in his own hands—Right of principal to continue suit against representatives of deceased agent. See PRINCIPAL AND AGENT, No. 1, 38 O.L.J. 492.

(11) Insolvent's right to sue after adjudication before Official Receiver's intervention. See PROVINCIAL INSOLVENCY ACT, No. 7, (1918) M.W.N. 289.

(12) Mother if can sue for declaration of legitimacy of child. See SPECIFIC RELIEF ACT, No. 21, 23 C.W.N. 171.

(13) Debt assigned by assignor before obtaining succession certificate—Assignee if can sue to recover debt without certificate in his own name. See SUCCESSION CERTIFICATE ACT, No. 4, 35 M.L.J. 666.

(14) Suit for rent by purchaser in name of vendor after assignment—Suit if maintainable. See VENDOR AND PURCHASER, No. 5, 40 Ind. Cas. 506.

Right of Way.

(1) *Suit for declaration of right of way—Whether it is necessary to locate the exact position or to show whether any definite track was used—Plaintiff to establish the termini from and to which the way runs—Plaintiff to enjoy the right in the way pointed out by owners of servient tenement—If not, the nearest route.*

In a suit for a declaration of the plaintiff's right of way, it is not necessary to locate the exact position in which the way was enjoyed over the compound of the defendants, nor is it necessary to show that any definite marked pathway over the compound was always used. If the plaintiffs establish the *termini* from which and to which the way runs, the plaintiffs would be entitled to have the right of way and that right would be enjoyed in the way that the owners of the servient tenement point out as being the track over which the way should be enjoyed; and if not, then the plaintiffs would be entitled to enjoy the way by the nearest route. *Lakhl Kanta Roy v. Raj Chandra Shaha*, 22 C.W.N. 921=46 Ind. Cas. 374.

FLETCHER and SHAMSUL, HUDA, JJ.

References:—Wimbledon and Putney Commons Conservators v. Dixon, (1875) 1 Ch. Div. 862, F.; 42 C. 164, *Expl.*

(2) *Public right of way through private field—Origin of such right—Dedication to public—Facts evidencing dedication—S. 24, Easements Act.*

A public right of way can exist through a private field. It is not an easement. Public rights of way originate from a dedication to the public by the owner of the soil over which they

Right of Way—(Concluded).

pass. Dedication may be inferred if it be shown that the public have used a way for a long time to the knowledge of the land-owner and without resistance by him.

Under the principles recognized in illustration (a) to S. 24, Easements Act, when the owner of the land renders a way impassable, the persons entitled to use the way may deviate from it and pass over adjoining land of the owner, provided that the deviation is reasonable. *Laxman v. Tukla*, 14 N.L.R. 78=44 Ind. Cas. 868.

Reference:—L.R. 9 Ch. 111, R.

(3) *Easements Act (V of 1882), Ss. 4, 12, 18 and 28—Land, Meaning of—Easement, Acquisition of—Evidence of user prior to statutory period, Admissibility of—'As of right,' Meaning of—Tenants of dominant tenement, user by, Effect of—Artificial structure—Easement over roof if can be acquired—General right of easement for sitting, drying clothes, etc., Validity of—Right of way, where delineation of path not necessary.*

In disputes relating to acquisition of easements, evidence of user prior to the statutory period is admissible.

Artificial structures, such as, flat, masonry roofs, of shops, are land within the meaning of that expression, as used in S. 4 of Act V of 1882, and easements can be acquired over them.

Held, that the user of an easement without any one's permission and without interference on behalf of the servient owner was user 'as of right'.

User of the servient tenement by tenants of the dominant owner, who occupied the premises, is, for the purpose of acquisition of an easement, as good as user by the dominant owner himself.

Held, that a general right of easement to use a roof, as a place for sitting, or, as a place for drying clothes, or, for other purposes of this nature, can be acquired under Act V of 1882.

Where the area, over which an easement of way has been acquired, is small and the points of egress and ingress are fixed, it is not necessary for the Court to delineate the particular portion of the ground, which persons enjoying the easement are entitled to use. *Ganesha Prasad v. Khuda Bakhsh*, 21 O.O. 78=45 Ind. Cas. 585.

LINDSAY, J.C.

(4) *Distinction between private and public rights of way—Way of necessity. See EASEMENT, No. 2, U.B.R. (1918), 1st Qr., 65.*

Right to Sue.

Transfer of a right to profits of a village actually accrued due an assignment of debt, not a transfer of a mere, prohibited under S 6 (a) of the Transfer of Property Act (1892). See TRANSFER OF PROPERTY ACT (1892), No. 4=47 Ind. Cas. 634.

Riparian Proprietor.

(1) Right of, if entitled only to carry water direct to lands—Right to store in wells—Irrigation of riparian land—Government's right to levy cess—See MAD ACT VII OF 1863 (IRRIGATION CESS), 7 L.W. 1.

(2) Right of, to middle of stream. See ALLUVION AND DELUVION, No. 1, 22 C.W.N. 379.

(3) Right to supply of water from natural stream—If such easement may be acquired. See WATER No. 1, 57 P.R. 1918.

Riparian Rights.

Ordinary rights of lower and upper riparian owners—Prescriptive rights, its effect on riparian rights.

It is a sound rule of law the riparian owners have rights to make use of the water of the rivulet for purposes of irrigation so long as that use is reasonable and natural. Put where the riparian owners have established by prescription their rights to the exclusive use of the water for purposes of irrigating their lands, situated in the lower village, the ordinary incidents of riparian rights cannot be applied in such a case. *Mahabir Sahu v. Ran Saran Sahu*, 44 Ind. Cas. 19.

SIR ALI IMAM, J.

River bed.

River — Presumption — Bed of river — Grant of land bounded by non navigable river—Grant, if includes half of bed of river.

Where a grant of land is made in India described as bounded by non-navigable river, there is a presumption that the right of the grantee extends to half of the bed of the river and the onus of showing that the grant did not cover the bed *ad medium flum aquas* is on the grantor. *Sri Rajah Yasireddi v. Secretary of State for India*, 35 M.L.J. 159=(1918) M.W.N. 662=41 M. 840=47 Ind. Cas. 606, (F.B.).

WALLIS, C.J. OLDFIELD, SADASIVA AIYAR, SPENCER and BAKEWELL, JJ.

References :—C B. 19 ; 6 M.L.A. 267 ; Cal. S.D.A.R. (1962), p. 160 ; 1 Hay, 426 ; 2 Hay, 541, Mad. S.D.A. (1859), p. 189 ; 1 M.H.C. 255 ; 12 B.L.R. 216 ; 5 C.L.R. 97 ; 17 C. 814, F. ; 2 B.L.R. 4 ; 5 B.L.R. 231 ; 22 M. 461, *Epl.*

Rivaj Nam.

(1) Entry in, relates generally to ancestral property. See CUSTOMS (PUNJAB—SUCCESSION), No. 5, 128 P.R. 1918.

(2) Entries in, Evidentiary value of—Special custom opposed to general custom, Statement as to, weight to be attached to. See CUSTOMS (PUNJAB—SUCCESSION), No. 5 a, 3 P.L.R. 1918.

Roof.

Easement over, for sitting, drying clothes, if can be acquired. See RIGHT OF WAY, No. 3, 21 O.C. 78.

Royal Proclamation.

Limitation Act (1908), S. 15, applies to judicial injunctions or orders, not to. See ALIEN ENEMY, 47 Ind. Cas. 122.

Ruling Chief or Prince.

Suit against—Civ. Pro. Code (1908), S. 86, Consent of Government of India requisite under, for maintainability of—Suit instituted without such consent—Jurisdiction, Submission to, without raising any objection—Jurisdiction, Want of, Objection on ground of, if can be taken in appeal.

Where a suit was instituted in a British Court against a Ruling Chief having sovereign powers without obtaining the consent of the Government of India as required by S. 86, Civ. Pro. Code (1908), and the Ruling Chief submitted to the jurisdiction of the Court without raising any objection, it was too late to set up in appeal the objection that no authority had been obtained from the Government of India prior to the institution of the suit. *Manikya Bahadur v. Hashmat Ali*, 46 Ind. Cas. 558.

FLETCHER and SMITHER, JJ.

Sale.

(1) *Non-payment of part or whole of consideration—Effect thereof.*

Where parties enter into a bargain, for the sale of property of any nature, if the real intention is that the right to the property should pass, the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer fictitious. The non-passing of the consideration may often be very strong evidence that the deed was not intended to operate. *Alamdaz Hussain v. Moty Ram*, 16 A.L.J. 454=46 Ind. Cas. 382.

RICHARDS, C.J. and BANERJI, J.

(2) *When complete—Execution of sale deed in regard to property under attachment—Registration sanctioned by Collector—Effect.*

The sale is not complete until the deed is registered, where registration was necessary.

Where a sale-deed was executed in regard to a property under attachment and the registration of the document was sanctioned by the Collector, before whom the execution proceedings were transferred, held that the sale was not void. *Parwatrao v. Ramji*, 45 Ind. Cas. 240.

BATTEN A J.C.

Reference :—18 N.L.R. 190, *Appr.*

(3) *Document, a sale or mortgage, Construction of—Consideration, Non-payment of—Effect of, on sale.*

Where a document is in the form of an outright sale the defendant, the executant is precluded from showing that it was in fact a

Sale—(Concluded).

mortgage but he is entitled to show that the consideration has not been paid and he is also entitled to retain possession until he has been paid the balance of the consideration. **Hardam Singh v. M. Po Htu**, 45 Ind. Cas. 841.

TWOMEY, C.J. and ORMOND, J.

(4) Breach of contract of sale of goods by non-delivery—Measure of damages. See CONTRACT ACT (IX OF 1872), No 50, 23 M L T. 820.

(5) Construction. of—Grant undertaken Waste Land Rules for fixed term—Assignment of unexpired term by document without reservation of right of renewal provided for in original grant—Renewal obtained by assignee on expiry of original term—Assignment of complete sale—Covenant for renewal if can be availed of by assignee for his own benefit. See GRANT, No. 2, 9 L B R. 268.

(6) Of immoveable property—Non payment of purchase-money—Remedy of vendor—Delivery of possession, if necessary, to validate sale—Oral evidence, Admissibility of, to explain document a sale or mortgage. See TRANSFER OF PROPERTY, No. 1, 45 Ind. Cas. 860.

(7) Deed of, Vendee claiming title under an unregistered. Position of—Trespasser—Ejection of—Vendee claiming title under a subsequent registered sale-deed See TRESPASSER, 111 P R 1918.

(8) Construction of sale deed—Money left with mortgages for discharge of mortgage. See VENDOR AND PURCHASER, No. 4, 40 Ind. Cas. 361.

Sale Certificate.

Particulars in, Correction of, with reference to boundaries given in plaint, Validity of. See CERTIFICATE OF SALE, 46 Ind. Cas 908.

Sale of Goods.

(1) C.I.F. contract—Payment against delivery of goods—Outbreak of war while contract still executory—Effect of war on contract—Prize Court—Impossibility of performance of contract—Indian Contract Act (IX of 1872), S 56 **Madho Ram Hurdeo Dast v G C Sett and B. R. Sett**, 21 C W N. 670—25 C L J. 62=45 C. 28. See Final Part, 1917, Col 827.

(2) Agreement to purchase cases of Belgium window glass—Contract of—Goods shipped in German ship at European port shortly before break of war between England and Germany—Ship condemned as prize—War how far affects such contract—Purchaser's liability to accept goods. **P. Thiruvarangiah v. D. K Pania & Co.**, 38 M.L.J. 410—48 Ind. Cas. 678. See Final Part, 1917, Col. 827.

(3) Purchase of goods by sample or after inspection—Warranty of commercial quality if implied. See CONTRACT ACT, No 64, 85 M. L.J. 180.

Sale of Goods—(Concluded).

(4) C.I.F. contract—Purchase of goods under, from a commission agent—Agent, C.I.F. vendor—Agency, whether still subsisting—Goods purchased on principal's behalf and at his risk—Outbreak of war while goods are in transit in an enemy ship—Loss, whether to be borne by the agent or by the principal—Indian Contract Act (IX of 1872), S. 222—Agency between vendor and vendee—Effect of, on C.I.F. contract See PRINCIPAL AND AGENT, No. 7, 35 M L J. 184.

Sale of Minor's Estates.

See MAD. REG. X OF 1831.

Sale Proclamation.

(1) Valuation in, Objection to, by judgment-debtor—Order overruling objection, Appeal of lies from—Civ. Pro. Code (1909), S. 47. No appeal lies from an order of the executing Court overruling the objection of the judgment-debtor to the valuation in the sale proclamation put in by the decree-holder **Bejoy Kelahang Nandy v. Dharnendra Krishna Deb**, 47 Ind. Cas. 512.

FLETCHER and SHAMSUL HUDA, JJ.

References.—10 Ind. Cas 371, 14 C L J 88; 16 C W N 194; 17 Ind. Cas 88=16 C.W.N. 970, relied upon.

(2) Property to be sold, Value of, Mode of reckoning—Twenty times the Government Revenue, Validity of

A Court's order to reckon the value of the property to be put up for sale in execution of a decree at twenty times the Government Revenue is only a colourable pretence of exercising the jurisdiction vested in it by law to ascertain the value of the property and record it in the sale proclamation. **Jaggannath Pershad v Chitragupta Karala Singh**, 3 Pat.L.J. 580.

ROE and JWALA PRASAD, JJ.

(3) Civ Pro. Code (1909), O. XXI, r 66, Under—Order settling terms of—Appeal if lies from See APPEAL (GENERAL), No 28-b, 46 Ind Cas. 564.

(4) Issue of, before disposal of objections of judgment debtor—Validity See CIV. PRO. CODE (1909), No 339, 43 Ind. Cas. 450

(5) Rent wrongly stated in—Rent, Recovery of, at a higher rate, if precluded by. See ESTOPPEL, No. 4, 46 Ind. Cas. 474.

Sanction to Prosecute.

(1) Tribunal constituted by Calcutta Improvement Act (V of 1911) and Calcutta Improvement (Appeals) Act (XVIII of 1911), if mere body of arbitrators or Court also under S. 195, Crim Pro. Code—Court of Justice in S 20, Penal Code—S. 3, Evidence Act, 1872.

The tribunal constituted by the Calcutta Improvement Act of 1911 cannot be regarded simply as a body of arbitrators, but must also be regarded as a Court for the purposes of S. 195.

Sanction to Prosecute—(Continued).

Crim. Pro. Code. The word "Court" in S. 195, Crim. Pro. Code, has a wider meaning than a "Court of Justice" as defined in S. 20 of the Penal Code and may include a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination. *Nanda Lal Ganguli v. Khetra Mohan Ghose*, 45 O. 585=27 C.L.J. 463.

CHITTY and SMITHER, JJ.

References:—17 C. 872; 22 C.W.N. 165, R; 27 B. 421, Not F.

- (9) *Civ. Pro. Code (Act V of 1908), S. 115—Cantonment Magistrate exercising Small Cause Court powers—Prosecution ordered by—Civil case—Revision.*

A Cantonment Magistrate, exercising the powers of a Small Cause Court, ordered a decree-holder to deposit diet money for his judgment-debtor, who was about to be arrested. The decree-holder complained to the Cantonment Magistrate that one Mul Chand, Ahalmad of the Collector's Court, had refused to accept the money which he had tendered. There was a report by the Cantonment Magistrate to the Collector, who reported that the decree-holder's statement was false and recommended his prosecution under S. 182 of the Indian Penal Code. The Cantonment Magistrate thereupon sanctioned the prosecution: *Held*, in revision, that the matter was of a civil nature and could not be brought up on the criminal side; and, treating it as a civil matter it was impossible under S. 115 of the Civ. Pro. Code to interfere. *Ram Prasad v. Emperor*, 16 A.L.J. 931.

TUDBALL, J.

- (3) *Subordinate Judge's order granting or revoking Appeal from—Crim. Pro. Code, S. 195 (7).*

Appeals from the order of the Subordinate Judge granting or revoking sanction to prosecute lie only to the District Judge, irrespective of the question of the valuation of the suit. *Bhalro Prasad v. Harihar Prasad*, 45 Ind. Cas. 679=19 Cr.L.J. 631.

SIR ALI IMAM, J.

References:—22 C. 487; 17 A. 51, F.

(4) *Institution of false suit and obtaining decree—Application for sanction—Penal Code, Ss. 193, 210—Decree not set aside—Petition, if maintainable—Revision—Civ. Pro. Code (1908) S. 115—Provincial Small Cause Courts Act (1887), S. 25—Government of India Act (1915), S. 107—Delay in applying for sanction—Effect. Jageshwar Pershad v. Ragho Misser 2 Pat. L.J. 688=4 Pat. L.W. 143=19 Cr.L.J. 146=48 Ind. Cas. 434. See Final Part, 1917, Col. 881.*

(5) *Application for, Agreement to withdraw, Void as against public policy—Contract Act (1872), Ss. 16, 23—Non-compoundable offence,*

Sanction to Prosecute—(Concluded).

Sanction to prosecute, application for, Compounding of: See AGREEMENT, 46 Ind. Cas. 424.

(6) *Perjury—Statements not altogether irreconcilable. See PENAL CODE, No. 1-a, 19 Cr. L.J. 234.*

Secondary Evidence.

(1) *Document, original not found, Admissibility of. See EVIDENCE, No. 4, 46 Ind. Cas. 344.*

(2) *Language of document clear and easily applicable to facts of case—Admissibility of extrinsic evidence to interpret document. See EVIDENCE ACT (I OF 1872), No. 45, 40 Ind. Cas. 491.*

(3) *Mortgage—Arrangement by which a mortgagor secures release from personal liability—Covenant in mortgage deed requiring payments towards mortgage to be endorsed on its back if precludes proof of arrangement. See EVIDENCE ACT, No. 34, 42 Ind. Cas. 615.*

(4) *Oral agreement to receive less than due under registered mortgage—Admission in pleadings of such oral agreement—Oral agreement if admissible in evidence. See EVIDENCE ACT, No. 18, 35 M.L.J. 555.*

Secretary of State.

Suit against—Bengal Tenancy Act (1885), S. 104-H, under—Civ. Pro. Code (1908), S. 80, Notice under—Two months during which notice current, if to be excluded in the calculation of limitation. See LIMITATION, No. 9, 46 Ind. Cas. 899.

Security.

Decree amount and costs, for—For stay of execution pending appeal—Dismissal of appeal—Decree-holder, Rights of, to enforce decree if affected by security. See EXECUTION OF DECREE, No. 21-a, 48 Ind. Cas. 454.

Security for Costs.

- (1) *Suit by an undischarged insolvent—Security for costs—Cause of action accruing after the order of adjudication—Amount claimed in excess of the debts provable in insolvency—Intervention of the Official Assignee—Nominal plaintiff—Civ. Pro. Code (Act V of 1908), S. 151.*

An undischarged insolvent brought an action for the recovery of a sum due in respect of brokerage from the defendant and earned by him subsequent to his adjudication, the amount claimed being in excess of the amount of his debts provable in insolvency. The defendant applied for an order that the plaintiff be directed to give security for costs of the suit.

Held—That the plaintiff was not a nominal plaintiff suing merely for the benefit of the Official Assignee and so no order for security for costs should be made.

Security for Costs—(Concluded).

That the application is not covered by any provision in the Code of Civil Procedure, but that Code is not exhaustive and it must be dealt with under the general law.

That it is well settled in English Law that a cause of action which accrues to a bankrupt subsequent to the adjudication in respect of the after-acquired property, remains vested in him and does not vest in his trustee in bankruptcy and that he is the proper plaintiff to sue in respect thereof and that anything recovered by him remains in the bankrupt until the trustee intervenes and the same principles are applicable in this country.

That it is also well settled that a plaintiff will not be compelled to give security for costs merely because he is a pauper or a bankrupt (a). *B. D. Murray v. East Bengal Mahajan Flotilla Co., Ltd.*, 22 C.W.N. 1018.

GREAVES, J.

References:—*Rhodes v. Dawson*, 16 Q.B.D. 548 at p. 558; *Cook v. Wnellock*, 24 Q.B.D. 558 at p. 659; *Cook v. Taylor*, 31 Ch. Div. 34 at p. 38, R.

(2) *Civ. Pro. Code (Act V of 1908)*, O. XLI, r. 10—*Application for security for costs, when to be made.*

Held, that an application for security for costs must be made promptly, not only on the ground that the respondent should apply for security for costs before he incurs them, but also on the ground that it is unreasonable that security should not be applied for till the appellant has incurred costs of the appeal (a).

An appeal was preferred on the 17th July, 1913, and was admitted on 11th October, 1913, and the application for security for costs was not made till the 29th March, 1917, when the appellant had incurred all the costs of printing the paper book and engaging counsel. The appeal had been fixed for hearing for no fewer than four times and had been actually heard on the 3rd January, 1917, when the Court decided that the appeal *in forma pauperis* could not be entertained and directed the appellant to pay the Court-fee leviable on the memorandum of appeal, which order was complied with on the 26th February, 1917, more than one month before the application was made.

Held, that the application was a belated one and could not be entertained (b). *Dalip Koer v. Jagir Singh*, 20 P.L.R. 1918-41 P.W.R. 1918-44 Ind. Cas. 28.

SHADI LAL, J.

References:—(a) (1886) 33 Ch. D. 76 ; 56 L.J. Ch. 41; 55 L.T. 462; 5 C.W.N. 119; 17 M.L.J. 588; A.W.N. (1869) 149, F.

Seduction.

No promise of marriage—Seduction resulting in pregnancy—Cause of action for damages to person seduced. See **BUDDHIST LAW (MARRIAGE)**, No. 1, 42 Ind. Cas. 589.

Self-acquisition.

(1) Property earned from gains of science of learning—How far joint family or. See **HINDU LAW (JOINT FAMILY)**, No. 3, 20 Bom. L.R. 566.

(2) Mopla in Burma, O.—Devolution of— if under Mahomedan Law or Marumakkathayam Law See **MARUMAKKATHAYAM LAW**, 46 Ind. Cas. 792.

Separate Suit.

(1) *Civ. Pro. Code (Act V of 1908)*, S. 47—*Hindu Law—Mitakshara—Suit on mortgage against father and son—Son exempted in the decree—Simple money decree against father—Execution against son disallowed—Subsequent suit against son barred.*

A suit was instituted against a Hindu father and his son (who were members of a joint Hindu family governed by the *Mitakshara* Law) on the basis of a mortgage. The son contested his liability on the ground that there was no legal necessity. The result was that a simple money decree was granted against the father alone and in the decree it was stated that the son was "exempted" and costs were given to him against the plaintiff. On the decree being executed, the sale of the father's share proved insufficient to pay off the decree. Thereupon, it was sought to attach and sell the son's share but upon objection being made by the son, he succeeded. A suit was accordingly brought against the son for a declaration that the son's share was liable to be sold in execution on the ground of his pious liability:—*Held* that the suit was barred by the provisions of S. 47 of the *Civ. Pro. Code*. *Held*, also, that the expression in a decree exempting a particular person was inaccurate and the operation of the decree was to dismiss the suit against that particular defendant. *Data Din v. Nanku*, 16 A.L.J. 752=47 Ind. Cas. 864.

RICHARDS, C.J. and TUDBALL, J.

References:—39 A. 437=15 A.L.J. 497 (P.C.), R.

(2) *Suit, if less—Civ. Pro. Code (Act V of 1908)*, S. 47—'Party'—'Representatives.'

If the property claimed by A in his personal capacity was sold, in execution of a decree passed in a suit in which he was sued in a representative character, as, the property of B, it was open to A to apply under S. 47 of the Code of Civil Procedure to have the sale set aside. A separate suit was not maintainable. *Khitish v. Thakomani*, 27 C.L.J. 572=46 Ind. Cas. 458.

RICHARDSON and WALMSLEY, JJ.

References:—17 C. 711, F.; 30 C. 134, B.

(3) *Civ. Pro. Code (1908)*, S. 47, O. XXI, r. 95—*Purchase of judgment-debtor's property at execution sale by decree-holder with Court permission—Summary remedy of r. 95 not availed of by decree-holder—Decree-holder if precluded from bringing separate suit for possession of property purchased by him.*

Separate Suit—(Continued).

A decree-holder, with the permission of the executing Court, purchased his judgment-debtor's property at the sale held in execution of his decree. In a regular suit subsequently brought by him to recover possession of the house on the strength of the auction sale, held that such a separate suit was not barred either by S. 47, Civ. Pro. Code, or by his failure to avail himself of the summary remedy provided by O. XXI, r. 95, or by the fact that he sought it but was unsuccessful, as the summary remedy provided by r. 95 is concurrent with the alternative remedy by separate suit (a). *Ghatha Ram v. Musammatt Karmon Bai*, 8 P.R. 1918=44 Ind. Cas. 169.

SHAH DIN, C.J. and LE-ROSSIGNOL, J.

References:—(a) 31 A. 82 (F.B.), F.; 58 P.R. 1888, Dist.

(4) Cause of action merged in decree in suit thereon—Subsequent remedy is in execution—Execution if barred, no separate suit. See MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS), No. 2, 7 L.W. 143.

(5) Partition proceedings—Suit for possession decreed by Privy Council after determination of partition, but without reference to it—Question whether decree of Privy Council should be executed against original shares claimed in plaint or those allotted on partition—Separate suit, if necessary therefor—Decision of High Court that question should be determined in execution proceedings, if final order, liable to appeal. See APPEAL TO PRIVY COUNCIL, No. 11, 3 Pat. L.J. 399.

(6) Assignment of decree if may be questioned in execution proceedings as *benami*—Proper procedure where liability of parties has to be altered. (See ASSIGNMENT OF DECREE, No. 2, 22 C.W.N. 491.

(7) Application for execution of surety bond—Dismissal of application and reference to separate suit—Dismissal of such separate suit on ground of execution application being proper remedy and for non-joinder of parties—Fresh application to execute surety bond if barred by rule of *res judicata*. See EXECUTION OF DECREE, No. 24, 21 O.C. 188.

(8) Breach of permanent injunction, Remedy for—Separate suit or application for execution. See INJUNCTION, No. 1, 22 C.W.N. 851.

(9) Refusal by liquidating Court to give preference to certain debt—Appeal from order of refusal dismissed by Chief Court as barred by limitation—Regular suit if lies to re-open question of preference. See LIQUIDATION, 40 F.R. 1918.

(10) Property alleged to be held in *benami* for insolvent if may be recovered without suit. See PROVINCIAL INSOLVENCY ACT, Nos. 10, 14, 15, 27, 22 C.W.N. 700, 702, 704, 709.

Separate Suit—(Concluded).

(11) Person in possession holding up as a shield payments made towards prior mortgages—Suit decreed subject to his lien—Final decree made without mention of lien—Property sold and purchased by mortgages—Dispossession of person in possession—Maintainability of suit by such person to recover money paid for prior mortgages. See RES JUDICATA, No. 5, 16 A.L.J. 685.

(12) Usufructuary mortgages incurring expenses to protect title to mortgaged property—Mortgages not bound to wait for recovering expenses till redemption—Separate suit lies therefor. See TRANSFER OF PROPERTY ACT, No. 56, 34 M.L.J. 177.

Service.

(1) Entry in order sheet, if sufficient proof of service of notice. See BEN. ACT VIII OF 1885 (TENANCY), No. 84, 22 C.W.N. 788.

(2) On pattadar who is not the real owner at the date thereof, sufficiency of. See MAD. ACT XI OF 1861 (REVENUE RECOVERY), No. 1, (1918) M.W.N. 191.

(3) Of notice to quit—On one joint tenant it raises presumption of notice reaching others—Delivery by post of notice—Effect of registering letter containing notice. See NOTICE TO QUIT, No. 1, 16 A.L.J. 969.

Service Grants.

Berar Inam Rules, r. 14 (2)—Alienation of Service Grants if always requires sanction of Deputy Commissioner—Lease by Manager of Hindu temple, Validity of.

R. 14 (2) of the Berar Inam Rules, which clearly refers to a permanent alienation of service grants such as a gift or exchange does not contemplate sanction to a temporary alienation by lease being obtained from the commissioner by the alienor or alienee.

The validity of a lease by the Manager of a Hindu temple depends upon the questions as to whether the money borrowed was for the purposes of the temple, whether the loan was justified by an existing necessity and whether the lease was one, which a prudent owner would be justified in making. *Narasalingdas v. Aladad Khan*, 14 N.L.R. 12=43 Ind. Cas. 384.

MITTRA, A.J.C.

Reference:—14 B.L.R. 450, F.

Service Inams.

(1) Inam—Service inam attached to Karnam office—Enfranchisement—If inam lands vest in joint family only or in divided branches of original grantees also—Madras Act III of 1895, S. 10 (2).

A family, having a hereditary right to the office of Karnam, have only a contingent right to the inam lands attached to the office till the time of enfranchisement of the inam. On

Service Inam—(Concluded).

enfranchisement' taking place, the property vests in the members of the family, who live jointly with the last holder of the office, but the divided members get no right. *Pyappu v. Syama Rao*, (1918) M.W.N. 849.

SPENCER and KRISHNAN, JJ

References.—26 M. 339, 30 M. 434, (1915) M.W.N. 838—89 M. 930, *Dist.*, (1915) M.W.N. 747; Appeal No. 178 of 1917 (Madras H. C. Unrep.), S. A. No. 222 of 1896 (Madras H. C. Unrep.), R.

(3) Grant purporting to have been made *Jivak Badai*—Suit by daughter of late male Vatanidar for her share of Vatan—Grant not service inam—Right of female to inherit to Vatan. See BOM ACT V of 1846 (VATAN), No. 1, 20 Bom. L.R. 983.

Service of Summons.

(1) *Civ. Pro. Code* (1908), O. V. r. 10 and 17, Rules re—*Delivery or tender of summons to defendant, Effect of—Irregularity by process-server or ministerial officer Effect of—Quod fieri non debet, factum valet, Doctrine of Applicability of*

O. V. r. 10 of the *Civ. Pro. Code* (1908), lays down the main rule that service shall be made by delivering or tendering a copy of the summons signed and sealed in a prescribed form. Whenever such delivery or tender has been made to the defendant personally, service is complete, and no subsequent irregularity by the process server or other ministerial official of the Court such as the omission of the process server to obtain the signature of the defendant can undo it. Such a case is particularly of a kind to which the maxim *quod fieri non debet, factum valet*, seems applicable.

But where the service is not personal, the necessity for insisting on a strict compliance with the prescribed procedure arises. *Gopaladas Ghedharilal v. Islu*, 46 Ind. Cas. 277.

STANFORD, A.J.C.

References.—26 C. 101—2 C.W.N. 574—13 Ind. Dec. (N.S.) 669, *Appl.*, 16 D. 117—3 Ind. Dec. (N.S.) 553, *Disc.*

(2) Summons duly served in *Civ. Pro. Code*, O. V. r. 19, meaning of See LIMITATION ACT (1908), No. 200, 42 Ind. Cas. 611.

(3) Of summons—Copy delivered to defendant but no acknowledgment of receipt endorsed by him—Service if proper either under r. 16 or r. 17 of *Civ. Pro. Code*. See SUMMONS, No. 1, 99 P.R. 1918.

Service Tenure.

(1) Bhumak, if a village servant—Right to hold lands for service as bhumak—*Central Provinces Tenancy Act*, S. 55

A bhumak is a private servant of the malgusar and his service is not village service, and his right is not governed by the provisions of Chap. V of the Tenancy Act. Being bound to do the work of the malgusar in addition to a bhumak's work, he is liable to be ejected, in

Service Tenure—(Concluded).

case he refuses to do such work, from land held for such service. *Bala v. Ballabhdas*, 14 N.L.R. 152—46 Ind. Cas. 779.

KOTVAL, A.J.C.

(2) Cases to which S. 1 of *Chaukidari Chakran Act* does not apply. See BEN ACT VI OF 1878 (VILLAGE CHOWKIDARI), No. 2, 28 O. L.J. 281.

(3) Lease providing option of landlord to receive money rent or eject tenant in failure by tenant to render service—Effect. See LANDLORD AND TENANT, No. 39-a, 45 Ind. Cas. 611.

(4) Right of occupancy if can be acquired in land held under. See OCCUPANCY TENURE, No. 3, 28 C.L.J. 249.

(5) Occupancy right, if can be acquired in land under. See OCCUPANCY TENURE, No. 7, 23 C.W.N. 136.

(6) Palayam held on condition of rendering military and police services, alienability of. See UNSETTLED PALAYAM, 34 M.L.J. 563.

Set off

(1) Money left with vendees for payment to mortgagee of vendor—Property in charged to secure sum different from property sold—Vendees paying interest to mortgagee owing to vendor's delay in registration of sale deed—Vendor's suit for balance of unpaid purchase-money—Set off if assumable by vendees for interest paid by them. See CONTRACT ACT, No. 45, 16 A.L.J. 581.

(2) Transfer of execution proceedings to Collector—Application for leave to bid at execution sale to be made to Collector—Set-off, if can be allowed by Court or Collector. See EXECUTION OF DECREES, No. 6, 20 Bom. L.R. 708.

(3) Pre-emption suit—Joinder of claims—Interest to which pre-emptor is entitled—Money left with vendee out of sale price—Vendee's failure to discharge encumbrance—Right to set off. See PRE-EMPTION, No. 19, 21 O.C. 269.

Setting aside Decree

(1) *Suit to set aside a decree as fraudulent—Suit when lies—Decree if open to attack as having been made on perjured evidence.*

The mere fact that the decree was obtained by false evidence would not be sufficient by itself to have it set aside by suit. The case itself must be found to be a fraudulent one. *Kalshur Goswami v. Amiruddin Gasi*, 23 C.W.N. 133—47 Ind. Cas. 14.

FLETCHER and SHAMSUL HUDA, JJ

References.—39 C. 395 (P.C.), 38 C. 936, R.

(2) Application to set aside *ex parte* decree—Applicant's want of knowledge of decree, Burden of proof of. See BURDEN OF PROOF, No. 10, 145 P.W.R. 1918.

(3) Judgment obtained by false evidence and suppression of evidence—Suit to set aside such decree if lies. See JUDGMENT, No. 3, 34 M.L.J. 590.

Setting aside Ex parte Decree.

- (1) *Final decree in mortgage suit passed ex parte—Application to set aside such decree, if maintainable—Civ. Pro. Code (1908), O. IX, r. 13.*

There is nothing in the language of r. 13, O. IX, Civ. Pro. Code (1908), to limit the word "decree" to the preliminary decree in a case where the law contemplates preliminary and final decrees, and an application to set aside an *ex parte* final decree can be made under the said rule. *Kanakasundaram Pillai v. Somasundaram Pillai*, 35 M.L.J. 375.

ABDUR RAHIM and KUMARASWAMY SASTRI, JJ.

(2) Dismissal of appeal for default on death of appellant if valid—Acceptance of appeal against party before service of notice of appeal on legal representative, if valid. See *APPEAL (GENERAL)*, No. 33, 96 P.R. 1918.

(3) Plea of defendant of ignorance of decree as ground of application for—Report of Nazir if admissible after his death to prove knowledge. See *SUMMONS*, No. 1, 99 P.R. 1918.

Setting aside Sale.

- (1) *Decree—Execution of decree—Property sold and purchased by one decree-holder—Application by judgment debtor with consent of decree-holder to set aside sale—Court refuses to set aside—Court's power to set it aside.*

In execution of a decree certain property belonging to the judgment debtor was sold and purchased by one of the decree-holders. In the Court below, judgment-debtor and the decree-holders (one of whom was also the purchaser) applied to get the sale set aside on the ground of inadequacy of price. The Court refused to set aside the sale on the ground that it had no power in law to set it aside when the judgment-debtor and the decree holders consented:—*Held* that the Court had power to set aside the sale, as there was no opposition on the part of the decree-holders or the purchaser. *Muhammad Abdul Rashid Ali v. Budh Sen*, 16 A.L.J. 750—47 Ind. Cas. 885.

RICHARDS, O.J. and TUDBALL, J.

- (2) *Civ. Pro. Code (Act V of 1908), Sec. 47, 144, 151—Ex parte decree—Sale of house in execution—Ex parte decree subsequently set aside—Retrial ends in a decree in plaintiff's favour—Application to set aside sale—Limitation Act (IX of 1908), Arts. 166, 181—Time within which application to be made—Sale set aside on defendant paying up amount of the second decree.*

The plaintiff obtained an *ex parte* decree for Rs. 86 against the defendant in 1906, in execution of which the defendants house was sold and purchased by the plaintiff in 1910. Subsequently, the defendant succeeded in getting the *ex parte* decree set aside and in having the case re tried: but the result was that a decree for Rs. 97 was passed in plaintiff's favour in 1914.

Setting aside Sale—(Continued).

The defendant next applied to have the previous sale of the house in execution set aside:

Held, (1) that the previous sale of the house in execution under the previous decree which had been set aside, should itself be set aside as having been no longer based on any solid foundation;

(2) that the order setting aside the sale could be passed under S 47 or S. 144 or 151 of the Civ. Pro. Code (1908);

(3) that the application was quite in time under the provisions of Art 181 of the Limitation Act, the cause of action having accrued upon the setting aside sale of the *ex parte* decree in 1914;

(4) that, under the circumstances, the sale should be set aside subject to the condition that the defendant should pay up the amount due from her under the second decree within a specified time. *Shivbal Babya Swamy v. Yesu Cheso Nayakin*, 20 Bom. L.R. 935.

HEATON and HAYWARD, JJ.

References:—7 Bom. L.R. 585, *Dist.*; 10 A. 166; 27 O. 810, R.

(3) Rent decree—Sale in execution—Right of judgment-debtor's donee or reversioner to deposit decretal amount and avoid sale. See *BEN. ACT VIII OF 1886 (TENANCY)*, No 80, 3 Pat. L.J. 145.

(4) Order setting aside sale on ground of fraud in conducting sale—Order not a decree—Only one appeal from order—No second appeal. See *APPEAL (SECOND APPEAL)*, No. 14, 3 Pat. L.J. 645.

(5) Auction purchaser entitled to benefit of his purchase if rules of code not strictly complied with—Deposit of money by judgment-debtor not made within time and not made with application to set aside sale—Appeal by auction-purchaser from order setting aside sale—Appellate order confirming sale—Judgment-debtor if can apply in revision. See *CIV. PRO. CODE (1908)*, No. 344, 16 A.L.J. 433.

(6) Purchase and possession of holding by landlord in execution of decree for arrears of rent against tenant—Fraudulent suppression of processes necessary to be served on judgment-debtor—Omission of service on notice under Civ. Pro. Code (1908), O. XXI, r. 22, vitiates sale—Burden of proving knowledge of fraudulent suppression of facts and processes lies on party guilty of fraud—Remedy of person aggrieved by fraudulent suppression of processes if lies under S 47, Civ. Pro. Code (1908). See *EXECUTION SALE*, No. 1, 27 O.L.J. 528.

(7) Proclamation of sale, Irregularity in. On ground of—Right of fishery over a stream extending 30 to 40 miles and flowing over 138 villages, Sale of—Affixing copy of order directing sale in only one village, if irregular procedure—Civ. Pro. Code (1908), O. XXI, r. 54. See *EXECUTION SALE*, No. 1-a, 44 Ind. Cas. 412.

Setting aside Sale—(Concluded).

(8) Bengal Land Revenue Sales Act (XI of 1859), ss. 3, 5, 6, 83—Sale for arrears of Government revenue—Illegality and irregularity. Distinction between—Official Gazette—Publication in Vernacular Gazette unnecessary. See REVENUE SALE, No. 6, 35 M L.J. 644 (P.C.).

Settlement.—

False representation as to rights of plaintiff—Consequent surrender of such rights for nominal consideration—Transaction if binding settlement. See MAHOMEDAN LAW (GIFT), No. 1, 28 C.L.J. 806.

Shamlat.

(1) Sale of specific land with share in village shamlat—Suit for pre-emption in re, such sale. See LIMITATION ACT (1908), No. 110, 68 P.R. 1918.

(2) Right of cultivating tenants to graze cattle on village shamlat—Tenants not parties to *waqf ul ars*—Tenants if disentitled to grazing rights. See PASTURE, No. 1, 122 P.R. 1918.

(3) Building erected on village shamlat—Right of some of proprietary body to sue for its removal without proof of special damage. See PUBLIC NUISANCE, No. 1, 176 P.W.R. 1918.

Share Certificates

- (1) Shares—Transfer by a person in possession—Contract Act (IX of 1872), S. 108—Obtaining possession by fraud—Transfer to a bona fide purchaser for value—Negotiability by custom—Share certificate with blank transfers, whether negotiable—Negotiability by estoppel—"Goods," meaning of—Remedy of the bona fide purchaser for value—Costs

Share certificates accompanied by transfer deeds endorsed in blank by the registered holder are not negotiable.

Before an instrument can be considered negotiable, it must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name, and it must be by the custom of trade transferable, like cash, by delivery (a).

The right principle to adopt with reference to such blank transfers duly signed by the registered holder of the shares is to hold that each prior holder confers upon the bona fide holder for value of the certificate for the time being an authority to fill in the name of the transferee and is estopped from denying such authority; and to this extent, and in this manner, but no further, he is estopped from denying the title of such holder for the time being (b).

The plaintiff firm claim to be the owners of 25 jute shares which they purchased from the defendant L on the 7th May 1917, and got their names registered in the books of the company. At the time of the sale, the plaintiff obtained possession of the certificate for the said shares and a blank transfer deed signed,

Share Certificates—(Concluded).

by the registered holder. The defendant L, bought the said shares from one U, who fraudulently obtained possession of them from the defendant S, who was the owner of the said shares. It was not clear what was the nature of the transaction between the defendants L and U. The purchase by the plaintiff was bona fide and for value.

Held—That the plaintiffs did not acquire any title to the said shares and were entitled to the value they paid for them from the defendant L with interest.

The expression "goods" in S. 108 of the Contract Act includes all moveable property. *Hazarimull Shohanlal v Satis Chandra Ghosh*, 22 O.W.N. 1036.

CHAUDHURI J.

References—(a) *Swan v. North British Australasian Co.*, 32 L.J. Ex. 273, *London and County Banking Co v London and River Plate Bank*, 20 Q.B.D. 232, R. (b) *Colonial Bank v. Hepworth*, 36 Ch. Div. 36, R.

(2) Shares—Transfer by a person in possession—Juridical possession—Possession for a particular purpose—Contract Act (IX of 1872), S. 108—Bona fide purchaser for value—Share certificate with blank transfer deeds, whether negotiable—Usage.

The defendant Bank bought 25 jute shares for one of their constituents, which consisted of the share certificate and a blank transfer deed signed by the registered holder, which were made over by the officer in charge of their Sale Custody Department to the Head Clerk of that Department in usual course. The clerk fraudulently disposed of them to Sham Das Sil, who again sold them to other persons. The plaintiff firm bought them from the defendant firm of Baijnath Champalall. Both the plaintiff firm and the defendant firm were bona fide purchasers for value.

Held—That the Head Clerk was not in possession of the shares within the meaning of S. 108 of the Contract Act and that the plaintiffs acquired no title in them (a).

Held, also, that the share certificates with blank transfer deeds signed by the registered holder were not negotiable instruments (b). *Roop Chand Jankidas v The National Bank of India*, 22 O.W.N. 1042.

CHAUDHURI J.

References—(a) 12 B.L.R. 43, R. (b) 22 C.W.N. 1036, R.

Share.

(1) Company—Liquidation—Shareholder's right to be removed from the list of contributors, Principles governing—Liability as contributory how far affected by fraud or misrepresentation—Share holder when can have his contract to take shares set aside—Repudiation. See CONTRIBUTORY, No. 2, 42 P.R. 1918.

(2) Mere deposit, without transfer of, it creates rights superior to Crown's. See CROWN DEBTS, No. 1, 22 C.W.N. 793.

Shebait.

Office of, if can be acquired by adverse possession. See RELIGIOUS ENDOWMENTS, No. 8, 3 Pat. L J. 327

Ship.

Common ownership of, if gives rise to partnership or only tenancy in common—Law as to earnings by employment of such ship. See PARTNERSHIP, No. 5, 35 M.L.J. 87.

Shipping.

Delivery to be taken at wharf—Consignee's delay to take delivery—Petition of ship owner—Bailee. See CONTRACT ACT, No. 71, 8 L.W. 4 (P.G.).

Shrine.

Religious Endowment—Wakf—Secular property—Alienation—Management of shrine—Right to share—Abandonment of right—Sale of share in offerings

Held, that there is no reason for holding that a re-transfer to the descendants of an heir of a part of the right to share in offerings, which he had lost by abandonment, was invalid, when the alienation in no way contravenes any principles which can be necessary to the harmonious management of the shrine. *Inayat Shah v. Kadar Bakhsa*, 43 P.L.R. 1918=94 P.W.R. 1918=46 Ind. Cas. 444.

LESLIE JONES, J.

Reference—106 P.R. 1892, R.

Silence.

Sale of Hindu joint family property—Long silence of members of family entitled to object to sale—Silence if amounts to consent to sale. See HINDU LAW (ALIENATION), No. 13, 21 O.C. 156.

Small Courts Act.

See BOM ACT XII OF 1866.

Slander.

False and malicious publication—Privileged communication made in matters concerning self protection—Bona fide belief—Damages.

The defendant who was the general manager of the estates of the plaintiffs told two of his subordinates that he had been poisoned and that the plaintiffs were at the bottom of it. In an action for slander it was found that relations were very strained between the parties that the defendant bona fide believed that the plaintiffs wanted to get rid of him, that he was in fact ill for a few days previous to the communications with symptoms approximating to poisoning, and that he made the communications complained of with the object of starting enquiries regarding the truth of his suspicions as to the plaintiffs' guilt.

Held—That the communications were privileged as they were made in the conduct of

Slander—(Concluded).

his own affairs in matters where his interest was concerned, although the persons to whom they were made had no interest in the matter. *Leslie Rogers v. Hajee Fakir Muhammad Salt*, 36 M.L.J. 673=24 M.L.T. 461.

WALLIS, C.J. and SESHAGIRI Aiyar, J.

References.—8 M., 175; *Harrison v. King*, (1817) 4 Price 46; *Tozer v. Mashford*, (1851) 6 Ex. 539; *Simmons v. Michal*, (1880) 6 A.C. 756; *Force v. Warran*, (1864) 15 O.B.N.S. 806; *Whitely v. Adams*, (1863) 15 O.B.N.S. 392 (418); *Stuart v. Bell*, (1891) 2 Q.B. 341; *Coxhead v. Richards*, (1846) 2 C.P. 569, R.; *Toogood v. Spyring*, (1834) 1 C.M. and R. 181, F.

Slavery Bond.

Terms of agreement in respect of money borrowed, when resemble—Enforceability of such bond—Public policy. See VOID AGREEMENT, 27 C.L.J. 459.

Small Cause Court.

(1) *Jurisdiction of—Maintenance, suit for arrears of—Fixed maintenance—Provincial Small Cause Courts Act (IX of 1887), Sec. II, cl. 38. Moniruddin v. Samirunnissa Bibi*, 15 A.L.J. 857=40 A. 52 See Final Part, 1917, Col. 843.

(2) *Plaintiff and defendant jointly carrying on cultivation—Agreement by defendant to pay plaintiff half-share of profits—Suit to recover money due thereunder—Whether such money rent Ram Nath v. Sekhdar Singh*, 15 A.L.J. 862=40 A. 51=45 Ind. Cas. 323. See Final Part, 1917, Col. 843.

(3) *Bengal, N.W.P. and Assam Civil Courts Act (XII of 1897), S. 25—Courts vested with Small Cause Court jurisdiction—Suit, instituted in such a Court—Civ. Pro. Code (Act V of 1908), S. 21, cl. (4)—Suit, transfer of—Court of Small Causes, meaning of—Provincial Small Cause Courts Act (IX of 1887), Sec. 5, 16.*

A Court of Small Causes under S. 24 (4) of the Code of Civil Procedure, from which a suit may be transferred or withdrawn, does include Courts, vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Provincial Small Cause Courts Act. *Madhusudan Gope v. Behari Lal Gope*, 27 C.L.J. 461=44 Ind. Cas. 881.

TEJNON and NEWBOULD, JJ.

References.—8 M. 25; 15 A.L.J. 69, F.; 81 C. 1057, Diss.

(4) *Small Cause Court may attach and sell decrees for immoveable property.*

There is nothing in the Code of Civil Procedure to prevent a Small Cause Court attaching and selling a decree for immoveable property.

A decree relating to immoveable property is not immoveable property within the meaning

Small Cause Court—(Concluded).

of the chapter relating to execution. *Krishnaji v. Ballram*, 44 Ind. Cas. 252.

MITRA, A. J. C.

References:—1 A. 348, *Distd.*; 14 C.P.L.R. 5, *Appr.*; 26 B. 306; 37 M. 51; 39 M. 339; 35 B. 288; 80 M. 426; 16 B. 522; 38 A. 771, *R.*

(5) *Suit for contribution,* within the cognisance of. See *CONTRIBUTION*, No. 2, 45 Ind. Cas. 236.

(6) Suit to recover balance of consideration on mortgage—Jurisdiction of Small Causes Court. See *SPECIFIC PERFORMANCE*, No. 4-7, 34 M.L.J. 342.

Small Cause Court, Jurisdiction of.

(1) *Court of Small Causes jurisdiction of, to try suit for specific sum of money involving possible examination of accounts—Civ. Pro. Code (Act V of 1909), rr 6, 7, O. XLVI—Circumstances necessitating action under.* *Khetranath Banerjee v. Kali Das Dasi*, 1 C.W.N. 784=27 O.L.J. 96=41 Ind. Cas. 929. See *Final Par.*, 1917, Col. 844.

(2) *Definite and ascertained sum representing share of profits of land. Suit for account, what is—Cognisability, test to determine—Plaint, not written statement—Provincial Small Causes Courts Act (IX of 1897), S. 11, Art. 31.*

A claim to a definite and ascertained sum representing in money the share of the profits of land jointly owned by plaintiff with the defendant is cognisable by a Small Cause Court.

It is not necessarily a suit for account where accounts have to be looked into.

To determine whether or not a suit is within the cognisance of a Court of Small Causes the plaint has to be looked into and not the written statement. *Rajiva Narayan Sahay v. Kirat Narayan Singh*, 43 Ind. Cas. 755=3 Pat. L.J. 423=4 Pat. L.W. 70.

ROE and IMAM, J.J.

(3) Power of Court to attach before judgment immoveable property. See *ATTACHMENT BEFORE JUDGMENT*, No. 4, 14 N.L.R. 1.

(4) Suit for recovery of consideration money agreed upon for right of fishing in certain tank, if within cognisance of. See *FISHERY*, No. 2, 14 N.L.R. 36.

(5) See *PRESIDENCY SMALL CAUSES COURTS ACT (XV OF 1882)*.

(6) See *PROVINCIAL SMALL CAUSES COURTS ACT (IX OF 1897)*.

(7) Suit for money by vendor prepared to execute conveyance for recovery of price—Specific performance only asked for—Small Cause Court if can try suit. See *SPECIFIC PERFORMANCE*, No. 5, (1918) M.W.N. 896.

Small Cause Suit.

(1) Small Cause decrees, Execution of, Order in, if subject to second appeal—Civ. Pro. Code (1908), S. 102. See *APPEAL (SECOND APPEAL)*, No. 6-a, 43 Ind. Cas. 15=3 Pat. L.W. 132.

(2) Execution of decrees in, Order passed in, Second appeal, if lies—Civ. Pro. Code (1908), S. 102. See *APPEAL (SECOND APPEAL)*, No. 10, 46 Ind. Cas. 82.

Solenamah

(1) Admissibility in evidence—Whether registration is necessary. See *REGISTRATION ACT* (1908), No. 17, 43 Ind. Cas. 26.

(2) Contract embodied in—Solenamah set aside—Contract not liable to specific performance. See *SPECIFIC PERFORMANCE*, No. 3, 44 Ind. Cas. 225.

Solicitor

Discretion of Court in re—General rule—Costs of Solicitor appearing on his behalf. See *CONTRACT ACT (IX OF 1872)*, No. 4, 27 C.L.J. 78.

Sonship.

Person claiming jagir of deceased as posthumous son—Legitimacy to be proved beyond doubt—Onus of proof. See *CUSTOMS (PUNJAB—SUCCESSION)*, No. 9, 12 P.W.R. 1918.

Special Case.

Reopening of, to be by consent only. See *BOM ACT III OF 1888 (CITY OF BOM MUNICIPAL)*, No. 1, 20 Bom. L.R. 839.

Special Damage.

(1) Co owners, Suit by some, against others—Encroachment on village shamilat by some owners—Maintainability of suit for removal without proof of special damage—Special damage, meaning of—Special damage, whole proprietary body need not prove—High way, Obstruction to, Removal of, Proof of special damage not required for. See *CO OWNERS*, No. 3, 176 P.W.R. 1918.

(2) Mosque—Worshippers living in the vicinity—Suit for declaration that a permanent lease granted by mutwalli is void—No special damage need be proved. See *MAHOMEDAN LAW (WAKF)*, No. 4, 23 C.W.N. 115.

(3) Public path, Encroachment of, Suit for removal of, by private person—Proof of special damage. See *PLEADINGS*, No. 5, 45 Ind. Cas. 894.

(4) Meaning of—Encroachment in village shamilat by some owners—Right of a few to maintain action for its removal, without special damage—Whole proprietary body if should prove special damage—When proof of special damage not required for removing obstruction. See *PUBLIC NUISANCE*, No. 1, 176 P.W.R. 1918.

Special Damag —(Concluded).

(5) Infringement of village pathway—Obstruction—Cause of action—Proof of special damage not required. See *RES JUDICATA*, No. 9, 93 C.W.N. 91.

Specific Performance.

(1) *Contract to sell property by certificated guardian on behalf of minor, with Court's leave—Specific performance.*

Where a guardian of minors appointed by Court, with the Court's sanction, agreed to sell the minor's property to A at a price which was above that fixed by the Court:—

Held, that a suit by A for specific performance of the contract was maintainable. *Innatunnessa Bibi v. Janaki Nath Sarkar*, 22 C.W.N. 477.

N. R. CHATTERJEA and NEWBOULD, JJ.

References:—(a) 39 O. 232=11 C.W.N. 207, *Dist.*

(2) *Contract embodied in Solenamah—Solenamah set aside—Contract not liable to specific performance.*

Where a contract was embodied in a *Solenamah*, which *Solenamah* was set aside by the Court, the specific performance of the contract cannot be enforced, as there was no contract subsisting which could be put before the Court. *Jiban Krishna Chakravarthi v. Ramesh Chandra Das*, 44 Ind. Cas. 225.

CHITTY and SMITHER, JJ.

(3) *Delay in instituting suit—Whether amounts to laches.*

Merely delay in instituting a suit for specific performance of a contract is not sufficient to justify to hold that the plaintiff has been guilty of laches. The delay must be of such a character as to give rise to an inference of the abandonment of the right or should disclose any prejudice to the defendant. *Batulan v. Nirmal Das*, 44 Ind. Cas. 244=4 Pat.L.W. 192.

IMAM, J.

Reference:—33 C. 633, *F.*

(4) *Contract to grant lease. Of—Failure to disclose previous default at time of contract—If suppression of material facts—Specific performance, if can be refused on ground of—Specific Relief Act (1877), S. 22.*

Failure to disclose to the defendant, at time of entering into a contract to grant a lease, of the plaintiff's default in a previous transaction with the defendant himself, is not a sufficient ground to refuse to the plaintiff specific performance of the contract. *Manikya Bahadur v. Hashmat Ali*, 46 Ind. Cas. 558.

FLETCHER and SMITHER, JJ.

(4-a) *Suit for recovery of balance of consideration for mortgage—Suit for specific performance of agreement to lend money on mortgage—Jurisdiction of Small Cause Court barred.*

A suit for the recovery of the balance of money remaining unpaid towards the consideration for a usufructuary mortgage is a suit,

specific Performance—(Continued).

for specific performance, that is to say, a suit to enforce an agreement to lend money on a mortgage, and is not cognizable by a Court of Small Causes (a). *Rajagopala Aiyar v. Sheli Davood Rowther*, 34 M.L.J. 342=45 Ind. Cas. 161.

ABDUR RAHIM and BAKWELL, JJ..

References:—(a) 2 M. 79; 43 C. 59, *Rel. on.*

(5) *Suit for money by vendor, he being ready to execute conveyance—If suit is for specific performance or for damages—Small Cause Court, if has jurisdiction.*

In the case of a contract of sale, the remedy by specific performance is mutual; and, where a vendor brings a suit for recovery of the price, alleging he is ready to execute a conveyance, it is a suit for specific performance, and the Small Cause Court has no jurisdiction to entertain the suit.

Their Lordships accordingly ordered that the plaint be returned for presentation to the proper Court. *Bhashyakarl Naidu v. Nungambakam Andalammal*, (1918) M.W.N. 896.

WALLIS, C.J. and SESHAGIRI Aiyar, J.

(6) *Contract to sell—Suit for specific performance—Subsequent transferee for value without notice—Burden of proof—Issue not framed—Evidence let—Remand, whether necessary—Specific Relief Act (I of 1877), S. 27 (e)—Notice and unconscionable contract—Question of fact.*

Held, that, where the prior contract, of which the plaintiff seeks specific performance, is proved, a subsequent transferee from the vendor must prove that he is a transferee for value in good faith, and further that he had no notice of the plaintiff's contract.

Held, also, that a remand is not necessary, merely because no issue has been framed on a particular point when it appears that evidence was let on the point and the Court came to a finding with regard to it.

Held, further, that the *factum* of notice is a question of fact and not of law, so also is the question whether a contract is unconscionable. *Hamid Hussain v. Bhahe Sarup*, 187 P.W.R. 1918=46 Ind. Cas. 659.

LE-ROSSIGNOL, J.

References:—36 B. 446=16 Ind. Cas. 660=14 Bom. L.R. 634; 8 A.L.J. 680=33 A. 684=11 Ind. Cas. 934; 4 Pat. L.W. 152=44 Ind. Cas. 470; 38 A. 184=14 A.L.J. 111=32 Ind. Cas. 953; 14 N.L.R. 27=43 Ind. Cas. 940, *Appr.*

(7) *Suit for specific performance of unregistered contract of sale—Sale of same property by vendor to another by registered sale-deed—Burden of proving want of notice of prior contract lay on subsequent vendee. See BURDEN OF PROOF, No. 8, 14 N.L.R. 27.*

(8) *Suit for of contract of sale and for possession of land sold—Court-fee payable. See COURT FEES ACT (1870), No. 11, 128 P.W.R. 1918.*

Specific Performance—(Concluded).

(9) Agreement of transfer made by guardian—Specific performance, whether can be decreed against minor. See **GUARDIAN AND WARD**, No. 1, 45 Ind. Cas. 192.

(10) Right of third party to enforce—Doctrine as to certainty of time of performance. See **LIMITATION ACT** (1908), No. 154, 41 M. 18.

(11) Right reserved to patnidar by S. 51, Village Chaudidari Act—Transfer of chaudidari chakran lands—Enforcement of such right if by suit for possession or specific performance. See **LIMITATION ACT** (1908), No. 155, 16 A.L.J. 964 (P.C.)

(12) Mortgagee by deposit of title-deeds put into possession by mortgagor's consent and allowed to appropriate rents and profits towards interest—Right to retain possession of lands until payment of debt—Implied promise to execute necessary legal documents—Right of defendants to sue for specific performance of such promise. See **MORTGAGE (EQUITABLE MORTGAGE)**, No. 3, 9 L.B.R. 172.

(13) Unregistered agreement for permanent lease—Admissibility of lease in suit for specific performance of agreement—Nature of decree for specific performance and method of execution of such decree. See **REGISTRATION ACT** (1908), No. 32, 42 Ind. Cas. 633.

(14) Agreement to land or borrow—Specific performance of agreement if will be decreed. See **REGISTRATION ACT** (1908), No. 13, 24 M.L.T. 315.

(15) Decree for execution of lease in suit for specific performance of agreement to lease—Transfer of suit property thirteen days after decree before execution of lease—Transfer whether affected by rule of *lis pendens*. See **RELINQUISHMENT OF PORTION OF CLAIM**, No. 2, 14 N.L.R. 176

(16) Of agreement to sell—Agreement is to transfer full title to purchaser—Transfer of title, registered document necessary for—Execution of unregistered conveyance not sufficient performance of agreement—Right of vendee to proceed against vendors to compel them to fulfil their contract—Parties to suit. See **VENDOR AND PURCHASER**, No. 2, 27 C.L.J. 598.

Specific Relief Act (I of 1877).

(1) S. 9—*Possessory suit—Decree for land and crops thereon—Crops removed—Subsequent suit for price of crops—Question of title to land.*

The plaintiff brought a suit for the possession of certain land with crops standing thereon under S. 9 of the Specific Relief Act and got a decree. In executing his decree, he could not get the crops which had been removed. The plaintiff brought the present suit for recovery of the price of the crops. The defendants denied his title to the land. The first Court decreed the suit but reduced the

Specific Relief Act (I of 1877)—(Continued).

amount of damages claimed. The lower appellate Court remanded it for trial of the question of title:—*Held* that the defendants could not by cutting and removing the crops annul the effect of the possessory decree, and that the order of remand was bad. **Munna Singh v. Ansan Singh**, 16 A.L.J. 924.

RICHARDS, C.J. and TUDBALL, J.

(2) S. 9—*Suit for possession—Physical possession.* **San Hia Baw v. Hia Paw**, 9 Bur. L.T. 172=9 L.B.R. 160 See Final Part, 1916, Col. 1338.

(3) S. 9—*Suit if lies after property attached under Crim. Pro Code (Act V of 1898)*, S. 146.

Where, following upon the dispossession by defendant of the plaintiff, an order for attachment was made under S. 146, Crim. Pro Code, in a proceeding in respect of the same property under S. 145, Crim. Pro. Code. *Held*—That the plaintiff after this has no right to relief under S. 9 of the Specific Relief Act. **Azimuddin Ahmed v. Alaaddin Bhunja**, 22 C.W.N. 931=43 Ind. Cas. 153.

TEUNON and SHAMSUL HUDA, JJ.

References:—30 A. 331; 26 B. 353, *Not F.*; 7 C.L.J. 547, *F.*

(4) S. 9—*Meaning of physical possession of Thakur Bari.*

Where a person appoints *pujari* of Thakur Bari, defrays the expenses of the deity's worship, repairs and re constructs the building and holds the actual possession of the key by which the door of the Thakurgar is opened, the person who holds such a possession is the person who holds the physical possession to be protected under S. 9, Specific Relief Act. **Narendra Nath Lahiri v. Charu Chandra Bose**, 44 Ind. Cas. 497.

TEUNON and NEWBOULD, JJ.

(5) S. 9—*Applicability of the section in respect of joint holders of possession of property—Legality of grant of lesser relief.*

Where plaintiffs brought a suit to be restored to the exclusive possession of a property, they were restored by the decree, to the joint possession with defendants, *held* that there was nothing illegal to grant such a decree. The plaintiff is always entitled to a lesser relief of the same kind as he has asked for. S. 9 of the Specific Relief Act applies to cases where a co-owner in possession of property jointly with other co-owners is dispossessed by the latter. **Ghooli v. Sliku**, 44 Ind. Cas. 567.

BATTEN, A.J.C.

References:—19 C.W.N. 1117, *F.*

(5 a) S. 9, *Possessory suit under—Mesne profits, Subsequent suit for, maintainability of—Possessory suit and suit for mesne profits—Cause of action, if different.* See **JURISDICTION (OF CIVIL COURTS)**, No. 7, 46 Ind. Cas. 885.

(6) S. 9—*Suit for possession alleging title and dispossession by defendant—Denial by*

Specific Relief Act (I of 1877)—(Continued).

defendant of title and dispossession—Suit decreed on weakness of defendant's case—Duty of plaintiff to prove title and statutory possession. See POSSESSION, SUIT FOR, No. 8, U.B.R. 1918, 4th Qr., 126.

(7) S. 9—Suit based on title wrongly dealt with as possessory suit under section—Decree for possession given—Appellate Court finding suit to be on title, if can dismiss suit—Remand for trial on point of title. See TITLE, No. 1, 16 A.L.J. 611.

(8) Ss. 19, 21 (b)—Lessor and lessee—Contract for the preparation of a set of jama wasil baki and jama mofussil papers—Specific performance—Claim for damages—Covenant running with the land

A covenant in a lease to "file with the lessor a set of jama wasil baki and jama mofussil papers at the close of every year" even assuming it to be one running with the land, is not one which can be specifically enforced. Where the representative in interest of the lessor sued for specific performance of the covenant against the assignee of the lease and in the alternative made a claim for damages for breach of the covenant, held that the case came within S. 21, cl. (b) of the Specific Relief Act, that the contract was one which, from its very nature, was such that the Court cannot enforce specific performance and that, in the absence of proof of actual damage sustained, the claim for damages was not also maintainable. *Mohunta Bhagwan Das v. Surendra Narain Singh*, 42 Ind. Cas. 521.

FLETCHER and NEWHOULD, JJ.

(9) S. 21—Agreement to arbitrate—Suit, when demand and refusal not proved, is by itself a refusal to arbitrate—Implied refusal.

Where two days after concluding an agreement to refer their disputes to arbitration, one of the parties instituted a suit and it was urged in defence that the suit was barred by S. 21 of the Specific Relief Act, but there was no allegation in the written statement that the plaintiff refused to perform the contract to refer to arbitration nor was any evidence given of performance, refusal.

of—Specific Relief Act.—That the filing of the plaint is a refusal "within the meaning of the Specific Relief Act.

Held per Fletcher J.—Neither demand nor suit was not a "refusal" and both may be implied from the Specific Relief Act.

Per SHAMSUL HUDA. Refusal need be expressed in circumstances that plaintiff was deterred from arbitration amounted to a refusal.

That the institution of the suit in circumstances which show the contract to arbitrate, was not to go to arbitration. See Ind. Cas. 279.

SHAMSUL HUDA, JJ. *Dinabandu Jana v. C.W.N. 362—44 Ind. 498; 29 C. 956; 17 C.W.*

FLETCHER and

References:—5 C.W.N. 351; 8 A. 57, C.

(10) S. 21 (b). S

Specific Relief Act (I of 1877)—(Continued).

(10 a) S. 22—Contract to grant lease, Specific performance of, if can be refused on ground of failure to disclose previous default. See SPECIFIC PERFORMANCE, No. 4, 46 Ind. Cas. 559.

(11) S. 23—Personal quality mentioned in section, what it includes. See VENDOR AND PURCHASER, No. 1, 20 Bom. L.R. 654.

(12) S. 27 (b)—Proof of want of notice to be given by whom in suit for specific performance of unregistered contract of sale. See BURDEN OF PROOF, No. 8, 14 N.L.R. 27.

(13) S. 30—Scope of section—Awards if converted into contracts. See APPEAL (SECOND APPEAL), No. 26, U.B.R. 1918, 3rd Qr., 109.

(13-a) S. 39—Limitation Act (1903), Sch. I, Art. 91—"Entitled," meaning of—Entitled under S. 39—Cancellation of document, Suit for, Limitation for. See CANCELLATION OF DOCUMENT, 47 Ind. Cas. 505.

(14) S. 39—Suit to avoid registered deed—Consequential relief of forwarding copy of decree to Registrar—Ad valorem Court-fee. See COURT FEES ACT (VII OF 1879), No. 9, 3 Pat. L.J. 194.

(15) S. 39—Mortgage deed, execution of, without consideration—Mortgagee put into possession—Suit for declaration that document is void—Document neither void nor voidable—Maintainability of suit. See MORTGAGE (GENERAL), No. 12, (1918) M.W.N. 769.

(16) Ss. 39, 41—Suit by minor for cancellation of sale-deed executed by him during minority—Minor if bound to compensate purchaser—Statutory right to impose conditions—Compensation apart from statute. See MINOR, No. 4, 7 L.W. 124.

(17 & 18) S. 41. See No. 16, *supra*.

(19) S. 42—Further relief—Person in possession as tenant not denying plaintiff's right—Persons claiming title to property not in possession.

One C owned a shop. After his death, his daughter-in-law, B, came into possession of it. Her son-in-law, P, managed her affairs. B made a gift of the shop to R, who was one of P's sons. P had a son M by another wife. M occupied the shop as a tenant, having executed a rent agreement in favour of P and paying rent to B while she was alive. After B's death, he paid rent to no one. R died leaving a widow, P, who made a gift of the shop to the plaintiff. The plaintiff sued for a declaration that she was the owner of the house and that a sale-deed in respect of it executed by J was null and void against her. M also claimed the ownership of the house. The suit was dismissed on the ground that the plaintiff being out of possession, she ought to have asked for further relief in addition to a mere declaration:—Held that the only relief that the plaintiff could have claimed was a declaratory decree, inasmuch as the persons

Specific Relief Act, (I of 1877)—(Continued).

against whom she claimed the relief were not in possession and the person in possession had not denied her right. *Ratan Moti v. Tilak Chaud*, 16 A.L.J. 666=47 Ind. Cas. 856.

BANERJI and RYVENS, JJ.

(20) S. 42—*Suit for declaration—Plaintiff not filling any legal character—Declaration that adoption in a joint family not valid—Unmarried daughter in the family not entitled to relief.*

The widow of a Hindu who lived in union with his family having adopted a son to her deceased husband, her unmarried daughter sued to have it declared that the adoption was invalid:—

Held, that the plaintiff was not entitled to maintain the suit under S. 42, Specific Relief Act, 1877, inasmuch as she was neither entitled to any legal character, nor had she any right to any property; her only right being to be maintained out of the family property and to have her marriage expenses paid from it. *Ganesh Anrit Dhokrikar v. Rangnath Manohar Passare*, 20 Bom. L.R. 413=46 Ind. Cas. 49.

BATCHLOR, AG. C.J. and KEMP, J.

References:—20 B. 202; 8 I.A. 14, *Rel. on*; 1 B. 248; 27 B. 614, R.

(21) S. 42—*Person entitled to a legal character, divorced wife of—Mother of can sue for declaration of legitimacy of child.*

The plaintiff sued her late husband for a declaration under S. 42, Specific Relief Act, for a declaration as to her marriage and the legitimacy of four children. The lower Court found that the plaintiff had been divorced some 20 years ago and refused the declaration about marriage, but decreed it as to the legitimacy of the eldest of the children who, it was found, was born shortly after the divorce:

Held—That the plaintiff who ceased to have the legal character of a wife 20 years ago was not entitled to ask the Court to make a declaration as to her marriage, for there was no legal character in having been a wife and then divorced.

That the decree of the lower Court as to the legitimacy of one of the children could not stand, for the mother of a child cannot be said to have a legal character as to whether her child, who is not a party to the suit, is or is not legitimate. *Latifan Meen v. Musett. Moorti Janona*, 23 O.W.N. 171.

FLETCHER and SHAMSUL HUDA, JJ.

(22) S. 42—*Limitation Act, 1908, Art. 120—Fresh invasion of right—Fresh cause of action—Dental of title, when communicated, limitation period begins to run.*

Held that a person is entitled to pass by an invasion of right to property and is not by his forbearance debarred from a future suit for a future invasion.

Where there is a cloud upon the title or an invasion of the plaintiff's right, the plaintiff is entitled to sue for declaration under S. 42,

Specific Relief Act (I of 1877)—(Continued).

Specific Relief Act, against any person denying his title to such right. But the denial must be communicated to plaintiff, in order to give him a cause of action. Unless so communicated, the statute of limitation cannot run against plaintiff. *Mahabir Roy v Sarju Prasad*, 43 Ind. Cas. 175.

WALSH, J.

References:—10 A.L.J. 413; 36 A. 492, F.; 11 A.L.J. 877; A.W.N. (1898) 215, *Appl.*; 31 A. 9, *Dist.*

(23) S. 42—*Civ. Pro. Code, 1908, O. XXI, r. 63—Suit praying for declaring that the attachment of a decree invalid and for substitution of plaintiff's name in the place of a benami decree-holder—Whether suit comes within the section.*

Where a plaintiff prayed that an attachment of a decree by defendant Nos. 2 and 3 be declared invalid and that his right be substituted in the place of the prior decree-holder (defendant No. 4) *held* that, if S. 42, Specific Relief Act, did apply to the case the consequential relief which it was possible for plaintiff to claim, had, in fact, been claimed. *Hari Lal Sahu v. Raschi Ministerial Officers, Urban Co-operative Credit Society*, 43 Ind. Cas. 396=3 Pat. L.J. 182=4 Pat. L.W. 138.

MULLICK and ATKINSON, JJ.

Reference:—29 M. 151; 16 M. 140; 14 M. 23, R., 21 M. 353, *Appl.*

(23-a) S. 42—*Suit for possession—Prayer for declaration incidental to title—Suit, not a suit for declaration under Specific Relief Act—Person not interested in relief prayed for by plaintiff, not a party to suit.*

Where in a suit for possession of certain properties, the plaintiff prayed for a declaration that he was the proper successor under the law and joined as defendant a remote *Bandhu*, who was not a necessary party, as he had at no time claimed any right, title or interest in the disputed property, *held* that the suit was not a suit for a declaration such as was contemplated by S. 42 of the Specific Relief Act and the suit should be dismissed as against the remote *Bandhu* who had no interest in the relief claimed by the plaintiff. *Asharfi Singh v. Madhabeshwar Indra Narain Sah*, 45 Ind. Cas. 665.

DAWSON MILLER and JWALA PRASAD, JJ.

(24) S. 42—*Froviso, meaning and scope of—Suit for declaration of invalidity of mortgage decree—Prayer for redemption, whether necessary* *Kandammal v. Sanka Krishnamurthi*, 33 M.L.J. 676=(1917) M.W.N. 790=43 Ind. Cas. 25. See Final Part, 1917, Col. 849.

(25) S. 42—*Scope of section—Suit for declaration that a will alleged to have been executed by undivided brother authorising widow to adopt was not executed—Maintainability of.*

Held that a suit for a declaration that a will said to have been made by the plaintiff's undivided brother, the deceased husband of

Specific Relief Act (I of 1877)—(Continued).

the defendant, authorising her to adopt a boy, was never executed, was competent under S. 42, Specific Relief Act

S. 42 while indicating the character of the right which may be declared by a Court of law leaves it to the discretion of such Court to grant or refuse the relief claimed; the point being that the question of the right of suit must not be mixed up with that of the exercise of discretion in regard to the relief. *Bobba Fadmanabhudu v. Bobba Buchamma*, 35 M.L.J. 144=8 L.W. 335=47 Ind. Cas. 702

AYLING and SESHAGIRI AIYAR, JJ.

References:—34 M.L.J. 67 (P.C.); *F.*; 49 I.A. 91; 39 M. 634 (P.C.); 17 C. 933 (P.C.); 39 M. 808; 39 M. 8; 30 M. 195; 29 M. 48; 28 M. 57, R.; 2 I.A. 169; 5 I.A. 87; 12 M. 134; 35 M. 592, *Not F.*

(26) S. 42—*Satisfaction of mortgage decree by deposit of decretal amount—Subsequent attachment of this decree by two successive parties in two money suits—Claim to attached property made by plaintiff against first of the two attachments, rejection of—Suit by rejected claimant for declaration that holder of satisfied mortgage-decree was his benamidar and that attachment was invalid—Civ. Pro. Code (1908), O. XXI, rr. 58, 63.*

R, a judgment-debtor satisfied a mortgage-decree obtained against him by defendant No. 4 by depositing in Court the decretal amount. Defendants 2 and 3 subsequently attached, in execution of a money decree obtained by them against defendant No. 4, the decree obtained by the latter against R. Subsequently again defendant No. 1, sued defendant No. 4, and attached before judgment the self same decree against R. The present plaintiff then appeared on the scene and under Civ. Pro. Code, O. XXI, r. 58, objected to the attachment made by defendants 2 and 3. On his objection being dismissed he filed a suit based on O. XXI, r. 63, for a declaration that defendant No. 4 was his benamidar, and that he was the real beneficiary entitled to the money deposited in Court and also prayed for a declaration that the attachment obtained by defendants 2 and 3 was invalid.

Held that S. 42, Specific Relief Act, was no bar to the suit and that the mere fact that the plaintiff did not ask for the recovery of the money was no bar to his obtaining the declaration which he sought and which involved the setting aside of the attachment (a). *Held*, also, that the suit based on Civ. Pro. Code, O. XXI, r. 63, must fail with regard to the defendant No. 1 against whom the plaintiff had not filed any claim under O. XXI, r. 58, in respect of his attachment before judgment. *Harilal Sahu v. The Ranchi Ministerial Officers, Urban Co-operative Credit Society*, 3 Pat. L.J. 182.

MULLICK and ATKINSON, JJ.

References:—40 C. 336; 14 M. 23; 16 M. 140; 21 M. 353; 29 M. 151, R.

Specific Relief Act (I of 1877)—(Continued).

(27) S. 42—*Private partition between parties—Subsequent application to Revenue Authorities for partition—Declaration, Suit for, that plaintiff is sole owner of properties allotted to him, maintainability of.*

In a suit for a declaration that plaintiff was the sole owner of the lands in suit, it appeared that, a dispute having arisen between the parties, there was a reference to arbitration and that, subsequent to the award, there was a private partition, by which the lands in suit fell to the plaintiff, but, in spite of that, the defendants had applied to the Revenue Authorities for partition.

Held, that, inasmuch as there had been a partition of the whole of the paternal estate between the plaintiff and the defendants, the latter were debarred from re-agitating the question and that the plaintiff was entitled to the relief sought. *Abdullah Sah v. Muhammad Bakar Shah*, 12 P.W.R. 1918=43 Ind. Cas. 127.

CHEVIS and LESLIE JONES, JJ.

(28) S. 42, proviso—*Usufructuary mortgage by father—Sons, Suit by, for declaration that their share not liable to attachment and sale in execution of money-decree against father, if maintainable. See DECLARATORY DECREE, No. 1, 45 Ind. Cas. 859.*

(29) S. 42, proviso, Applicability of—*Declaration, suit for, by decree-holder that property first attached in execution of decree but afterwards attachment withdrawn is of judgment-debtor, maintainability of. See DECLARATORY DECREE, No. 2, 45 Ind. Cas. 972.*

(30) S. 42. See DECLARATORY SUIT.

(31) S. 42—*Suit for declaration of right to pass along public street accompanied by music past mosque—Maintainability. See DECLARATORY SUIT, No. 1, 20 Bom. L.R. 667.*

(32) S. 42—*Suit for mere declaration without praying for ejectment of trespasser if competent. See DECLARATORY SUIT, No. 7, 118 P.R. 1918.*

(33 & 34) S. 42—*Whether mother of minor—Mahomedan girl entitled to sue for a declaration that the marriage of her minor daughter effected by her uncle, invalid. See MAHOMEDAN LAW (MARRIAGE), No. 2, 45 Ind. Cas. 203.*

(35) S. 42—*Declaratory suit by trespasser, whether maintainable. See INTENTION, No. 1, 45 Ind. Cas. 303.*

(36) S. 42, Ill. (a)—*Decree for declaration—Deed executed by Hindu widow conferring estate on one reversioner—Suit by other reversioners for declaration of invalidity of the deed—Maintainability—Declaration involving a finding that the plaintiffs are reversioners, is a bar to grant thereof.*

Where a deed is executed by a Hindu widow in possession of her husband's properties, purporting to confer the absolute estate on one of

Specific Relief Act (I of 1877)—(Concluded).

the reversioners and the effect of which is to prejudice the interests of the other reversionary heirs, these latter heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may sue for a declaration as to the effect of such deed and a declaration can be validly granted to the effect that the deed is not binding on the plaintiffs and this view is clearly borne out by *illn. (e) to S. 42 of the Specific Relief Act (a)*.

The fact that the declaration involves a finding that the persons in whose favour it is made are all reversionary heirs does not negative the right to the grant thereof. *Sandagar Singh v. Pardip Narayan Singh*, 7 L.W. 146 = 23 M.L.J. 81 = 84 M.L.J. 67 = 4 Pat. L.W. 52 = 16 A.L.J. 61 = 27 C.L.J. 186 = 22 C.W.N. 486 = (1918) M.W.N. 323 = 20 Bom. L.R. 509 = 45 C. 510 = 43 Ind. Cas. 484 (P.C.).

LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMBER ALI and SIR LAWRENCE JENKINS.

Reference;—(a) 43 I.A. 207. *Dist.*

(37) S. 45—Powers of High Court under section to interfere with the cancellation of the registration of a patent by the controller. See ACT II OF 1911 (PATENTS AND DESIGNS), No. 1, 22 C.W.N. 580.

(38) S. 45—Decision of Chairman of Calcutta Corporation refusing to expunge names of certain persons from Municipal Election Roll, if final—High Court, if can interfere with decision. See ELECTIONS, No. 1, 45 C. 950.

Spes Successionis.

(1) *Transfer of Property Act (IV of 1882), S. 6 (a)—Hindu Law—Adoption by widow—Postponement of adoptee son's estate during the widow's life—Transfer made by adopted son of property forming part of the estate in the widow's lifetime.*

D K adopted B by means of a deed of adoption, which provided that the latter would from that day acquire all the rights which an adopted son had under the law in all the property left (*matruka*) by Raja Raghubir Singh deceased and now in the possession of the Rani Sahaba. But it had been agreed.....that according to the wish and permission of Raja Raghubir Singh, the Rani Sahaba, would continue to be owner and in possession (*malik aur gahis*) of the entire *Rajyat* during her life. Subsequently B transferred certain property of the *Rajyat* to J and others. After the sale, B leased the property to D, father of I. There was considerable litigation between B and J, which eventually terminated in a decree based on compromise between the parties to the effect that in the event of B, paying to J on a certain date certain sums of money, J, would give up all claims to the property in question, and that, in the event of non-payment, the suit of J against B would be decreed and the suit of B against J would be dismissed. B did not

Spes Successionis—(Concluded).

pay the amounts as required and the result provided for in the decree followed. J applied for execution of the decree, B objected that he had only an expectant interest in the estate which interest was inalienable:—*Held*, upon a construction of the adoption-deed, that the interest created in favour of B was not a mere possibility of succession to the estate after the death of D K, but that it was a vested right, the right of enjoyment and possession being only postponed, and that the sale was unaffected by the provisions of S. 6 (a) of the Transfer of Property Act *Balwant Singh v. Joti Prasad*, 16 A.L.J. 765 = 40 A. 692 = 47 Ind. Cas. 599.

TUDHALL and RAOOF JJ.

References:—13 A. 391; 27 M. 577, R.; 30 M. 255, *Dist.*

(2) Agreement between widow and her reversioners to divide reversion on her death in certain shares—Some of the reversioners only entitled remotely, some being next reversioners—Agreement not operative. See WILL, No. 12, 35 M.L.J. 684.

Stamp Act (II of 1899).

(1) Formation of new contract in place of old, discharging liability on old contract—Infringement of Stamp Law made by new contract—Remedy of creditor. See HUNDI, No. 3, 15 P.W.R. 1918.

(2) Ss. 2 (5), 35 (a)—*Promissory note—Bond—Unstamped document—Admissibility in evidence on payment of penalty and stamp duty. Kasaram Ranglah v. Malla Chengama Naidu*, 33 M.L.J. 603 = 43 Ind. Cas. 55. See Final Part, 1917, Col. 852.

(2-a) Ss. 2 (10), 57, Art. 23—Letter reciting earlier sale and receipt of consideration not a conveyance within the meaning of—No stamp duty—Construction of Stamp Act. See CONVEYANCE, 151 P.L.R. 1917.

(3) S. 25—Marupat creating charge or improvements for arrears of rent. See LEASE, No. 1, 41 M. 469.

(4) Ss. 26, 35—*Document securing advances of money up to a fixed maximum—Value of subject-matter of document, Rule for determination of.*

A document, bearing a stamp of Rs. 15 and recording the terms of a loan transaction, provided that, subject to a maximum of Rs. 50,000 the lender was to advance and be repaid monies in a particular manner from time to time and was to have a security upon all the paddy and rice kept by the borrower in his mill up to Rs. 50,000 for what was at any time owing to the lender under the document. *Held* that the amount of the subject-matter of the charge was Rs. 50,000.

Where there is a maximum limit in a document, which creates a charge in respect of a varying account, the maximum must be taken to be the amount that is intended to be secured.

Stamp Act (II of 1899)—(Continued).

Held that, to this document, S. 26 of the Stamp Act did not apply, and that the deficiency in the stamp could be made good under S. 35 of the Stamp Act. **A. L. A. M. A. L. Chetty Firm v. Maung Aung Ba**, 9 L.R. 217.

TWOMEY, C.J. and ORMOND, J.

(5) S. 33, sub-S 1—*Impounding of document insufficiently stamped—Conditions necessary for the application of section—Suit for money on hatchitta produced in Court in bound volume containing other hatchittas—Jurisdiction of Court to impound those other hatchittas.* **Saahli Mohan Saha v. Kumud Kumar Biswas**, 21 O.W.N. 246=27 C.L.J. 525. See Final Part, 1917, Col. 853.

(6) S. 35—*Promissory note executed in Nizam's dominions but stamped with British stamp—Right of suit on such note in British Courts.* See JURISDICTION (GENERAL), No. 3, 20 Bom. L.R. 464.

(7) S. 35 See No. 4, *supra*.

(8) S. 35 a. See No. 2, *supra*.

(9) S. 40. See No. 11, *infra*.

(10) S. 57—*Certificate by Collector that document duly stamped—Reference by Board of Revenue to High Court—Jurisdiction of High Court to decide the question.*

Where the Collector finding a sale deed insufficiently stamped, under S. 40 (1) (b) of the Stamp Act, levied the deficit together with the penalty provided by law (which fact was endorsed on the document), and the Board of Revenue then referred the question as to the stamp duty, if any, payable on the document to the High Court, under S. 57 of the Act, *held* that the High Court had no jurisdiction to decide the question. *In the matter of Khubchand*, 16 A.L.J. 43 (F.B.)=47 Ind. Cas. 299.

KNOX, A.C.J., RAFIQ and PIGGOTT, JJ.

Reference.—25 M. 752, F.

(11) Ss. 57, 40—*Indorsement of certificate by Collector that instrument is duly stamped—Power of Chief Controlling Revenue authority to refer matter to High Court in respect of correctness of Collector's decision—Matter referred if case—Jurisdiction of High Court.*

A Collector, acting under S. 40 (1) (b) of the Stamp Act, levied the deficit stamp duty and penalty payable on an instrument and, after collecting them, certified under S. 40 (c) (a) by indorsement on the deed that it was duly stamped; but the Chief Controlling Revenue authority referred the matter under S. 57 (1) to the High Court for its opinion as to whether the instrument was in fact sufficiently stamped or not. *Held* that this was not a 'case' within the meaning of S. 57, that, the Collector having fully decided the case before him and there being no room for any further disposal of the matters referred were, under the circumstances

Stamp Act (II of 1899)—(Continued).

not within the jurisdiction of the High Court (a). Stamp Reference by the Board of Revenue, 40 A. 128.

KNOX, C.J., RAFIQ and PIGGOTT, JJ.

Reference :—(a) 25 M. 752, F.

(11-a) S. 47. See No. 2-a, *supra*.

(11-b) Sch. I, Art. 13—*Order to a firm to pay money to certain person or bearer, a bill of exchange payable on demand—Stamp duty of one anna.* See BILL OF EXCHANGE, 47 Ind. Cas. 561.

(12) Sch. I, Arts. 13, 35—*Agricultural lease—Agreement to hypothecate crops for payment of rent—Liability to stamp duty.*

An agricultural lease entered into by the cultivating tenants is exempt from stamp duty under exemption (a) to Art. 35, Sch. I of the Stamp Act, 1899. Where a lease executed by tenants gave the landlord the sole right over the whole crop until rent was paid and the tenants agree not to alienate or otherwise do away with crops without landlord's consent, until the rent was paid, the instrument is an agreement of hypothecation of moveable property by way of security for the repayment of a future debt, and as such was liable to the duty chargeable on a bill of exchange under Art. 13 (b), Sch. I of the Stamp Act, 1899. **Maung Htat v. Maung San Hun**, 44 Ind. Cas. 109.

PARLETT, J.

(12-a) Art. 23. See No. 2-a, *supra*.

(13) Sch. I Arts. 25, 40—*Mauput—Counterpart of lease—Mortgage—Stamp duty.*

A mauput is a counterpart of a lease or a deed executed by a tenant promising certain rent, and where the deed contains a special clause creating a charge over the tenant's improvements in favour of the landlord for arrears of rent, it must be stamped both as a counterpart and as a mortgage. **Palakkunnath Illath Govindan Nambudri v. Ottathayil Moldeen**, 33 M.L.J. 693=41 M. 469 (F.B.). See Final Part, 1917, Col. 854.

(14) Sch. I, Art. 35. See No. 12, *supra*.

(15) Sch. I, Art. 40. See No. 13, *supra*.

(16) Sch. I, Art. 48 (d)—*Court Fees Act (VII of 1870), Art. 8, Sch. I—General Power of Attorney, whether its copy produced in Court requires Court-fee of annas 8—S. 113, Civ. Pro. Code, Act V of 1908, and O. XIII, r. 9; O. I, r. 12; O. III, rr. 2, 4 and 6 and O. XVIII, r. 1 of the same Code.*

Held, that a copy of a General Power of Attorney produced in Court for verification does not require a Court Fee Stamp of annas eight under the Court Fees Act, Sch. I, Art. 8.

Held, also, that a copy of General Power of Attorney or the original is not required by law to be placed on the record of a case in which the attorney is acting.

Stamp Act (II of 1899)—(Concluded).

Held, further, that a fiscal enactment such as the Court Fees Act, must be strictly construed and that Art. 48 of Sch. I of the Act is intended to authorise the levy of annas 8 in the case contemplated under Art. 13, r. 9 of the Civ. Pro. Code. *Rustomji v. Kala Singh*, 186 P. W.R. 1917-9 P.R. 1918-48 Ind. Cas. 388.

• SCOTLANDSMITH and LESLIE JONES, JJ.

Stamp Duty.

Court Fees Act (VII of 1870), Sch. II, Art. 6—*Stay of execution—Security bond for, how stamped—Court-fee or non-judicial stamp—Stamp Act* (II of 1899), Sch. 1, Art. 15, *Dwarakanath Day v. Sallaja Kanta Malik*, 21 C.W.N. 1150-43 Ind. Cas. 376. See Final Part, 1917, Col. 854.

St. 24 and 25 Vic., C. 67 (Indian Councils).

See INDIAN COUNCILS ACT, 1861.

Statutes, Interpretation of.

(1) See BEN. ACT VIII OF 1885 (TENANCY), No. 97-a, 44 Ind. Cas. 94 (F.B.).

(2) Proviso to section how far affects operation of section. See MAD. ACT XIX OF 1883 (LAND IMPROVEMENT LOANS), 34 M.L.J. 446.

(3) Principle guiding retrospective effect to Statutes. See CIV. PRO. CODE (1908), No. 136, 28 M.L.T. 255.

(4) Interpretation of technical words in Statute arrived at by implication and reference—Restrictive and penal constructions not to be generally adopted. See LIMITATION ACT (1908), No. 201, U.B.R. (1918), 1st Qr., 79.

(5) Illusory *wakf* created before passing of Act—Such *wakf* whether validated by any retrospective operation of Act. See MAHOMEDAN LAW (WAKF), No. 2, 16 A.L.J. 841.

(6) Illustrations to section to be taken as part of statute. See UNCONSCIONABLE BARGAIN, No. 1, 35 M.L.J. 614 (P.C.).

Statutory Body.

(1) Jurisdiction of Civil Courts to determine legality of imposition of tax by. See PUN. ACT III OF 1911 (MUNICIPALITIES), No. 2, 74 P.L.R. 1918.

(2) If statutory authority servant or agent of Crown—If such body exempt from liability for misfeasance as exercising sovereign functions—General responsibility of such bodies. See TORT, No. 1, 41 M. 538.

Stay of Execution.

(1) Application for execution stayed as to part of decree—Exclusion of time of partial stay—Limitation Act, 1908, S. 15.

A partial stay of execution is stay within the meaning of S. 15, Limitation Act, so as to

Stay of Execution—(Concluded).

justify exclusion of time under that section. *Nachiappa Chetty v. Maung Pe*, U.B.R. (1918), 1st Qr., 78-46 Ind. Cas. 399.

HEALD, J.C.

References:—36 M. 780, R; 20 Ind. Cas. 489, Dist.

(2) Order for sale of immoveable property—Appellate Court if can stay sale. See APPELLATE COURT, No. 2, 34 M.L.J. 470.

(3) Appeal to Privy Council—Decree against respondent given as security for costs—Acceptance of security if operates as order staying execution during pendency of appeal—Time of pendency if may be excluded from limitation period. See LIMITATION ACT (1908), No. 24, 3 Pat. L.J. 132.

Stay of Proceedings

Contract of sale of goods—Provision for arbitration in case of dispute—Contract impeached on equitable grounds—Stay of arbitration proceedings, if valid. See ARBITRATION, No. 4, 22 C.W.N. 535.

Step-in-aid of Execution

(1) Limitation Act (IX of 1908), Art. 182 (5)—Execution of decree—Step-in-aid of execution.

An application to the Court executing a decree, asking that certain objections to the execution of the decree be dismissed, in step-in-aid of execution and saves the bar of limitation. *Tamil-un Nissa-Bibi v. Najju*, 16 A.L.J. 704-40 A. 668-46 Ind. Cas. 669.

TUDBALL and RAOOF, JJ.

(2) Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Limitation—Step-in-aid of execution.

An application for execution of a decree was made on the 20th January 1911. The judgment debtor put in an objection and the Court ordered the parties to adduce evidence in support of their respective cases. In the course of these objection proceedings, the decree-holder on the 25th November 1911 filed a list of witnesses and intimated to the Court that he was ready to proceed with his case.

Held, that this should be taken to be an application to the Court to take some step-in-aid of execution and a subsequent application for execution of the decree filed on the 22nd August 1914 was within time (a). *Brojendra Kishore Roy Choudhury v. Dil Mahmud Sarkar*, 22 C.W.N. 1027-44 Ind. Cas. 604.

TEUNON and NEWBOULD, JJ.

Reference.—21 C.W.N. 423, Rel. on.

(3) Application for payment out of money deposited in Court as security—Order for payment—Limitation Act, Art. 182, cl. 5—Application is a step-in-aid of execution.

An application for payment out of money in Court in execution is a step-in-aid of execution under Art. 182, cl. 5, Limitation Act.

Step-in aid of Execution—(Concluded).

Where money is deposited in Court as security for the costs of the suit, an order of the Court is necessary to make it available for payment towards the decree amount and an application for such an order is one in execution of the decree itself. *Thangl Shettlithi v. Duga Shetti*, 85 M.L.J. 575=8 L.W. 519=(1918) M. W.N. 748=24 M.L.T. 483.

SPENCER and KRISHNAN, JJ.

References:—2 M. 174; 16 M. 452; 17 M. 165; 22 B. 340; 6 A. 366, F.; 43 Ind. Cas. 537; 8 C. 89; 10 C. 549; 11 C. 227; 23 C. 196, *Dist.*

(4) Application to transfer decree to Court of Native State for execution—Application if a. See LIMITATION ACT (1908), No. 216, 20 Bom. L.R. 421.

Sub-lease.

Assignment by sub-lessee of absolute occupancy tenant of sub-lease, it requires landlord's consent. See LANDLORD AND TENANT, No. 68, 14 N.L.R. 188.

Subrogation.

(1) Contribution, Suit for—Contract Act (1872), Ss. 69, 70—"Persons interested in the payment" in S. 69—Subrogation. See CONTRACT ACT (1872), No. 43-a, 22 C.W.N. 347=42 Ind. Cas. 30.

(2) Satisfaction of decree by some of joint judgment-debtors in suit on mortgage—Decree binding on all judgment-debtors—Right of judgment-debtor satisfying decree to be subrogated to position of mortgagee decree-holder. See CONTRIBUTION, No. 1, 45 C. 691.

Subscription.

Benefit Society—Subscriptions by members of society as form of co-operation making capital available to each subscriber—Right to claim refund of past subscriptions when arises—Burden of proof.

The plaintiff claimed a refund of the aggregate of his subscriptions to a pool or co-operative Benefit Society, generally called a "committee;" alleging that the organiser and manipulator of the scheme had refused to continue to receive his subscriptions, in consequence of which he lost all prospect of taking the pool; to which each contributor was in turn entitled on paying a monthly subscription to the pool with the further privilege, on his inability to continue his subscriptions before taking the pool, to get back his past subscriptions. *Held* that, if the plaintiff refused to continue his subscriptions, he must prove his right to a refund, and, if so, when; but that, if the defendant be responsible for the breach, the burden of proving that no refund is claimable lay on such defendant. *Ghulam Haider v. Must. Bhagan*, 77 P.R., 1918=107 P.L.R. 1918=157 P.W.R. 1918=47 Ind. Cas. 416.

LE-ROSSIGNOL, J.

Succession.**(1) Custom of—Eunuch, Heirs of.**

Ordinarily when a male becomes an eunuch, his heirs are his natural heirs under the personal law to which he is subjected, and, to set aside the presumption that the rule of succession would be his personal law, it is necessary to prove a great deal more than that in certain instances, even if numerous, the relatives did not take the trouble to claim the "property" of the eunuch, but permitted it to go to another eunuch. *Badhij Singh v. Basti*, 46 Ind. Cas. 77=5 O.L.J. 189.

STUART, A.J.C.

(2) Property purchased or inherited by Ondh Talukdar—Accretion—Village transferred in exchange—Right of succession to estate—Primogeniture. See CROWN GRANT, No. 1, 24 M.L.T. 282 (P.C.).

Succession Act (X of 1865).

(1) Applicability of, to Chinese Buddhists. See CHINESE CUSTOMARY LAW, No. 1, 9 L. B.R. 179.

(2) S. 50—Evidence Act, S. 68—Witnesses necessary to prove will. See WILL, No. 2, 22 C.W.N. 315.

(3) Ss. 101, 105—A charitable bequests, Applicability of S. 101 to—Bequests, Validity of, under—On what depends—English Rule if applicable to India. See BEQUESTS, 47 Ind. Cas. 383.

(4) S. 105. See No. 3, *supra*.

(5) S. 111—Applicability to bequest to brother's widow and on her death to her daughter—Substantial gift. See WILL, No. 5, 22 C.W.N. 689.

(6) S. 197—Death of residuary legatee of testatrix after applying for grant of administration with copy of will annexed—Son of such legatee, Right of, to grant on proof of will. See LETTERS OF ADMINISTRATION, No. 1, 45 C. 862.

(7) Ss. 269, 293—Powers of executor to dispose of property. See EXECUTOR, No. 1, 28 C.L.J. 141.

(8) S. 293. See No. 5, *supra*.

Succession Certificate.

(1) Decree, execution of—Application for execution—Person to whom certificate to collect debts granted, if competent.

The appellant was one of the sons of the original decree-holder. After the death of his father, he made an application under the provisions of the Succession Certificate Act to which he made the other heirs of his deceased father parties, as to the grant of a certificate in order to entitle him to obtain the particular decretal amount; and it was granted. He alleged in his application for execution that he was the only person entitled to the judgment-debt:

Succession Certificate—(Continued).

Held, that the appellant was entitled to maintain the application. **Shelkh Golam Khalik v. Tasardak Ali Khan**, 28 C.L.J. 299.

FLETCHER and SHAMSUL HUDA, JJ.

- (2) *Dayabhaga joint Hindu family—Hand-note executed in favour of father—Subsequent renewal in favour of son represented by Karta—Suit on renewed Hand-note by the son—Succession certificate, Necessity of, for maintainability of suit—Succession Certificate Act (VII of 1889), S. 4—Parties to suit, Non-joinder of, Objection on ground of, if can be taken in Revision.*

A hand-note was executed on 22nd July, 1909 by the defendant in favour of B, who with his brother C, constituted a joint Hindu family governed by the Dayabhaga Law. B having died in the meanwhile, the hand-note was renewed on the 22nd July 1912 in favour of C, as the karta of the joint family constituted by himself and the sons of B. A suit was brought on the hand-note after the death of C, by his heirs and the heirs of B. C's widow who, during the pendency of the suit obtained letters of administration to his estate was not made a party to the suit nor was any objection taken during the trial as to her non-joinder. The suit having been decreed against the defendant, on a Revision petition.

Held, (1) that B's heirs were claiming in their own right as persons in whose favour the hand-note of the 22nd July 1912 was executed, C having represented them in that transaction and it was not necessary for them to take out a succession certificate in respect of their share of the debt;

(2) that no objection having been taken in the trial Court on the score of non-joinder of C's widow, when the Letters of Administration to C's estate taken by her during the pendency of the suit was produced during the course of the suit, it was not competent to raise that objection in revision before the High Court. **Nilmoni De v. Soorendra Nath Mitra**, 46 Ind. Cas. 648.

RICHARDSON and BEACHCROFT, JJ.

- (3) *Decree-holder, One of several heirs of a deceased, Execution of decree by, after obtaining certificate, Validity of—Judgment-debtor if entitled to go behind the terms of—Succession Certificate Act (VII of 1889), S. 16, Conclusiveness of certificate under.*

One of the heirs of a deceased decree-holder, who obtains a succession certificate in respect of the decree, can maintain an application for the execution of that decree, and the judgment-debtor is not entitled to go behind the terms of the succession certificate, since under S. 16 of the Succession Certificate Act (1889) the certificate is conclusive as against the person liable to pay the debt. **Golam Khalik v. Tasardak Khan**, 46 Ind. Cas. 890.

FLETCHER and SHAMSUL HUDA, JJ.

Succession Certificate—(Concluded).

(4) Holder of, has title to recover debt due to deceased—Payment to holder valid discharge. See **LIMITATION ACT (1908)**, No. 128, 7 L.W. 330.

(5) Mortgage, Suit on, by sons after father's death—Mortgage in favour of father as madhager as joint Hindu family consisting of father, sons and nephew—Nephew disclaiming interest—Succession certificate if necessary for maintainability of suit. See **MORTGAGE SUIT**, No. 2, 47 Ind. Cas. 649.

Succession Certificate Act (VII of 1889).

- (1) *Application for succession certificate—Objection on the ground of re-union—Whether the objection was suitable for enquiry in summary proceedings.*

Where a claimant applied for a succession certificate and the objector raised the allegation of re-union, *held* that the allegation was not suitable for enquiry in a summary proceeding under the Succession Certificate Act. **Jaganath Prasad Sahu v. Musammatt Kuadari Sahu**, 43 Ind. Cas. 126.

CHAPMAN and ROE, JJ.

- (2) *S. 4—Suit for arrears of rent due to deceased person—Succession certificate and probate papers not filed—Institution of suite not barred—Decree to be deferred till papers filed.*

S. 4, Succession Certificate Act, does not prohibit the institution of a suit for arrears of rent due to a deceased person, even though the plaintiff has not filed a certificate of succession or probate; what is barred by the section is the passing of a decree until the production of such papers, to do which the Court should give time to the plaintiff. **Alice Thorp v. Shelkh Shamatullah**, 3 Pat. L.J. 160—44 Ind. Cas. 733.

ROE and IMAM, JJ.

- (3) *S. 4, sub-S. (1) (a)—Plaintiff, death of—Substitution—Suit for recovery of money.*

S. 4, sub-S. 1, cl. (a) of the Succession Certificate Act, applies to the case of a person, who has been substituted as plaintiff for one, who has died pending a suit for recovery of money due on a bond. No decree can be passed in favour of the substituted plaintiff without the production of a succession certificate. **Nepusi Bewa v. Nasreddin**, 27 C.L.J. 400—45 Ind. Cas. 730.

MOOKERJEE and BEACHCROFT, JJ.

References:—7 C.L.J. 668, F.; 23 C. 148—85 C. 767; 16 B. 519; 26 C. 899, R.

- (4) *Ss. 16, 18—Assignment of debt by person entitled to succession certificate—Assignment made before assignor obtained such certificate—Assignee's right to sue for debt without certificate in his own name.*

The assignee of the person, to whom a succession certificate has been granted, has a right of suit without obtaining a succession certificate in his own name, for payment to the assignee is as valid as payment to the assignor, in the absence of any restriction

Succession Certificate Act (VII of 1889)
—(Concluded).

imposed by law. S. 4 (1) of the Succession Certificate Act only requires the production of a certificate and not one in the name of the person suing. A certificate is valid until revoked, under S. 18 of the Act, and affords protection, even though the assignor obtained the succession certificate only after the assignment. *Arunachella Chettiar v. Muthu*, 35 M.L.J. 666.

PHILLIPS and KUMARASWAMI SASTRI, JJ.

References:—14 A.L.J. 677, F., 35 A. 74, Diss.; 36 A. 21, R.

(5) S. 9—Application by widow—Security asked from applicant as condition precedent to grant. No special circumstances—Whether order legal. *Narain Del v. Parmeshwari*, 15 A.L.J. 881=40 A. 81. See Final Part, 1917, Col. 85°.

(6) S. 16—Succession Certificate granted under Act, Conclusiveness of, under—One co-heir of a decree-holder obtaining certificate, Execution of decree by, Validity of—Judgment-debtor, if entitled to go behind certificate. See SUCCESSION CERTIFICATE, No. 3, 46 Ind. Cas. 890.

(7) S. 16. See No. 4, *supra*.

(8) S. 18. See No. 4, *supra*.

Suicide.

Per Chief Justice.—At common law suicide is a form of homicide and S. 299 of the Indian Penal Code is wide enough to cover the case of suicide. *Chikkam Ammiraju v. Chikkam Seshamma*, 34 M.L.J. 494=5 L.W. 735=(1917) M.W.N. 423=41 M. 33. See Final Part, 1917, Col. 859.

Suits Valuation Act (VII of 1887).

(1) Ss. 3 (1), 6—Suit for pre-emption—Value for purposes of jurisdiction—Madras Civil Courts Act, S. 14—Court Fees Act, S. 7 (v).

A suit to enforce a right of pre-emption is a suit whose subject-matter includes such rights relating to land as pre-emption within the meaning of S. 6 of the Suits Valuation Act, and its proper valuation for purposes of jurisdiction is, in accordance with S. 14 of the Madras Civil Courts Act, that fixed in the manner provided by the Court Fees Act, S. 7 (v). *Narayana Nair v. Cherla Katiri Kutty*, 34 M.L.J. 397=41 M. 721.

OLDFIELD and SADASIVA AYYAR, JJ.

(2) S. 4—Suit for declaration that certain land is absolute property of plaintiff—Valuation for purposes of jurisdiction. See VALUATION OF SUIT, No. 6, 115 P.W.R. 1918.

(3) S. 6. See No. 1, *supra*.

(4) S. 9—Suit to declare an adoption valid—Ad valorem fee. See COURT FEES ACT (1870), No. 83, 43 Ind. Cas. 64.

(5) S. 11—Valuation of suit, Objection to pecuniary jurisdiction based on, if can be raised for the first time in High Court. See VALUATION OF SUIT, No. 4, 46 Ind. Cas. 892.

Summons.

(1) Service of summons on defendant—Copy given to him—No acknowledgment given by him—Service if proper under Civ. Pro. Code, O. V, rr. 16 and 17—Setting aside ex parte decree—Nazir's report, if admissible after his death.

Case where it was held that a defendant's application to set aside the ex parte decree passed against him was time-barred, the report of a Nazir since deceased, being held to be admissible for the purpose of ascertaining when the defendant came to know of the decree against him.

Where the report, with reference to the summons issued to a defendant, was that, on each occasion when a copy had been given to the defendant he had refused to sign on the original summons the required acknowledgment of its receipt, held that the summons was not duly served so far as r. 17, O. V, Civ. Pro. Code, was concerned, and that personal service could not be said to have been effected within the four corners of r. 16, O. V, Civ. Pro. Code, 1908. Three modes of serving a summons on a defendant pointed *Dewan Chand v. Mussamat Parbati*, 99 P.R. 1918=184 P.W.R. 1918.

BROADWAY, J.

Reference:—16 B. 117, F.

(2) Document, To produce, to Government servant—Court, Discretion of, to issue—Evidence Act, 1872 S. 162. See ADJOURNMENT, No. 1, 45 Ind. Cas. 898.

(3) Mode of service—Duty of Court. See CIV. PRO. CODE (1908), No. 235, 43 Ind. Cas. 632.

(4) Defendant's refusal to accept service—Time for compliance with summons, sufficiency of—Ex parte proceedings, validity of. See CIV. PRO. CODE (1908), No. 231, 41 P.L.R. 1918.

(5) Service of, on defendant—Mode of legal service—Scope of O. V, r. 17, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 232, U.B.R. 1918, 4th Qr., 123.

(6) Service of, on munim of firm—Whether service on member of family. See DISMISSAL FOR DEFAULT, No. 1, 105 P.W.R. 1918.

(7) "Duly served" in Civ. Pro. Code, O. V, r. 19, meaning of. See LIMITATION ACT (1908), No. 200, 42 Ind. Cas. 611.

Sunday.

Last day for filing appeal under Provincial Insolvency Act being dies non—Exclusion of such day in computing limitation. See PROVINCIAL INSOLVENCY ACT (III OF 1907), No. 37, 35 M.L.J. 581.

Surety.

(1) Surety for property sought to be attached before judgment—Suit referred to arbitration—Court passes decree for amount awarded by arbitration—Liability of surety. See CIV. PRO. CODE (1908), No. 463, 46 Ind. Cas. 432.

Surety—(Concluded).

(2) Suretyship, kinds of—Father's surety debt—Son's liability—Texts as to, Discussion of, See HINDU LAW (DEBTS), No. 7-a, (1918) M.W.N. 675.

(3) See PRINCIPAL AND SURETY.

Surety-bond.

(1) *Cn. Pro. Code (Act V of 1909), S 145—Surety bond executed in execution proceeding—Liability of surety, if continues after the termination of the particular execution proceeding, or ceases with the dismissal of the particular execution case.*

In a certain execution proceeding, the decree-holder had attached the standing crops of the judgment debtor, whereupon certain other persons put in a claim to those crops. The claimants were permitted to cut away the crops on two other persons standing sureties to pay Rs. 50 to the decree holder if the claim was ultimately disallowed. Eventually the claim was dismissed and the execution case was also struck out for default. In the next execution case, the decree-holder having sought execution against the sureties, the latter contended that the bond became inoperative as soon as the execution case, in the course of which it was furnished, was dismissed and they could not be made liable.

Held—The mere fact that the execution case against the judgment debtor was dismissed after the claim was dismissed does not affect the question of the liability under the bond. Had there been a suit under the bond, there is no doubt that the sureties could have been made liable. The present Code however provides for realization of the amount due under the bond by execution. *Ajitulla Sarkar v. Nandoor Mahammad*, 22 C.W.N. 919=43 Ind. Cas. 464.

OHITTY and SMITHER, JJ.

References—14 C. 757, 21 Ind. Cas. 612, Dist.

(2) Bonds taken out of Court by judgment creditor not contemplated by Civ. Pro. Code, S. 145—Only surety bonds contemplated. See CIV. PRO. CODE (1908), No. 187, (1918) M.W.N. 764.

(3) Surety making himself liable for decretal money in case dispute not settled—Compromise decrees—Decree if can be executed against surety. See CIV. PRO. CODE (1908), No. 188, 99 P.W.R. 1918.

(4) Application for execution of surety-bond—Dismissal of application and reference to separate suit—Dismissal of such separate suit on ground of execution application being proper remedy and for non-joinder of parties—Fresh application to execute surety-bond if barred by rule of *res judicata*. See EXECUTION OF DECREES, No. 24, 21 O.C. 188.

(5) Partnership suit, Executed in, Nature. See PARTNERSHIP, No. 7-a, 167 P.W.R. 1917.

Surrender.

(1) *Lease—Document, if necessary—Surrender by operation of law.*

In surrendering a lease no document in writing is necessary.

A surrender of lease to the landlord does not require any registered document.

A settlement lease from Government operates as a surrender of a previous lease in favour of another by operation of law. *Brojo Nath Sarma v. Maheswar Gohani*, 28 O.L.J. 220.

FLETCHER and SHAMSUL HUDA, JJ.

(2) Undivided tenancy—Death of one tenant—Surrender by survivor of deceased's rights to landlords—Collaterals of deceased, Right of—Possessory suit by surviving tenant, Maintainability of. See ESTOPPEL, No. 6 b, 154 P.L.R. 1917.

(3) Vendor of portion of occupancy tenure if has anything left to—Nature of, if transfer or grant—Acceptance of surrender by landlord of portion of inalienable occupancy holding—Eviction of transferee if can be made. See LANDLORD AND TENANT, No. 13, 22 C.W.N. 965.

(4) Sale of portion of non-transferable occupancy tenure—Surrender by vendor of same and re-settlement taken by him of rest—Implied surrender—Landlord if may evict purchaser. See LANDLORD AND TENANT, No. 14, 24 C.W.N. 967.

(5) Vendor of portion of occupancy tenure if has anything left to—Nature of, if transfer or grant—Acceptance of surrender by landlord of portion of inalienable occupancy holding—Eviction of transferee if can be made. See LANDLORD AND TENANT, No. 15, 22 C.W.N. 972.

(6) *Lease, Of, if writing necessary for—Registration, Necessity of—Surrender by operation of law, what is.* See LANDLORD AND TENANT, No. 47, 46 Ind. Cas. 100.

(7) Implied, Rule of, applicability of, where rent paid in advance—Mere non-cultivation does not amount to—C.P. Tenancy Act (1898), S. 35 (4). See LANDLORD AND TENANT, No. 52-a, 47 Ind. Cas. 28.

(8) Effect of, on sub-lease. See LANDLORD AND TENANT, No. 65, 14 N.L.R. 107.

(9) Surrender by occupancy tenant to landlord for consideration—Heir of tenant put in possession by Revenue Officer—Landlord's right to recover purchase-money with interest—Suit for refund if lies in Civil Court. See LANDLORD AND TENANT, No. 66, 14 N.L.R. 125.

(10) Relinquishment of lease or—Writs if necessary. See LEASE, No. 9, 22 C.W.N. 441.

Survey and Settlement Act.

See BOM. ACT I OF 1865.

Survey Maps.

Admissibility in evidence—Their value as evidence.

Survey maps are official documents prepared by competent persons, and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong: but in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made. *Maung Thin v. Mazl Zan*, 44 Ind. Cas. 247.

RIGG, J.

Reference :—30 C. 231, F.

Symbolical Possession.

(1) When sufficient to interrupt adverse possession. See ADVERSE POSSESSION, No. 4, 23 M.L.T. 26 (P.C.).

(2) Bonamidar, Decree against—Sale of property held in *benami* in execution of decree, if binds beneficiary—Symbolical possession, if binds beneficiary. See BENAMI TRANSACTION, No. 2, 24 C.W.N. 807.

(3) Meaning of. See CIV. PRO. CODE (1908), No. 365, 44 Ind. Cas. 839.

(4) Of bare site equivalent to actual possession. See POSSESSION, No. 7, 76 P.R. 1918.

Tank-beds.

Madras Estates Land Act (I of 1908), S. 3 (16), Explanation of term in—Tank-beds, if communal land under S. 20—Landholders, Rights of, over, if affected by S. 20. See MAD. ACT I OF 1908 (ESTATES LAND), No. 4-a, 47 Ind. Cas. 594.

Temple.

(1) Presumption as to intention of author of trust, where temple was open for public worship—Right of suit for proper administration of trust. See CIV. PRO. CODE (1908), No. 122, 45 Ind. Cas. 213.

(2) Suit for recovery of price of fireworks sold to manager of temple—No decree against temple funds. See RELIGIOUS ENDOWMENTS, No. 5, 34 M.L.J. 358.

Tenancy.

(1) Contract of. Kinds of—Express and implied—Implied, Instance of—Landlord and tenant—Tenancy, contract of, when can be inferred.

A contract of tenancy like any other contract may be implied as well as express.

A tenant openly breaks up waste-land adjoining his holding with the knowledge and frequently with the oral consent of the landlord. If the tenant is permitted to do this, by labour, tillage, expenditure of money, to improve the soil and make it a valuable source of income while the landlord stands by and signs the *jamabandis* which show the cultivator as a tenant *albeit* one not yet fixed with rent, it is

Tenancy—(Concluded).

reasonable to infer that the cultivation is with the landlord's consent. That makes the cultivator a licensee in the first instance; but where cultivation and improvement of the land have gone on for a number of years continuously and the landlord has not objected to the cultivator being shown as a tenant in the village records, a contract of tenancy may be implied. *Ratnool v. Nabidad Khan*, 46 Ind. Cas. 909.

STANYON, A J.C.

(2) Ejectment suit—Determination of tenancy, On ground of—Landlord and tenant, Relationship of, Proof of, Necessity of. See EJECTMENT, No. 4, 46 Ind. Cas. 238.

(3) Area of, Mistake as to, if mistake of law. See FINDING OF FACT, 46 Ind. Cas. 351.

(4) Mortgage—Purchaser in execution of mortgage decree—Suit for possession—Tenancy rights set up by some defendants—Duty of Court to adjudicate on such rights. See PLEADINGS, No. 3, 42 Ind. Cas. 550.

Tenancy Act:—

See BEN. ACT VII OF 1869.

See BEN. ACT VIII OF 1885.

See BEN. ACT II OF 1913 (ORISSA).

See C. P. ACT IX OF 1883.

See C. P. ACT XI OF 1898.

See PUN. ACT XVI OF 1877.

See PUN. ACT XVI OF 1887.

See U. P. ACT II OF 1901.

Tenancy-in-Common.

(1) Lands leased out—Suit by one tenant-in-common to recover his share of land and rent by partition—Suit against lessees only—Other tenants-in-common not necessary parties—Parties, joinder of. *Narayan Balkrishna Rajadhyaksha v. Fasco Monu Lem*, 19 Bom. L.R. 931=42 B. 87=43 Ind. Cas. 471. See Final Part, 1917, Col. 862.

(2) Co-ownership of ship if gives rise to partnership among owners—Law as to earnings by employing it. See PARTNERSHIP, No. 5, 36 M.L.J. 87.

Tender.

(1) Of draft of proposed agreement in case of enhancement of rent—Stamped draft sent to Court for service on tenant—Identical copy without stamp served by Court on tenant—Service if valid tender. See BEN. ACT VIII OF 1885 (TENANCY), No. 16, 22 C.W.N. 558.

(2) Mortgage-deed providing part-payment of mortgage money—Tender made after demand by mortgagees, Validity of—Interest, Rebate of. See MORTGAGE (GENERAL), No. 19, 33 P.W.R. 1916.

(3) What amounts to—Mere expression of willingness to pay not a valid—Dispensation of tender—Transfer of Property Act (1882); S. 84. See TRANSFER OF PROPERTY ACT (1882), No. 66-a, 8 L.W. 416.

Tender—(Concluded).

(4) What amounts to valid tender under S. 84 of the Transfer of Property Act. See **TRANSFER OF PROPERTY ACT**, No. 66, 45 Ind. Cas. 106.

(5) Deposit in Court by mortgagor of more amount than that due—Deposit if a valid tender—Mortgagor's right to interest on amount so deposited. See **TRANSFER OF PROPERTY ACT**, No. 64, 34 M.L.J. 439.

(6) Offer by mortgagor to repay debt—Assertion by mortgagee of absolute right to property—Tender if dispensed with—Amount not paid by mortgagor—Exoneration of mortgagor from payment of interest. See **TRANSFER OF PROPERTY ACT**, No. 67, 34 M.L.J. 488.

Thak Map.

Relevancy of, in suits for *lakheraj* title. See **EVIDENCE**, No. 2, 22 C.W.N. 396.

Third Party.

Contract relating to land—Third party having beneficiary interest in its purpose if may claim benefit of contract—Contract by Government with landlord—Undertaking by landlord to maintain rights of recorded tenure-holders—No waiver of such condition by tenant or Government—Right of landlord to declaration that certain tenant got entry in Record fraudulently—Right of tenant to take advantage of condition. See **LANDLORD AND TENANT**, No. 73, 3 Pat. L.J. 394.

Title.

- (1) *Suit framed as for possession and damages purporting to be unvier—Specific Relief Act, S. 9—Suit brought within six months of dispossession—Suit really based on title—Suit dismissed in toto as being one in which, upon plaint as framed, no relief could be given—Dismissal wrong—Remand.*

Plaintiff was a mortgagee with possession of certain zemindari for a period of five years. He entered into possession and had the land cultivated. His sub-tenants were dispossessed, as alleged by him, by the defendants. Within six months of the dispossession, he brought the suit for recovery of possession by declaration of his title and also asked for recovery of damages. He purported to bring the suit under S. 9 of the Specific Relief Act. The plaint was subsequently amended by striking out the claim for declaration of title. The Munsif granted him a decree for possession under S. 9 as prayed, but dismissed the claim for damages as being improper in conjunction with a claim for possession under the said section. Upon appeal, the District Judge dismissed the suit in toto, because, in his opinion, upon the plaint as framed, no relief could possibly be granted to the plaintiff. Upon second appeal, held that the suit being one for possession based upon title, inasmuch as a claim for damages had been made in the plaint, it could not be dismissed in toto but ought to have been remanded

Title—(Concluded).

for a decision on the merits. **Narsain Das v. Het Singh**, 16 A.L.J. 611 = 40 A. 637 = 46 Ind. Cas. 936.

TUDBALL and BAOOF, JJ.

Reference :—8 A.L.J. 910, *Dist.*

- (2) *Title, proof of—Document, rectification of—Lapse of time—Fraud or mistake.*

Title may be established without rectification of an instrument, even though the time to secure a rectification of the instrument has elapsed, and it is open to a party to give evidence to prove that his name has been omitted from the document by fraud or mistake (a). **Asiatulla v. Sadatulla**, 28 C.L.J. 197.

MOOKERJEE and WALMSLEY, JJ.

Reference :—(a) 2 C.W.N. 260, *F.*

- (3) *Wajib ul-ars—Entry as to title—Presumption.*

Though an entry as to title in a wajib-ul-ars or record-of-right does not create a title, it gives rise to presumption in its support which prevails until its correctness is successfully impugned. **Dakas Khan v. Ghulam Kasim Khan**, 24 M.L.T. 271 = 20 Bom. L.R. 1068 = 28 C.L.J. 441 = 45 C. 793 (P.C.).

LORD BUCKMASTER, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

Reference :—33 I.A. 101, *R.*

- (4) *Ejectment suit—Burden on plaintiff to prove title—Proof of possession within twelve years—Effect.* See **EJECTMENT**, No. 1, 30 Bom. L.R. 346.

- (5) *Landlord and tenant—Proprietary title, question of, decided in Revenue Court without evidence—Civil Court's jurisdiction to try such question.* See **JURISDICTION (OF CIVIL COURTS)**, No. 11, 21 O.C. 324.

- (6) *Suit for declaration of proprietary title—Adverse entry in revenue records, Effect of—Cause of action—Commencement of limitation.* See **LIMITATION ACT (1908)**, No. 163, 72 P.L. R. 1918.

- (7) *Suit for possession of land—Allegation of title and dispossession—Denial of both by defendant in possession—Duty of plaintiff to prove title—Duty of plaintiff also to prove twelve years' possession where title based on possession.* See **POSSESSION, SUIT FOR**, No. 3, U.B.R. 1918, 4th Qr., 125.

Tort.

- (1) *Negligence in stacking gravel in Municipal road—Suit for compensation for injuries sustained by motor vehicle passenger—Liability of Municipality for injuries, Principles governing—Employment of independent contractor, if exempts Municipality from liability—Municipalities whether exercise sovereign functions in maintaining roads—Statutory bodies, Rights and*

Tort—(Continued).

liabilities of, discussed—Municipality if agent or servant of Crown—Act IV of 1884 (Madras District Municipalities), Ss. 172, 173—Omission to obtain license under Madras Act I of 1907 (Motor Vehicles) if dissatisfied injured person to damages.

The plaintiff sued the Municipality of Vizagapatam for compensation for injuries sustained by him owing to the negligent stacking of gravel in a Municipal road to repair which the Municipality had employed a contractor and on which the plaintiff was riding in his motor bicycle without taking a license for the vehicle. Both the Courts below decreed the plaintiff's claim, but the lower appellate Court increased the amount of damages awarded by the first Court. *Held*, on second appeal, that the plaintiff was entitled to damages from the Municipality, but that the damages should be reduced to an amount smaller than even that awarded by the first Court.

Per Seshagiri Aiyar, J.—In laying and maintaining a road, Municipalities in this country are not exercising purely sovereign functions and consequently they are liable for misfeasance.

Though there is no provision for damages in the District Municipalities Act, which directs the application of Municipal funds in a particular manner, that direction is not binding upon a person against whom a wrong has been committed by the statutory body, against which a claim for damages can, therefore, lie; and this claim is not affected by the circumstance that the plaintiff did not obtain a license under the Madras Motor Vehicles Act I of 1907 (a).

On the question whether the Municipality can be held liable when it had given a contract for the making of the road to an independent contractor, the employer is not ordinarily liable, if there has been illegality or neglect on the part of the contractor, because an employer is entitled to expect of the contractor that he will perform the duty lawfully and without negligence. But there is an exception to this rule even in the case of private employers, that where the employer is aware that the doing of a contract work involved a public danger, he ought to see that the contractor so discharges his duty as to avoid such a danger. There is another exception also to the effect that, in the case of statutory bodies entrusted with the performance of a public duty, their liability cannot be shifted to a contractor (b). In the case of injuries occurring on Municipal roads, even though there may be a large margin of width for travellers to go through, the liability of the Municipality is not thereby lessened (c).

Per Napier, J.—It cannot be said that a statutory body, like the Municipality here, is either the servant or the agent of the Crown, unless it is so constituted by the provisions of the Act.

The principle of making corporations liable for neglect of duty is not limited in its application only to cases where a profit is derived by the levying of tolls (d).

Tort—(Continued).

S. 172 of the District Municipalities Act which requires a Municipality to take proper precautions during repairs, need not be read with S. 173, which has no application to the present case.

Where a statutory authority has power to do something to a road which will make it dangerous while it is being done, there is a duty cast upon them to take care that no persons are injured by any carelessness in the doing of what has to be done, whether that action be that of their own servants or of an independent contractor (e). *Municipal Council of Vizagapatam v. Foster*, 41 M. 538 = 44 Ind. Cas. 308.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 33 B. 393; 38 B. 116; 38 C. 796; 10 C. 415; *Parnaby v. The Lancaster Canal Co.*, (1839) 11 Ad. & Ell. 223; *McCheliam v. Manchester Corporation*, (1913) 1 K. B. 118, R.; *Harris and wife v. Baker*, 4 M. & S. 27; 39 M. 351; 5 B. H. C. Ap. 1, D.; 38 C. 296; *A. G. v. Lewes Corporation*, (1911) 2 Ch. 495. R. (b) *Hardkar v. Idle District Council*, (1896) 1 Q. B. 335, 14; 11 B. 329; 3 B. L. R. 265, Expl. (c) 11 M. 343; *Weanessday Corporation v. Lodge Holes Colliery Co.*, (1905) 2 K. B. 523, R. (d) *Mersy Dock Trustees v. Gibbs*, 1 H. L. 93, R. (e) *Dalton v. Angus*, (1881) 5 A. C. 740; *Penny v. Wimbledon Urban District Council*, (1895) 2 Q. B. 72; *Pickard v. Smith*, (1861) 10 C. B. N. S. 470, R.

(2) *Master and servant—Liability of a Railway Company for wrongful assaults committed by its servants—Company not liable for acts of its employees which the Company itself is not empowered to do—Indian Railways Act (IX of 1890), Ss. 108, 121, 128, 132.*

The plaintiff and his wife were travelling in a compartment of a train of the defendant company. The compartment got overcrowded. The plaintiff became afraid of being molested by other passengers and he pulled the communication chain and the train stopped. The engine-driver of the train ran up to the plaintiff's compartment, pulled him out of it and struck him blows with his fist; the guard came up to the spot and he too slapped the plaintiff on his face. The plaintiff was arrested by the engine-driver and the guard and was handed over to the Station Master at a station. After his statement was recorded by the police he was released and allowed to proceed to his destination. The plaintiff sued the Railway Company claiming Rs. 3,000 as damages for the wilful assault committed by the engine-driver and the guard:

Held, that, as the Company was not authorised under S. 108 of the Railways Act, to arrest the plaintiff for pulling the communication chain, the Company was not liable for assaults committed by its servants (a).

Held, further, that the special provisions of S. 108 of the Railways Act could not be controlled by the more general language of Ss. 121 and 128 of the Act (b),

Tort—(Continued).

The master is liable when the servant, acting in a matter which is, within the scope of his authority, that is, within the course of his employment, commits a wrong by exceeding the authority vested in him. The act itself which constitutes the wrong may be and usually is, in excess of the servant's authority, but if in thus transgressing his authority the servant is doing in the master's interests one of the class of acts which the master has employed him to do then the master is liable. *Girja Shankar Dayashankar Valdia v The B. B. and C. I. Railway*, 20 Bom L R 126 = 45 Ind Cas. 715.

SCOTT, C.J. and BATCHELOR, J

References—(a) *Poulton v London and South Western Railway Co.*, (1867) L R 2 Q B. 534, F. (b) *Parker v Elger*, (1894) A C 748, R.

(3) *Trespass—Branches overhanging from trees on neighbouring land—Right to cut off overhanging branches—Claim for injunction not dependent upon ability to prove damages*

A person has the right to cut off those portions of the trees which overhang his land. He can sue to obtain an injunction to remove the growth, even if he is unable to prove actual damage. *Vishnu Jagannath Joshi v Yashdeo Raghunath Oka*, 10 Bom L R 925 = 47 Ind Cas 649.

SHAH and KEMP, JJ

References—31 C 944, 19 B. 420 *Lemmon v. Webb*, (1895) A C 1, R.

(4) *Negligence—Injuries incapacitating plaintiff for life—Compensation—Measure of—Suit for compensation—Amendment of plaint at late stage of the trial—Amendment increasing damages claimed—If can be allowed—Question of damages—Appellate tribunal—How far can interfere with lower Court's finding—Appellate Bench—Desirability of, in agreeing on sum to be awarded.*

Per Sir John Wallis, C J—In a suit for compensation for injuries sustained by the plaintiff due to the defendant's negligence, which permanently incapacitated the former from the use of his limbs, the proper measure of damages is that something fair and reasonable should be given but it should always be less than an absolute compensation. (a)

Per Sadasiva Aiyar, J.—The defendant in such cases should not be visited with the utmost amount which a too compassionate jury might think equivalent for the mischief done and a Court should not give the plaintiff the value of an annuity of the same amount as his average income for the rest of his life.

Per curiam—Where an Aiyangar boy aged about 16 years and reading in the third form was permanently incapacitated by the fall of a temple door due to the negligence of the temple servants and it appeared that his father was very poor though there was a distant connection who was somewhat rich and his brothers

Tort—(Concluded).

were not highly educated and consequently held only humble positions in life and in a suit by the boy for compensation against the temple, the plaintiff was allowed at a late stage after the evidence was taken to amend his plaint by claiming Rs. 12,000 instead of Rs. 5,000 as originally prayed for.

Held on appeal,

(1) that the boy must be taken to be a backward boy and that Rs. 6,000 would be a sufficient compensation under the circumstances for the plaintiff's loss of career as well as his physical sufferings and (2) that the amendment allowed was, however, not illegal.

Per Sadasiva Aiyar, J.—The question of the quantum of damages in these cases is not one that can be accurately and mathematically answered out where, however, two Judges sitting on an Appellate Bench have to decide a question of that kind it is desirable that in exercising the functions of a jury the Bench should come to an agreement on the matter.

Per Sir John Wallis, C J—Although the Appellate Court can form its own opinion on the reasons given by the lower Court in assessing damages it should always be slow to interfere unless in its opinion the damages awarded are clearly excessive or inadequate. *Vinayaga Mudaliar v Parthasarathi Aiyangar*, 7 L W 115 = 43 M. L T 312 = 45 Ind. Cas. 656.

SIR JOHN WALLIS, C J and SADASIVA AIYAR J

References—(a) *Phillips v London and South Western Railway Company*, 5 C.P.D. 280, F. *Armsworth v South Eastern Railway Company*, 11 Jur. 768, *Rowley v. London and North Western Railway Company*, L.R. 8 Exch 221, R.

(5) 'Act of God'—Limitation of term—Collection of rain water—Damage to adjoining wall—Liability to compensate owner of wall. See ACT OF GOD No. 1, 21 O O 295

(6) Suit for damages for illegally impounding cattle—Burden of proof. See ACT OF 1871 (CATTLE TRESPASS), No. 1, 44 Ind. Cas. 237.

(7) Tort arising out of negligence of minor's guardian—Whether minor liable. See CONTRACT ACT, No. 86, 43 Ind. Cas. 923.

Tout

Person seen canvassing and introducing litigants to members of the Bar—Position of such person if that of tout. See LEGAL PRACTITIONERS ACT (XVIII OF 1879), No. 3, 16 A. L J. 76.

Transfer of Case.

(1) *Civ Pro. Code*, S. 24 (1) (b)—O. XLVII, r. 2—*High Court Circular*, R. O. C. No. 5856 of 1916—*Transfer by District Judge—Review in Small Cause to special Small Cause Judge—If valid.*

Where a Sub-Judge acting as a Small Cause Judge ordered notice of review in a Small Cause

Transfer of Case—(Concluded).

suit, and the High Court thereafter issued a circular R.O.C. No. 8656 of 1916 that all Small Cause suits should be tried by a special Small Cause Judge after 1-1-1916 and in pursuance thereof the District Judge transferred the review petition to the new Court.

Held, it was not proper for the District Judge to transfer a case already once decided by original Judge, as the circular applied only to cases instituted thereafter and the order is *ultra vires* *Valthilinga Chetty v. Kallaperumal Mudali*, (1918) M.W.N. 291=24 M. L.T. 32=8 L.W. 259=45 Ind. Cas. 13.

SESHAGIRI AIYAR, J.

Reference:—2 N.W.P. 230, F.

- (2) *Civ. Pro. Code (Act V of 1908), S. 22—Application for transfer by defendant objecting to jurisdiction of Court, maintainability of—Grounds for transfer, inconvenience of defendant's witnesses if sufficient for—Forum, interference with plaintiff's choice.*

A defendant in a suit, who takes objection to the jurisdiction of the Court in which it has been instituted to try that suit, cannot maintain an application for its transfer to another Court under S. 22 of the Civ. Pro. Code.

A plaintiff's right to choose his own *forum* cannot be taken away from him, except for very cogent reasons.

Held, that the fact that the defendant's witnesses would be very much inconvenienced, if the suit continued in the Court chosen by the plaintiff as his *forum*, is not a sufficient ground for taking action under S. 22 of Act V of 1908. *Askaran Bald v. Bhola Nath*, 21 O.C. 217.

LINDSAY, J.C.

References:—12 A.L.J. 896, 13 B. 178, Rel. on.

(3) Appeal transferred before fixed date to Subordinate Judge—Transfer order not communicated to parties—Dismissal of appeal for default on fixed date—Restoration of appeal—Sufficient cause. See APPEAL (GENERAL), No. 31, 3 Pat. L.J. 218.

Transfer of Decree.

- (1) *Portion of decrees, Transfer of—Transfer without notice to judgment-debtor, Effect of—Civ. Pro Code (Act V of 1908), Ss. 39, 42.*

A portion of a decree cannot be transferred to another Court for execution.

A decree transferred to another Court for execution is not binding on the judgment-debtor, when no notice has been given to him. *Prakash Chandra Sarkar v. Pande Ramnarain*, 43-Ind. Cas. 186=3 Pat. L.W. 247.

CHAMIER, C.J. and SHARFUDDIN, J.

(2) Transfer of jurisdiction after, while execution proceedings pending, Effect of. See CIV. PRO. CODE (1908), No. 301-a, 33 M.L.J. 750.

Transfer of Decree—(Concluded).

(3) Whole property covered by decree not, but only part, situate in jurisdiction of Court to which decree transferred for execution—Such Court if can execute same. See EXECUTION OF DECREE, No. 27, 48 P.R. 1918.

Transfer of Property.

- (1) *Sale of immoveable property—Non-payment of purchase money—Remedy of vendor—Possession, Delivery of, if necessary, to validate transfer—Oral evidence, admissibility of, to explain document—Evidence Act (I of 1872), S. 92.*

In a sale of immoveable property, the non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser can notwithstanding such non-payment maintain a suit for possession of the property, and the only remedy of the vendor is a suit for the recovery of the purchase-money (a).

Oral evidence is not admissible to show that a transaction which is *ex facie* a sale is really a mortgage, except to prove fraud on the part of the party taking benefit under the deed. *R. M. A. R. V. Venkatachallam v. Mg. Tula E.*, 45 Ind. Cas. 860.

MAUNG KIN, J.

References:—(a) 30 A. 125; 11 A. 244; 2 B. 547; 23 B. 625.

(2) *Fraudulent transfer—Transfer in lieu of dower in favour of wife—Husband's indebtedness—Insolvency of husband. Naimunissa v. Abdul Kadir*, 20 O.C. 295=43 Ind. Cas. 280. See Final Part, 1917, Col. 868.

(3) Creation of occupancy rights for consideration—Creation if mere act of management or transfer of valuable rights. See CUSTOMS (PUNJAB—ALIENATION), No. 7, 125 P.R. 1918.

Transfer of Property Act (IV of 1882).

(1) Lease of land containing fruit trees—Enjoyment of fruits by lessee—Land available for fresh plantation—Land on orchard but not garden—Lease governed by provisions of Transfer of Property Act. See BEN. ACT VIII OF 1885 (TENANCY), No. 88, 43 Ind. Cas. 580.

(2) *Usufructuary mortgage—Mortgagor taking lease—Mortgagee obtaining decree for arrears of rent—Equity of redemption, Sale of, in execution—Mortgagees, Purchaser at, Position of. See MORTGAGE (REDEMPTION), No. 13, 46 Ind. Cas. 493.*

(2-a) S. 2-d. See No. 21, *infra*.

(2-b) Ss. 3, 6 (a), 8—*Share in village and profits accrued due, Assignment of—Assignee, Suit by, for recovery of profits, Maintainability of—Mere right to sue under S. 6—Profits accruing after sale*

Transfer of Property Act (IV of 1882)
—(Continued).

pass with land under S. 8—Previous profits not beneficial interest.

Under S. 8 of the Transfer of Property Act only profits accruing after the transfer pass with the land. Previous profits are not a beneficial interest in the land within the meaning of the definition in S. 3, since the land could not be transferred with retrospective effect.

A suit for profits by a person as assignee of a co-sharer, the assignor having sold his village share and the right to profits prior to the sale is a suit on an assignment of a mere right to sue within the meaning of cl. (e) of S. 6 of the Transfer of Property Act, so far as the suit related to the profits accrued due prior to the sale, and therefore not maintainable. *Lakshpat Sabai v. Tikaram*, 47 Ind. Cas. 158.

BATTEN, A.J.C.

(2-c) S. 6—Future property, Assignment of, Validity of—Construction of section—Specific immoveable property in S. 58, Meaning of—Charge on both moveable and immoveable property—Non-registration of document, Rights over moveable property not affected by. See CONTRACT, No. 8, 47 Ind. Cas. 563.

(3) S. 6—Right of inheritance, alienation of, before vesting—Validity. See MAHOMEDAN LAW (INHERITANCE), No. 2, 7 L.W. 216.

(4) S. 6 (a)—Postponement of adopted son's estate during widow's lifetime—Transfer by adopted son of property forming part of estate during widow's lifetime—Validity of such transfer. See SPES SUCCESSIONIS, No. 1, 16 A.L.J. 765.

(4-a) S. 6 (e)—Profits of a village, Right in the, Transfer of, an assignment of debt—Not transfer of mere right to sue and not prohibited under.

A transfer for valuable consideration of a right in the profits of a village, actually accrued due and in existence at the time of transfer, is an assignment of a debt and not of a transfer of a mere right to sue. Although the transfer of the right to sue is a necessary incident of the transaction, the transfer of the right in the profits is not bad in law under S. 6 (e) of the Transfer of Property Act. *Bahrat Singh v. Bindu Charan*, 47 Ind. Cas. 634.

STUART and MOHAMMAD ALI, A.J.CS.

References:—9 C. 695=1 C.L.R. 440=4 Ind. Dec. (N.S.) 1112; 2 C.W.N. 43; 5 A. 207=A.W.N. (1882) 219=3 Ind. Dec. (N.S.) 166 and 1 Ind. Cas. 827=36 C. 345=13 O.W.N. 384, Dist.

(a-b) S. 6-e. See No. 2-b, *supra*.

(5) Ss. 6, 54—Assignability of contract—Covenant to repurchase—Covenant meant to be personal—Assignment outside family, if allowed. See VENDOR AND PURCHASER, No. 1, 20 Bom. L.R. 654.

Transfer of Property Act (IV of 1882)
—(Continued).

(6) Ss. 6, 109, 111—Breach of condition involving forfeiture by tenant—Transfer by landlord of his right subsequent to breach—Transferee if can enforce forfeiture. See LEASE, No. 4, 20 Bom. L.R. 767.

(6a) S. 8. See No. 2-b, *supra*.

(7) S. 10—Creation of darpadni lease by patnidar—Stipulation in darpadni that subordinate interests carved out by darpadni dar should become extinct on sale of darpadni for arrears of rent—Condition if absolute restraint on alienation or one inserted for lessor's benefit—Validity of condition. See LESSOR AND LESSEE, No. 1, 45 O. 940.

(8) S. 19—Interest in immoveable properties to take effect on the death of a living person—Whether vested or contingent—Sust by two persons as reversioners—Compromise decree passed—Provision therein that some properties should be taken by them on a certain person's death—One reversioner predeceasing the contingency—Other, if solely entitled to the whole.

Where two persons claiming to be reversioners to one K, deceased, instituted a suit against K's widow, mother and brother, disputing the genuineness of a will whereby the properties of K were bequeathed to them and a compromise was arrived at whereby some of the properties were to be taken by the plaintiffs on the death of the mother, the widow's rights having been already purchased by the mother and brother in a compromise in a prior suit by her, and subsequently one of the two persons having predeceased the mother, the other alone brought a suit for the recovery of the whole of the properties secured by the compromise on the ground that he has become entitled to the whole properties by survivorship in preference to the heirs of the deceased.

Held that the rights accrued to the two persons by the compromise was a vested interest and that it did not pass from one to the other by survivorship but was inheritable and divisible between the two donees. *Krishna Iyer v. Saminatha Iyer*, 8 L.W. 140=24 M.L.T. 101=(1918) M.W.N. 503=47 Ind. Cas. 723.

AYLING and SESHAGIRI AIYAR, JJ.

References:—4 M.L.A. 137, 38 C. 469, B.

(9) S. 35—Sale by guardian of minor's property for purchasing other property—Purchase of such other property not originally contemplated nor in same transaction—Property purchased by guardian, if benefit under S. 64, Contract Act and S. 35, Transfer of Property Act. See VENDOR AND PURCHASER, No. 7, 35 M.L.J. 652.

(10) S. 41—Transfer by ostensible owner—Purchase of equity of redemption—Nominal enforcement of satisfaction by a life-tenant of mortgage—Possession obtained by the purchaser from the life-tenant out of affection—Sale of the property to a third

Transfer of Property Act (IV of 1882)
—(Continued).

party—Plea of bona fide purchase for value without notice cannot avail against the remainderman of the mortgagee suing for possession—Principle that deed imports consideration does not apply in India—Consideration.

In 1895, the property in dispute was mortgaged to P. who died in 1899, having made a will under which his widow, H was given a life-interest in his estate and the remainder was left absolutely to his daughter's daughter (plaintiff). In 1900, defendant No. 3, who was a confidential clerk of H, purchased the equity of redemption in the mortgage and purported to pay off the mortgage, on the 5th April 1900. Though the mortgage-deed bore an endorsement that the mortgage was satisfied yet it was found that the endorsement was a sham nothing having been really paid. Nor was any transfer of the property taken by defendant No. 3 from H. Defendant No. 3 sold the property to defendant No. 4 in 1912. On H's death in 1914 the plaintiff sued to recover possession as mortgagee from defendant No. 4 or to recover the amount of the mortgage-debt. Defendant No. 4 pleaded that he was a bona fide purchaser for valuable consideration without notice.

Held, (1) that the endorsement of satisfaction on the mortgage-deed amounted merely to a gratuitous promise not binding on the releasor, since the English method of procedure by deed, on the principle that a deed imported consideration, had no application in India;

(2) that S 41 of the Transfer of Property Act, 1882, could not avail defendant No. 4; for defendant No. 3 never became the ostensible owner inasmuch as there was no transfer to him from H in whom consequently the title always remained;

(3) that the possession which defendant No. 3 had obtained out of affection from H would enure for the benefit of his assignee (defendant No. 4) so long as H, the life-tenant of the mortgagee, survived, but it could not prejudice the rights of the plaintiff, the remainderman of the mortgagee;

(4) that, therefore, defendant No. 4 was not protected by the plea of bona fide purchase for value without notice. *Bai Jayagavri v. Parshotamdas Sunderlal*, 20 Bom. L.R. 177 = 44 Ind. Cas. 926.

* **SIR BASIL SCOTT, KT., C.J.** and **BATCHELOR, J.**

(11) S. 41—Principle enunciated in section explained. See **BENAMI TRANSACTION**, No. 6, 46 P.R. 1918.

(12) Ss. 43 and 70—*Mortgage of Kumaki lands—Kumaki lands subsequently granted in dharkast by Government to mortgagor as wardar of adjoining lands—Right of mortgagee—Accession to mortgaged property—Indian Trusts Act (II of 1882), S. 90.*

Transfer of Property Act (IV of 1882)
—(Continued).

The predecessor in-title of the plaintiff mortgaged with possession her warg lands as also the adjoining lands over which she had kumaki rights. At the Settlement, adjoining kumaki lands were classed as waste poramboke and plaintiff managed to obtain the same on dharkast. In a suit by the plaintiff in ejectment as regards lands obtained on dharkast against the mortgagee, it was contended that the mortgagee was entitled to the benefit of the dharkast lands as part of his mortgage security.

Held that S. 43 of the Transfer of Property Act did not apply, as no erroneous representation was made by the mortgagor at the time of the mortgage.

Held, also, that the lands obtained on dharkast could not be regarded as an accession under S 70 of the Act to the mortgaged warg lands.

Held, further, that S 90 of the Trusts Act did not apply, the plaintiff not being a limited owner and that plaintiff was, therefore, entitled to recover the lands in ejectment. *Kndi Shankara Bhatta v. Moldin*, 8 L.W. 100 = 35 M. L. J. 120

OLDFIELD and SADASIVA AIYAR, JJ.

References:—29 M.L.J. 44; 33 M.L.J. 370; 34 M. 159; 10 Ind. Cas. 443; 32 C. 832; 28 M. 257, R.

(13) S. 48—*Presumption that separately created rights relate to different entities—Rights created in favour of different persons, exercise of.*

The principle recognised by S 48 of the Transfer of Property Act (IV of 1882) suggests that where separate rights created in favour of different persons can all be exercised without encroaching upon each other they must be treated as relating to different entities. *Mahabir Prasad v. Chhote Singh*, 21 O.C. 317.

KANHAIYA LAL, A.J.C.

(14) S. 18. See No. 39, *infra*.

(15) S. 51—*Purchase from limited owner—Improvements effected—Whether purchaser can claim compensation.*

Where a purchaser knows, or must be presumed to know, that the vendor could sell only under certain circumstances and he either knows that such circumstances do not exist or wilfully abstains from making any enquiry on the subject, the mere fact that he purchased for consideration will not suffice to show good faith; and he will not be entitled to claim compensation for improvements effected by him.

Apart from provisions of S. 51, Transfer of Property Act an equitable right may arise in favour of the owner of a limited interest who makes improvements on the property in his possession. But this right can only come into existence if it can be shown that the true owner stood aside and abstained from asserting his rights, and the person in possession was under

Transfer of Property Act (IV of 1882)
—(Continued).

a mistaken belief that he had a permanent interest in the property. *Etizad Husain v. Bani Bahadur*, 45 Ind. Cas. 242

TINDSAY, J.O.

References:—31 M. 530, 21 A. 496, A.W. N. (1885) 100, *Appr*

(16) S. 51—Improvements made by trespasser in good faith—Liability of owner to pay value of improvements See *CONTRACT ACT*, No. 47, 40 Ind. Cas 464.

(17) Ss. 51, 54, 118—Unregistered instrument of exchange—Possession given to transferee and buildings erected with knowledge and encouragement of transferor, effect of—Whether transferor can recover land—Compensation, whether payable and amount of—Whether S 51 applies to invalid transfers *Ramanathan Chetty v. Ranganathan Chetty*, 22 M.L.T. 173=43 M.L.J. 252=6 T.W. 300=(1917) M.W.N. 757=40 M. 1134=43 Ind. Cas 139 See Final Part, 1917, Col. 879.

(18) S. 52—Doctrine of *lis pendens*—Alienation of property *pendente lite*—Compromise entered into between parties—Whether decree can be passed in pursuance of compromise so as to affect the interests of alienee

In regard to the question whether an alienee of immoveable property *pendente lite* from the defendant in the suit is entitled to object to a decree being passed in terms of a compromise arrived at between the plaintiff and the defendant, after the date of alienation in question, and before the date when the alienee was made a party to the suit, *held per Wallis, C. J.*, that there is no sufficient reason for refusing to give effect to the compromise entered into between the original parties before the alienor had been made a party.

Per Srinivasa Aiyangar J (dissenting) held, that no decree on the compromise between the plaintiff and the defendant could be passed so as to affect the interests of the alienor, *pendente lite* *Cherilo Subba Reddi v. Amparayan Venkataseshiah*, 43 Ind. Cas. 502

WALLIS, C. J. and SRINIVASA AIYANGAR, J.

References:—29 M. 426 (F B), F, London v. Morris, (1892), 5 Sim. 247, *Mellen v. Molins Malleable Iron Works* (1889) 131 4 U St Sup. Courts Rep 352, *Winchester (Bishop of) v. Paine*, 11 Ves. (Jun) 194 at p. 197, *Harrington v. American Gulse Co.* (1899) 63 L.R. 4737, R.; 10 M.L.A. 476, *Dist. v. Bellamy v. Sabie*, (1857) De G. & J. 566, 29 A. 339, *Tenison v. Sweeney*, 7 Ir. Eq. 511; 8 B.L.R. 474, 20 C.L.J. 107; *Greenough v. Littler*, (1880) 15 Ch. D. 93; 27 A. 544, R.

(19) S. 52—Scope of the section—Plaintiff consenting for defendant raising a charge on property pending suit—Priority of charge over the decree-debt in the pending suit—Interest in the nature of penalty.

Transfer of Property Act (IV of 1882)
—(Continued).

The essence of S. 52 of the Transfer of Property Act is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit who is not a party to the transaction.

A held two mortgages on the same property and a decree was obtained on the first mortgage and a suit on the second mortgage was proceeding. That while the property was brought to sale in execution of the decree on the first mortgage, A consented for grant of time to mortgagor to raise a loan from H to pay off the mortgage decree. *Held* that, under such circumstances, H is entitled to ask for an account upon his prior charge and to recover the sum advanced for the payment of the first mortgage debt of A.

Where a decree granted interest at 6 per cent. per annum and the decree holder imposed a condition for granting time to pay the decretal amount that interest should be raised to 12 per cent. per annum, *held*, that the increase of the rate of interest was in the nature of penalty and was disallowed, *Benode Behari Bose v. Hira Singh*, 44 Ind. Cas. 726

SHARFUDDIN and ROE, JJ

Reference:—10 C 1035, F.

(20) S. 52—"Any other party to the suit"—Necessity for contest between the parties—Co defendants, absence of contest between—Purchase by one defendant from another—Court auction—*Lis pendens*—Scope of doctrine—*Res judicata*

M brought a suit for a declaration that a sale by him in favour of A and a mortgage by A in favour of B were not binding on him (M). There was no contest between A and B and they made common cause against M. A decree was passed affirming the sale but declaring the lien of M for unpaid purchase money in priority to the mortgage in B's favour. Pending the suit A's interest in the properties were brought to sale in execution of a decree by a third party and was purchased by a third party. In a subsequent suit by the heirs of B to enforce the mortgage it was contended that it was not open to the auction purchaser of A's interest to question the mortgage as it was recognised in the previous suit and that the purchase was affected by the doctrine of *lis pendens*.

Held that the doctrine of *lis pendens* did not apply and it was open to the purchaser to question the mortgage.

The term "any other party" in S. 52 of the Transfer of Property Act, means any other party between whom and the party alienating there is an issue for decision, which might be prejudiced by the alienation.

The law of *lis pendens* is an extension of the doctrine of *res judicata* and makes the adjudication in the suit binding on the alienor from the parties, pending the suit, just in the same way as the law of *res judicata* makes the adjudication binding on the parties to the suit.

Transfer of Property Act (IV of 1882)
—(Continued).

and their representatives and if there was no contest between the parties the doctrine of *lis pendens* like that of *res judicata* has no application (a).

Where the decree in the previous suit while giving M, a decree for his lien amount in priority to the mortgage in B's favour contained a declaration that the mortgage was good as between M and B.

Held that this did not amount to an adjudication upon the validity of the mortgage as between A and B who made common cause against M. *Manjeshwara Krishnaya v. Yasudeva Mallaya*, 7 L.W. 104=23 M.L.T. 70=34 M.L.J. 263=44 Ind. Cas. 471 (F.B.).

WALLIS, C.J., BAKEWELL and KUMARASWAMI SASTRI, JJ.

References:—(a) 29 A 339, Rel. on; *Bellamy v. Sabine*, 1 D.C. and J. 566, R.

(20-a) S. 52—*Lis pendens*, Doctrine of, Applicability of, to a lease by *ijadarar* after expiry of *ijara* and during pendency of ejectment suit. See *LANDLORD AND TENANT*, No. 52 f, 47 Ind. Cas. 365.

(31) Ss. 52, 2 (d)—*Lis pendens*—Transfer effected under another Court's order pending suit—Transfer ineffective against parties to suit—Suit on mortgage—Company—Liquidation of affairs of Company—Liquidators authorised to create charge—Charge when created gains no priority over claims of parties. *Motilal Shrivastav v. Poona Cotton & Silk Mfg. Co.*, 19 Bom. L.R. 602=41 Ind. Cas. 246=42 B. 215. See Final Part, 1917, Col. 874.

(22) S. 52—Partition proceedings under C.P. Land Revenue Act, 1881, when contentious under section. See *LAMBARDAR*, No. 1, 14 N.L.R. 18.

(23) S. 52—Agricultural lease of surrendered lands pending foreclosure suit—Validity of lease. See *LIS PENDENS*, No. 3, 14 N.L.R. 138.

(24) S. 52—Transfers *pendente lite*—Validity. See *LIS PENDENS*, No. 1, 20 Bom. L.R. 929.

(25) S. 52—Transfer of suit property before execution of decree directed by decree to be executed in suit for specific performance of agreement to lease—Transfer if contravenes rule of *lis pendens*. See *RELINQUISHMENT OF PORTION OF CLAIM*, No. 2, 14 N.L.R. 176.

(25 a) Ss. 52, 60—Applicability of—Mortgages, Acquisition by, of portion of mortgaged property—Effect of, on right of redemption of owner of other portion—Equity of redemption, Portion of, Acquisition by mortgagee pending suit. See *MORTGAGE (REDEMPTION)*, No. 12-a, 47 Ind. Cas. 115.

(26) S. 53—Transfer to stranger for value in fraud of creditors—Knowledge of intention to defraud, if sufficient.

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—(Continued).

A transferee who is not himself a creditor and who takes the transfer with full knowledge of the fraudulent intention of the transferor to defeat his creditors is not a transferee in good faith and such a transfer is void against a creditor even if the transferee has paid full value of the property purchased by him.

Such a transfer cannot be held to be valid on the ground that a portion of the consideration money was applied by the transferor in payment of some debts which he owed to third persons. *Aftabuddin Chaudhury v. Basanta Kumar Mukhapadhyaya*, 22 C.W.N. 427=45 Ind. Cas. 441.

N. R. CHATTERJEE and RICHARDSON, JJ.

References:—34 C. 999; 24 C. 825, R.

(27) S. 53—Essence of mischief contemplated under section—Defendant releasing rights in regard to property when plaintiff's debt was existing—Transaction not bona fide.

The essence of the mischief contemplated by S. 53, Transfer of Property Act, is that there must be an intention to secure a benefit to the transferor.

Where a decree obtained by plaintiff was for a debt which was in existence, when the release deed was executed by the defendant who acted in a reckless manner and with evident intention of cheating the plaintiff, held that the element of bona fides was wanting and the transaction can be impeached under S. 53, Transfer of Property Act. *Subroya Gowndan v. Perumal Chettiar*, 43 Ind. Cas. 966.

SPENCER and SESHAGIRI Aiyar, JJ.

References:—32 M.L.J. 425; 43 C. 521; 34 O. 999, Dist.; 30 M. 6; 5 M.L.T. 288; 19 M.L.T. 206, F.; 25 B. 202; 10 M.L.T. 128, Dist.

(28) S. 53—Alienation by judgment debtor before decree—Attachment of alienated property by decree-holder—Claim by alienee disallowed—Subsequent suit by defeated claimant under O. XXI, r. 63, Civ. Pro. Code—Attaching decree holder made a defendant to suit—Part of alleged consideration for sale found true—Defence that alienation is in fraud of creditors, if open to decree holder—Separate suit to set aside sale, if necessary. *Subramania Aiyar v. A. L. V. R. R. M. Muthia Chettiar (dead)*, 6 L.W. 750=33 M.L.J. 705=41 M. 612=43 Ind. Cas. 651 (F.B.). See Final Part, 1917, Col. 875.

(29) S. 53—Transfer in fraud of creditors but really intended to pass title—Whether should be set aside or can be resisted by way of defence to a suit on the transfer. *Palanandi Chetty v. M. Y. Appavu Chettiar*, 22 M.L.T. 474=45 Ind. Cas. 52. See Final Part, 1917, Col. 876.

(30) S. 53—Preference of one creditor over another, when void under section. See *FRAUDULENT PREFERENCE*, 21 O.O. 97.

Transfer of Property Act (IV of 1882)
—(Continued).

- (31) *S. 54—Purchaser of immovable property, suit to recover possession by—Agreement to reconvey to person in possession.*

Certain taluks were sold in execution of a mortgage decree. The auction-purchaser transferred the properties to the plaintiffs by a conveyance. The plaintiff sued for declaration of title to and possession of the land by virtue of the conveyance, while the defendant in possession alleged that the purchase was for his benefit and the plaintiff was his benamidar. It appeared that, prior to the purchase, there was an agreement between the plaintiff and the defendant that the properties would be reconveyed.

Held—That the Transfer of Property Act did not contain the whole law on the subject of the transfer of property, because there are other Acts, which contain provisions relating to the same subject and S. 54 of the Act was not of itself sufficient to enable the plaintiff to succeed in the contention that title being in the plaintiff by virtue of the conveyance, the defendant cannot resist his claim for possession on the basis of a mere agreement to reconvey.

Held (as to the argument that the defendant could not rely on the agreement because it was too late for him to sue for specific performance)—That it might be that the defendant could not actively enforce his rights under the agreement by legal proceedings but possession is itself a title (at any rate to remain in possession) which a plaintiff must displace before he can succeed. *Shafikul Huq Chowdhury v. Krishna Gobinda Dutt*, 23 C.W.N. 284 = 28 C.L.J. 77

TEUNON and RICHARDSON, JJ.

References:—29 M. 336; 38 M. 519, 40 M. 1134; 44 C. 542; 12 C.W.N. 445, 20 C.W.N. 149; 41 B. 438; *Walsh v. Londale*, (1882) L.R. 21 Ch. D. 9; *Loksey v. Port Swettenham Rubber*, (1913) L.R. A. C. 491; 24 M. 377; 39 B. 472, R.

- (32) *S. 54—Sale—Necessity of registration of sale-deed—Registration Act, S. 35—When Registrar bound to register—Appellate Court—Discussion of evidence—Bengal Tenancy Act, S. 153—Nagdi rent—Second appeal.*

A transfer of tangible immovable property of the value of Rs. 100 and upwards can only be effected by a duly registered instrument. The contract of sale unless followed by the registration of the deed cannot completely transfer the property, and cannot by itself create any interest in or charge on the property.

Under S. 35, Indian Registration Act, all persons executing a document should have admitted the execution before the Registrar before he was bound to register the document.

Where the Court of first instance fully discussed the evidence and the judgment of the appellate Court is a judgment in agreement,

Transfer of Property Act (IV of 1882)
—(Continued).

held that the contention that the appellate Court did not discuss the evidence was futile.

Where there was an issue whether defendant held land at a nagdi rent, **held**, that S. 153, Bengal Tenancy Act, is no bar for a second appeal in the case. *Sheikh Wajid Ali v. Musammat Mahmunissa* 43 Ind. Cas. 777 = 4 Pat. L.W. 71.

JWALA PRASAD, J.

References:—13 C.W.N. 742, 23 M. 580; 19 C.W.N. 823, R.

- (33) *Ss. 54, 49—Exchange of property valued over Rs. 100—Document unregistered—Bargain acted upon binding upon parties—Part performances*

An exchange of property, valued over Rs. 100 is binding upon the parties thereto when the bargain has been acted upon, even though the exchange is not in writing and is unregistered (a). *Salamat-ul-zamini Begam v. Masha Alla Khan*, 16 A.L.J. 98 = 40 A. 187 = 43 Ind. Cas. 645

PIGGOTT and WALSH, JJ.

References:—(a) 42 C. 817 (P.C.); *Maddison v. Alderson*, (1883) 8 A.C. 467, F.; 31 B. 165; 24 B. 400; 26 A. 266; 44 C. 542; 16 A. 344; 33 A. 693; 15 A.L.J. 761, R.; 38 M. 519; 29 M. 336, Diss.

- (34) *Ss. 54, 59—Successors in title of original equitable mortgagee in possession with consent of mortgagors—Registered document if necessary for such transfer of possession. See MORTGAGE (EQUITABLE MORTGAGE), No. 3, 9 L.B.R. 172.*

- (35) *Ss. 51, 78—Mortgage suit—Mortgaged property partly sold and partly mortgaged to persons induced by some of the mortgagees themselves to believe property to be free from encumbrance—Estoppel—Interests of co-mortgagees if severable—Document creating transfer of simple mortgage if compulsorily registrable—Transfer of Property Act (IV of 1882), S. 54—Registration Act (XVI of 1908), S. 17 (b).*

In a mortgage suit, some of the defendants were purchasers of a portion of the mortgaged property and one had taken a puisne mortgage of the remainder. It appeared that some of the plaintiffs-mortgagees led these defendants to believe that the whole property was unencumbered. The lower Court dismissed the suit so far as these plaintiffs were concerned.

Held—That as regards the defendants who were purchasers of a portion of the mortgaged property the claim of these plaintiffs was rightly dismissed under the rule of estoppel, but as regards the other defendant who was a puisne mortgagee of the remainder of the

Transfer of Property Act (IV of 1882).
—(Continued).

mortgaged property the effect of the estoppel under S. 78 of the Transfer of Property Act was to postpone these plaintiffs in respect of their share of the original debt to this defendant and the decree should declare that the property mortgaged to this defendant was hypothecated to these plaintiffs for their share of the original mortgage debt and their rights as mortgagees were postponed to those of this defendant.

These on mortgagees are presumably tenants in common of the mortgage debt and their interests are severable or partible among themselves and it was open to the Court to sever the interests of those plaintiffs who had taken no part in the debt practised upon the purchaser from those who did, and to make a decree in their favour in proportion to their interest in the debt.

That a mortgage-debt is immoveable property both for the purposes of S. 54 of the Tr. P. Act as also for the purposes of S. 17 (b) of the Registration Act; and where a mortgage-debt is transferred by an instrument in writing and the value of the right, title or interest transferred is one hundred rupees or more, the writing requires registration and the absence of registration makes the document inadmissible. *Sakhluddin Saha v. Sonaulah Sarkar*, 29 C.W.N. 641=27 C.L.J. 453=45 Ind. Cas. 386.

RICHARDSON and BEACHCROFT, JJ.

References:—Davenport v. James, 7 Hare 249; 15 C. W. N. 375=12 C.L.J. 25; *In re Hoyles*, 1 Ch. 179; 3 B. 442; 17 B. 236; 9 C. 889; 18 A. 69. R.; 29 C. 460; 6 C.W.N. 5; 12 C.W.N. 626, *Dist.*

(36) S. 54. See Nos. 5 and 17, *supra*.

(37) S. 55, cl. 4 (b)—*Vendor taking promissory note from one of the vendees for part of sale money—Whether vendor has a charge on the land sold for money due on the note.*

Plaintiff and another sold land jointly to defendants 1 to 4 for Rs. 10,000. Of this amount Rs. 8,650 were received by the vendors in cash and for the balance of Rs. 1,350 the 1st defendant alone executed two promissory notes one, in favour of each of the vendors for Rs. 675 each. Plaintiff sued on his promissory note for Rs. 675 with interest and claimed a charge on the land sold treating the amount due on the note as unpaid purchase-money.

Held, that the fact that promissory notes were executed in favour of each of the vendors by only one of the vendees, that there was a stipulation for a fixed rate of interest and that only one of the vendors brought the suit without joining the co-vendor shows that the promissory note formed part of the consideration, that there was, therefore, no unpaid purchase-money and that the plaintiff (vendor) is not entitled to a charge on the land.

Transfer of Property Act (IV of 1882)
—(Continued).

English and Indian Law on the subject of vendors' lien compared. *Krishnaswami Iyengar v. Subrahmanya Ganapathigal*, 28 M.L.T. 85 = 7 L.W. 310 = (1918) M.W.N. 281=35 M.L.J. 304=44 Ind. Cas. 528.

AYLING and PHILLIPS, JJ.

(38) S. 58—Simple mortgage—Mortgage by conditional sale. No personal covenant to pay—Personal decree against mortgagor, if cash be passed. See MORTGAGE (BY CONDITIONAL SALE), No. 2, 46 Ind. Cas. 326.

(39) Ss. 58 (d), 67, 68—*Usufructuary mortgage—Possession not delivered to mortgagor—Sust by mortgagee for sale of mortgaged property—Maintainability.* *Marturu Subbamma v. Gadde Narayya*, 33 M.L.J. 628=32 M.L.T. 429=(1917) M.W.N. 828=6 L.W. 738=41 M. 269=43 Ind. Cas. 4 (F.B.). See Final Part, 1917, Col. 879.

(40) Ss. 58 and 100—*Distinction between mortgage and charge—Charge created by judgment debtors on properties outside the suit, validity of.*

The distinction between a mortgage and a charge under S. 100 of the Transfer of Property Act is, that in the case of mortgage there is transfer of the property to the creditor, which requires registration and in the case of charge there is no such transfer. The debtor only agrees that the property shall be security for the repayment of the debt, and it does not require registration.

In a mortgage suit, the defendants filed a compromise wherein it was provided that if the whole of the suit amount should not be recovered by sale of the mortgaged properties, the plaintiffs would be entitled to recover it by sale of certain other specified properties. The suit was decreed accordingly. And in execution of the decree, the other specified properties were brought to sale and bought by plaintiffs.

Held that all right, title and interest of the judgment-debtors in those properties were extinguished by the sale.

Held, further, there was nothing to prevent the judgment-debtors by agreement from creating a valid charge upon properties outside the suit. *Samiruddin v. Abdul Syed*, 44 Ind. Cas. 784.

CHITTY and SMITHER, JJ.

(40 a) S. 58. See No. 53, *infra*.

(41) S. 59—*Attestation of mortgage-deed executed by parganashin—Requirements of.* See MORTGAGE (GENERAL), No. 10, 34 M.L.J. 545 (R.C.).

(42) S. 59—*Execution of mortgage by two persons—Attestation after execution by one—*

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—(Continued).

No fresh attestation, even though attestors present when executed by second person—Admission of execution dispenses with proof—Attestation, Nature of. See MORTGAGE (GENERAL), No. 19, (1918) M.W.N. 859.

(43) S. 59—Attestation of mortgage-deed by person not witnessing actual execution—Provisions of section imperative—Duty of appellate Court to take note of defect. See MORTGAGE (GENERAL), No. 16, 9 L.B.R. 159.

(44) S. 59. See No. 34, *supra*.

(45) Ss. 60, 62—Stipulation in usufructuary mortgage for discharge of debt by appropriation of usufruct—Provision also made for redemption on earlier fixed date, in default of which original stipulation to continue—Default in taking advantage of concession—Original stipulation if clog on equity of redemption. See MORTGAGE (REDEMPTION), No. 15, 35 M.L.J. 287.

(46) Ss. 60, 89—Decree for foreclosure—Agreement for foreclosure of portion of mortgaged property—Validity of. See CIV PRO CODE (1909), No. 445 43-Ind. Cas. 999

(46 a) Ss. 60. See No. 25-a, *supra*.

(47) S. 62. See No. 15, *supra*.

(48) S. 63—Mortgagee from khot if can purchase without khot's leave occupancy tenure—Such mortgagee if can rely upon section and claim reimbursement of price of occupancy tenures purchased by him. See OCCUPANCY TENURE, No. 1, 20 Bom. L.R. 691

(49) S. 67—Money decrees with lien on certain properties comprised in a mortgage—Sale in execution of such property without suit under section if valid. See EXECUTION OF DECREES, No. 1, 45 C. 530.

(50) S. 67. See No. 39, *supra*.

(51) S. 68—Mortgage—Trespass—Mortgagee's rights as against trespassers.

The provisions of S. 68 of the Tr. P. Act are designed for the purpose of indemnifying the mortgagee against any disturbance in his peaceful enjoyment of the property. They are provisions of enabling nature that they do not preclude a mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to the general law and claiming as against him a declaration of title and recovery of possession. There is nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which S. 68 empowers him to claim from his mortgagor. *Beehu Sahu v. Arjun Sahu*, 8 Pat. L.J. 162—48 Ind. Cas. 917.

MULLICK and ATKINSON, JJ.

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—(Continued).

(52) S. 68. See No. 39, *supra*.

(53) Ss. 69, 58—Mortgage money includes interest. See MORTGAGE (SALE), No. 10, 9 L.B.R. 106.

(54) S. 70. See No. 12, *supra*.

(55) S. 72—Mortgagee paying arrear of revenue to prevent sale—Whether such payment creates charge on the mortgaged property.

Where a preliminary mortgage decree was passed and, while appeal was pending, the mortgagee paid arrears of revenue in order to prevent sale: Held that such payment creates a charge on the property to the extent of the amount paid. *Ma Pwa Kin v. K. P. S. A. R. P. Fien*, 43 Ind. Cas. 190.

MAUNG KIN, J.

References:—30 C. 794; 31 C. 975, F.; 26 M. 696, 11 M. 452, Appl.; 14 C. 809; 14 A. 273; 26 B. 437, 13 A. 195, Dist.

(56) S. 72—Protection by mortgagee of mortgagor's title, Institution of criminal proceedings for—Mortgagee's right to recover expenses incurred—Mortgagee is bound to add them to mortgage money and to claim them before redemption—Mortgagee's right to bring separate suit for such expenses—Step mother if can act as minor's guardian—Liability of minor on bond executed for proper purposes.

The plaintiff obtained a usufructuary mortgage from the father of the 1st defendant in 1906. He had to institute criminal proceedings against his tenants who had carried away the crops on the land adjoining with, and asserting the title of a stranger as owner of the mortgaged land. For the expenses incurred in conducting the criminal proceedings, the 2nd defendant who was the step mother of the 1st defendant, executed a document, on which the plaintiff sued both the defendants. It was found that the expenses of the criminal proceedings were necessary and that the mortgagee in possession acted as a prudent owner in incurring them. It was contended in the suit that a separate suit for recovery of the expenses incurred was not tenable under S. 72, Tr. P. Act, that the 2nd defendant was not a guardian of the minor and could not bind him by her bond and that the plaintiff was not entitled to a decree either against the minor personally or against his estate. Held that, on the findings, a separate suit lay, as S. 72 was a permissive provision and not an objection imposed upon the mortgagee to add the money spent by him to the moneys due under the mortgage and to insist upon being paid those sums before redemption and that there was an independent cause of action for the expenses incurred (a). Held, also, that the step-mother, who happened to be the sister of the minor's own mother, was,

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—(Continued).

in the absence of nearer relation, not incompetent to act as his guardian (b). *Held*, further, that the estate of the minor was liable for the debt, the minor not being personally liable (c). **Yenkitaswami Nalcker v. Muthusawmy Pillai**, 34 M.L.J. 177 = 73 M.L.T. 280 = 45 Ind. Cas. 949.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 9 M.L.J. 177, *Not F.*; 20 A. 401. *Rel. on.* (b) 7 W. R. 321; 16 Ind. Cas. 900; N.W.P. Sudder Court Rulings for 1847, p. 115; 2 Bombay Sudder C.R. 144, R. (c) 39 M. 915, *F.*; 33 M.L.J. 631, R.

(57) S. 72—Applicability of section to claim, by person holding tenure, under *patni* tenure payment of money made by him on account of *patni* rent. See **BEN. REG. VIII OF 1819**, No. 2, 41 Ind. Cas. 694.

(58) Ss. 74, 76—Improvements made by mortgagee in possession—Mortgagee if can recover costs of improvements from mortgagor. See **MORTGAGE (REDEMPTION)**, No. 4, 20 Bom. L.R. 895.

(59) Ss. 74, 101—Right of subrogation if enforceable by suit—Purchaser of mortgaged property, discharge of prior incumbrance by—Intention to keep such incumbrance alive—Question of fact—Presumption. See **MORTGAGE (SUBROGATION)**, No. 2, 8 L.W. 175.

(60) S. 76. See No. 58, *supra*.

(61) S. 78. See No. 35, *supra*.

(62) S. 82—Contribution — Mortgagee not affected by the principle.

S. 52, Transfer of Property Act, defines the relation of the mortgagors *inter se*; there is nothing in the language of the section which compels the conclusion that the mortgagee must distribute his debt in a certain manner, or is unable to enforce it against each and every part of the property made security for the mortgage (a). **Timaji Krishna Potdar v. Rama Piraji Bhatkhande**, 20 Bom. L.R. 175 = 45 Ind. Cas. 862.

BATCHELOR, A.C.J. and SHAH, J.

References:—(a) 18 C. 320; 29 M. 217, R.

(63) S. 83—Deposit by mortgagor after institution but before notice of suit—Deposit, if valid—Interest.

Held that a deposit of the amount of mortgage money after the institution of a suit by the mortgagee was not effectual to stop the running of interest.

A deposit, under S. 83 of the Transfer of Property Act, is invalid, if made after the institution of a suit by the mortgagee. There is no reason for making any exception in favour of allowing a mortgagor to deposit the money

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before he receives notice of the suit, but after its institution. **Thiagaraja Aiyar v. Ramaswamy Aiyar**, 35 M.L.J. 605.

PHILLIPS and KUMARASWAMI SASTRI, JJ.

References:—35 M. 209, *F.*; 30 M. 464, R.

(64) S. 83—Mortgage — Deposit of larger amount than is due—Depositor if can claim benefit of tender—Interest on amount of deposit if how far claimable by depositor.

The defendant obtained a mortgage of certain properties in 1902. On a portion of these properties, there was a mortgage to a third party who brought them to sale in a suit on his mortgage and the present plaintiff purchased them in 1908, subject to the defendant's mortgage. In January, 1912, the plaintiff deposited in Court the whole of the money due on the defendant's mortgage and applied under S. 83, Tr. P. Act, for an order directing the defendant to accept the amount and give him possession of all the properties or in the alternative, to deliver only the lands purchased in auction by the plaintiff on receiving the proportionate amount. The Court gave notice of the deposit to the defendant, who did not take any objection that the plaintiff had not deposited the amount remaining due on the mortgage so as to enable him to decide whether he would accept the money so deposited in full discharge of the amount due to him, but simply declined to accept it as there was only an offer to pay proportionate amount without specifying such amount though he agreed to hand over the plaintiff the portion purchased by him on receiving the whole of the mortgage amount due on his (the defendant's) mortgage. As the parties were not able to come to terms, the petition was dismissed and they were referred to a regular suit. Accordingly the plaintiff brought the present suit for redemption of the portion purchased by him on payment of the exact amount due thereon out of the money in deposit. It was found that the money had remained in Court ever since it was deposited and that the amount mentioned in the plaint as due was the correct amount. *Held* that the tender made in January, 1912, was a valid one and that the plaintiff was entitled to interest thereon from the date of the service of the plaint and summons on the defendant, on the principle of O. XXIV, r. 3, Civ. Pro. Code.

Per Seshagiri Aiyar, J.—Where more than the amount due under a mortgage is paid, it is a valid tender under S. 93, Tr. P. Act (a). **Subramania Iyer v. Narayanaswami Yandayar**, 34 M.L.J. 489 = 7 L.W. 537 = 45 Ind. Cas. 638.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) *Wade's Case*, (1601) 5 Coke's Rep. 114; *Douglas v. Patriak*, (1790) 3 Term Rep. 683; *Dean v. James*, (1848) 4 B. and Ad. 547; *Evans v. Ress*, 5 M. and W. 306, *F.*; 34 M. 320; 23 M.L.J. 586; 30 M.L.J. 607; 39 M. 579, *D.*

Transfer of Property Act (IV of 1882)
—(Continued).

(65) Ss. 83 and 84—Deposit of mortgage money and notice to mortgagee through Court, if will amount to tender under S. 84—Interest, if ceases to run. *Govindan Nair v. Cheruvanna*, (1917) M.W.N. 853=7 L.W. 81=43 Ind. Cas. 126=85 M.L.J. 313. See Final Part, 1917, Col. 886.

(66) S. 84—What amounts to valid tender under S. 84.

A mere readiness and willingness to pay, not communicated to the creditor, and without the accompanying circumstance of the debtor being in a position to pay immediately if the offer was accepted, does not amount to a valid tender under S. 84, Transfer of Property Act. *Sheoratan v. Biharlal Sewardan Marwadi*, 45 Ind. Cas. 106.

KOTWAL, OFFG A.J.C.

Reference:—30 C. 865, Dist.

(67) S. 84—Tender—Mortgagor offering to pay up the debt—Denial by mortgagee of right to redeem—Dispensation of tender—Interest, cessation of—Rules under Legal Practitioners Act, r. 41—Fees for two vakils.

The mere assertion by the mortgagee that he has acquired an absolute right to the property will not amount to a dispensation of tender and will not exempt the mortgagor who has merely expressed his willingness to pay the debt, but has not actually tendered the amount from the payment of interest (a).

The Court may in a case involving a large sum of money allow fees for two vakils though there is no difficult or important question to determine. *Yenkatrayanum Garu v. Yenkata Subhadrayamma*, 34 M.L.J. 488=24 M.L.T. 56=(1918) M.W.N. 371=8 L.W. 416=45 Ind. Cas. 437.

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 8 B.H.O.R. 133. 28 C. 557; 22 C.L.J. 352, D.

(68) S. 84. See No. 65, *supra*.

(69) Ss. 86, 89, 93 (2)—Suit by prior mortgagees for recovery of loan—Puisne mortgagees made party—Subsequent suit by puisne mortgagees if barred. See RES JUDICATA, No. 25, 35 M.L.J. 639.

(70) S. 89. See Nos. 46 and 69, *supra*.

(71) S. 91—Usufructuary mortgage of sir lands prior to Tenancy Act—Sale of mortgagor's proprietary rights after Tenancy Act—Expropriatory tenancy—Redemption of mortgage. See MORTGAGE (REDEMPTION), No. 3, 16 A.L.J. 796.

(72) S. 91 (a)—Interest in property giving right to redeem, nature of—Permanent lessee

Transfer of Property Act (IV of 1882)
—(Continued).

of mortgaged property is so entitled. See MORTGAGE (REDEMPTION), No. 18, 14 N.L.R. 117.

(73) S. 93 (2). See No. 69, *supra*.

(74) S. 95—Contribution, Suit for—Co-mortgagor, Payment by, it creates charge—Natural guardian of co-mortgagor, Payment by, it can create charge, when such guardian not appointed by Court. See CONTRIBUTION, No. 4, 45 Ind. Cas. 904.

(74-a) S. 95, Scope and applicability of. See MORTGAGE (REDEMPTION), No. 19-a, 3 Pat. L.J. 490.

(75) Ss. 95, 100—Property of three co-sharers purchased in execution of decree against two of them—Redemption of existing mortgage on entire property by such purchaser—Determination of mortgage and creation of charge on third share of co sharer in favour of purchaser—Limitation. See LIMITATION ACT (1908), No. 196, 22 C.W.N. 637.

(76) S. 98—Demise in perpetuity by way of kanom with covenant for renewal every twelve years—Right of redemption, clog on. See MALABAR LAW, No. 3, 7 L.W. 119.

(77) S. 99—Sale in contravention of section—Purchase by mortgagee—Right of mortgagor to redeem. See MORTGAGOR AND MORTGAGEE, No. 1, 28 C.L.J. 151.

(78) S. 100. See Nos. 40 and 75, *supra*.

(79) S. 101. See MORTGAGE (SUBROGATION), No. 1, 7 L.W. 30.

(80) S. 101. See No. 59, *supra*.

(81) Ss. 105, 106 and 109—Notice to quit—Persons entitled to give—Subsequent lessee, if entitled to give notice to quit to a prior lessee—English and Indian Law on the point—Lease granted by one of two temple trustees—Course of temple business for one trustee to be in active management—Lease not objected to by the other. —If invalid—Lease for ten years, under an unregistered document—Possession thereunder accompanied by payment of a monthly rent—Tenancy from month to month—Whether presumable. *Manikkam Pillai v. Rathnasami Nadar*, 6 L.W. 689=(1917) M.W.N. 837=83 M.L.J. 684=43 Ind. Cas. 210. See Final Part, 1917, Col. 889.

(82) Ss. 105, 107—Compromise recorded and filed and incorporated in decree altering one condition in lease—Compromise if lease requiring registration. See REGISTRATION ACT, No. 11, 3 Pat. L.J. 255.

(83) Ss. 105, 111—Provisions of sections if apply to permanent leases. See LANDLORD AND TENANT, No. 55, 35 M.L.J. 139.

Transfer of Property Act (IV of 1882)
—(Continued).

(84) S. 106—Notice to quit served on tenant—Requisites of valid notice—Service of notice on one joint tenant—Delivery of notice by registered post. See NOTICE TO QUIT, No. 1, 16 A.L.J. 969 (P.G.).

(84 a) S. 106, Provision in, for notice to quit—Applicability to cases where parties not regulated by contract—No notice necessary under, where provision in lease for re-entry on payment of full compensation. See NOTICE TO QUIT, No. 3 a, 47 Ind. Cas. 19.

(85) S. 106. See No. 81, *supra*.

(86) S. 107—Scope and meaning of—Lease of immovable property—Yearly rent is conclusive as to tenancy being from year to year. *Sarat Chandra Ditta v. Jadav Chandra Goswami*, 21 G. W. N. 206=44 C 211=27 C. L. J. 198=37 Ind. Cas. 956. See Final Part, 1917, Col. 990.

(87) S. 107. See No. 82, *supra*.

(88) S. 108 (b)—Lease—Duty of lessor to put lessee in possession—Notice to tenants, whether sufficient. *Abdul Karim v. The Upper India Bank, Ltd.*, Delhi, 96 P. W. R. 1917=110 P.L.R. 1917=19 P.R. 1918. See Final Part, 1917, Col. 890.

(89) S. 108 (j)—Absolute occupancy tenant, sub-lease by—Assignment of sub-lease by sub-lessee, if valid—Principle of section applies to case. See LANDLORD AND TENANT, No. 68, 14 N.L.R. 188.

(90) S. 108 (j)—Homestead, Lease of, Transferability of. See LEASE, No. 11-b, 46 Ind. Cas. 656.

(90a) S. 109. See Nos. 6 and 81, *supra*.

(91) S. 111. See Nos. 6 and 83, *supra*.

(92) S. 111, cl. (g)—Landlord and tenant—Landlord suing tenant in ejectment—Denial of landlord's title—Assertion of the denial in plaint—Sufficient intention to determine the lease—Forfeiture.

Where a landlord sues his tenant in ejectment, the mere institution of the suit and the assertion in the plaint as to the repudiation of the landlord's title constitute a sufficient manifestation of the landlord's intention to determine the lease for the purposes of cl. (g) of S. 111 of the Transfer of Property Act, 1882 (a). *Isabell Tayabali v. Mahadu Ekoba*, 90 Bom. L. R. 29=42 B. 195=43 Ind. Cas. 851.

SIR BASIL SCOTT, C.J. and, BATCHELOR, J.

References:—(a) 38 C. 339; 31 M. 408, R.; 34 M. 161; 84 I.A. 92=9 Bom. L.R. 602; *Toleman v. Portbury*, L.R. 6 Q.B. 245; *Evans v. Davis*, 10 Ch. D. 747; *Jones v. Carter*, 71 E.R. 800; *Seribant v. Nash Field Co.*, 2 K.B. 304; *Clough v. London & N.W. Ry. Co.*, L.R.

Transfer of Property Act (IV of 1882)
—(Continued).

7 Ex. 26 (34, 35); *Croft v. Lamb*, 6 H.L.C. 672; *Clayton's case*, 1 Mer. 685; *Cory & Bro. v. Owners of Turkish Steamship, Mesca*, (1897) A.C. 286, *Rel. on*.

(93) S. 111 (g)—Lease—Forfeiture for non-payment of rent—Suit for ejectment. *Naurang Singh v. Janardan Kishore Lal Singh Dgo*, 41 Ind. Cas. 952=45 C. 463. See Final Part, 1917, Col. 891.

(94) S. 111 (g)—Doctrine of forfeiture contained in, if can be extended. See LANDLORD AND TENANT, No. 66, 35 M.L.J. 647.

(95) S. 111 (g)—Lease, forfeiture of—Rent, Non-payment of, for two consecutive years—Waiver—Overt act—Institution of suit. See EJECTMENT, No. 2, 27 C.L.J. 277.

(96) S. 112—Forfeiture for non payment of rent provided for—Suit for ejectment—Inclusion in suit of claim for rent for period subsequent to default—Waiver of forfeiture caused by claim for such rent—Suit for ejectment not maintainable. See LANDLORD AND TENANT, No. 24, 42 Ind. Cas. 614.

(97) S. 115—Effect of forfeiture on under-lease—Assignment of lessee's interest—Repudiation of lessor's title by original lessee if works forfeiture against assignee. See LEASE, No. 5, 20 Bom. L.R. 830.

(98) S. 115—Whether the equity embodied in the section is applicable to a case of mortgage by tenant, when he dies without heirs. See OCCUPANCY HOLDING, No. 1, 43 Ind. Cas. 912.

(99) S. 118. See No. 17, *supra*.

(100) S. 123—Gift—Execution of deed—Repudiation prior to registration—Suit by donee for compulsory registration—If maintainable—Undue influence—Allegation of—How proved.

Per curiam.—Where, after the execution of a deed of gift but before its registration, the donor repudiated the gift and applied to the Sub-Registrar for its return (which, however, he was prevented from getting by a temporary injunction obtained on the donee's behalf in a suit for the compulsory registration of the gift-deed), and also executed and registered another document not only inconsistent with the deed of gift but also expressly cancelling it and the gift-deed was not delivered by the donor to the donee or anybody else acting on the latter's behalf.

Held in a suit for its compulsory registration (i) that there was no completed gift, (ii) that the donor was entitled to retract and (iii) that the donee was therefore not entitled to have the document compulsorily registered (a).

Transfer of Property Act (IV of 1922) —(Concluded).

Per *Abdus Rahim, J.*—I. Whether in making a certain alienation, the alienor's mind was unduly influenced and dominated by another is not a matter always capable of direct proof and must depend on the conclusions to be drawn from the entire circumstances in which the transaction had its origin.

II. The motive of the gift, its nature, its effect on the donor and his family, the state of mind of the donor, whether he acted upon any misrepresentations or misconceptions, the benefit which the person who is alleged to have dominated the donor's will derives by the act, how the donor regarded the act when removed from the influence of the person for whose benefit the gift was made, what independent and competent advice he had and whether the persons advising him knew of the influence he was acting under, are some of the circumstances to be borne in mind in ascertaining whether the transaction is vitiated on the ground of undue influence.

Per *Oldfield, J.*—In order to sustain a plea of undue influence, it is not enough to prove that the person alleged to have been unduly influenced insisted on conditions which no reasonable man would insist upon but there must be proof direct or indirect with reference to the opportunities for and disposition to the exercise of influence of the one side and the result of its exercise as indicated by the merits of the transaction, the acceptance of false representations and the entertainment of false beliefs on the other (b). *Padmavati v. Shrinivasa Kampli*, 7 L.W. 339=44 Ind. Cas. 483.

ABDUR RAHIM and OLDFIELD, JJ.

References.—(a) 40 M. 759, D. (b) *Huguenin v. Basely* 2 White and Tudor's Leading Cases, 6th Ed., 597, F.

(101) S. 123, Applicability of—Burmese Buddhist religious gifts, if must be registered. See **BUDDHIST LAW (GIFT)**, 45 Ind. Cas. 926.

Transfer of Suit.

By agent to his Assistant after framing of issues—No objection taken, but decision on merits awaited—Waiver See **AGENCY RULES (GANJAM)**, No 1, (1918) M.W.N. 772.

Trees.

(1) *Tak* trees on Varkas lands—Khot's right to proceeds of sale thereof. See **KHOTI TENURE**, 20 Bom. L.R. 141.

(2) Standing on land pass with land by prescription, with all rights of easement. See **PRESUMPTION**, No. 14-b, 47 Ind. Cas. 654.

Trespass.

(1) *Subordinate tenure*—Trespasses committed against tenant—Grantor when bound to sue—Cause of action, Accrual of.

A grantor of a subordinate tenure is not bound to sue for trespasses committed against his tenant during the tenure. His right of

Trespass—(Concluded).

action accrues only when the tenancy comes to an end. *Joy Chandra Das Gupta v. Khaki*, 46 Ind. Cas. 587.

WOODROFFE and SMITHER, JJ.

(2) Trespasser dispossessing actual cultivator—Compensation—Principle of calculation of mesne profits. See **COMPENSATION**, No. 1, 43 Ind. Cas. 53.

(3) Trespasser—Possession as title—Sufficiency. See **MAHOMEDAN LAW (SUCCESSION)**, No. 1, 43 Ind. Cas. 398.

Trespasser.

(1) *Sale, Unregistered deed of, Vendee claiming title under a, Position of—Trespasser—Ejectment of, by person under a subsequent sale deed duly registered—Registration Act (1908), S. 17.*

The possession of a vendee of property, who is unable to prove his title because of the non-registration of the writing on which he relies as evidence of the sale in his favour, is clearly that of a trespasser and he cannot resist the suit for ejectment brought by another vendee under a subsequent duly registered deed of sale, unless his possession has matured into ownership by prescription. *Uttam Chand v. Janji Ram*, 111 P.R. 1918.

SHAH DIN, J.

References—34 M. 64; 19 Ind. Cas. 236, *Ref. to.*

(2) Non occupancy tenant of old waste holding over, if a, under S. 163 of Madras Estates Land Act (I of 1908). See **MAD. ACT I of 1908 (ESTATES LAND)**, No 8-a, 33 M.L.J. 757.

(3) Suit against joint—Co defendants acting in concert title to property in one defendant, if can defeat plaintiff's claim by proving. See **CO-DEFENDANTS**, 47 Ind. Cas. 550.

(4) Action against, by whole proprietary body—Special damage, Proof of, not necessary in case of. See **CO-OWNERS**, No. 3, 176 P.W.R. 1918.

(5) Declaratory suit by trespasser, whether maintainable under Specific Relief Act. See **INTENTION**, No. 1, 45 Ind. Cas. 303.

(6) Ejectment of—Revenue Court, jurisdiction of. See **JURISDICTION (OF REVENUE COURTS)**, No. 4-a, 46 Ind. Cas. 543.

(7) Whether co sharer landlord can eject a trespasser from entire area trespassed. See **LANDLORD AND TENANT**, No. 39, 45 Ind. Cas. 496.

Trust.

(1) *Trust property—Suit for recovery of possession—Trespasser—Civ. Pro. Code (Act V of 1908), S. 92, O. 1, r. 8.*

Suits for recovery of possession of trust properties from third parties, for instance, from

Trust—(Concluded)..

trespassers and from transferees from trustees, are not within the scope of S. 92 of the Code of Civil Procedure (a).

It is outside the power of a Judge to make use of O. I. r. 9 of the Code of Civil Procedure for joining a purchaser of a trust property as a party to the proceedings under S. 92. *Musal Gholam Mowlah v. Mollah Ali Hafiz*, 28 C.L.J. 4=47 Ind. Cas. 111 (F.B.).

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References:—(a) 33 A. 360; 36 B. 29; 37 B. 95; 33 C. 789; 2 C.L.J. 431; (1914) M.W.N. 52; 29 M.L.J. 326, F.; 11 C. 33; 24 C. 418, Diss.

(2) *No clear proof of dedication—Property used as trust property for long period—Presumption of dedication—Right of trustee to alienate—Suit to contest alienation—Limitation Act, Art. 134.*

Where there is no clear proof of a dedication in regard to a property, but, from the fact that for more than 200 years the property has been incorporated with a particular *asthan* and held by the *mahant* from time to time and treated as a part of the *asthan* property, a dedication of such property may be presumed.

If a tenure was in the nature of trust for a charitable purpose, any *mahant* who succeeded to the tenure had no right to mortgage the same except for legal necessity.

Where a trust property was alienated for valuable consideration by a trustee, the plaintiff ought to contest the alienation within the period allowed by Art. 134 of the Limitation Act., *Basdeo Ban v. Ram Saran*, 45 Ind. Cas. 292.

STUART and KANHAIYA LAL, A.J.CS.

References:—12 O.C. 296; 32 M.L.J. 369, Appx.; 2 I.A. 145, R.; 23 C. 536, Appr.; 27 B. 363; 40 A. 482; 13 M.L.T. 498; 36 C. 1003; 38 C. 526, R.

(3) *Temple—Presumption as to intention of author of trust where it was open for public worship—Right of suit for proper administration of trust.* See CIV. PRO. CODE (1908), No. 122, 45 Ind. Cas. 213.

(4) *Private or public—Object of feeding devotees—Construction as to.* See HINDU LAW (WILL), No. 2, 47 Ind. Cas. 611.

(5) *Land assigned for fixed term—Suit for recovery thereof on expiry of term—Express trust.* See LIMITATION ACT (1909), No. 46, 12 P.L.R. 1918.

(6) *Suit for recovery of price of fireworks sold to manager of temple—No decree against temple funds.* See RELIGIOUS ENDOWMENTS, No. 5, 34 M.L.J. 358.

Trustee.

(1) *Promissory note in favour of a trustee—Suit by succeeding trustee thereon without endorsement—Maintainability—Indian Trusts*

Trustee—(Concluded).

Act (II of 1882), S. 75, *Principles of—Applicability to public trusts—Rights and duties of trustees. nature of.* *Ramanadhan Chetty v. Katha Velan*, 33 M.L.J. 627=(1917) M.W.N. 543=6 L.W. 753=22 M.L.T. 456=41 M. 353. See Final Part, 1917, Cbl. 896.

(2) *Mortgagee when can purchase equity of redemption—Mortgagee if holds equity of redemption as trustee for mortgagor.* See MORTGAGE (REDEMPTION), No. 5, 27 C.L.J. 431.

(3) *Execution by trustee as such of bill if binds trustee personally or otherwise.* See NEGOTIABLE INSTRUMENTS ACT, No. 1, 35 M.L.J. 90.

(4) *Father and grandfather of present trustee of oboltry, misappropriation of trust funds by—Liability of trustee to account for such misappropriation—Courts, Power of, to limit period of such liability.* See PUBLIC CHARITIES, No. 1, 35 M.L.J. 661.

(5) *Of public trust, Liability of, for compound interest—Duties of.* See TRUSTS ACT, No. 2, (1918) M.W.N. 655.

Trusts Act (II of 1882).

(1) *S. 6—Trust, Creation of—Trust-deed, Construction of.*

Except in the cases mentioned in S. 6 of the Trusts Act, it is necessary for the creation of a trust that the property should be transferred to the trustee and to effect this some words of conveyance must be found in the deed. The mere description of the deed as a trust-deed can have no such effect, if, as a matter of fact, the deed does not by some language purport to transfer or assign the property to the trustee. *Alagappa Chettiar v. Lakshmanan Chettiar*, 24 M.L.T. 267.

ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

References:—37 B. 53, Diss.; 6 M.I.A. 393, Ezpl.; 40 I.A. 21=12 M.L.T. 852, R.

(2) *S. 23, cl. (a)—Public trusts—Hereditary trustee—Circumstances justifying removal—Court's duty to safeguard interest of trust—Want of capacity to manage, if sufficient ground—Duties of trustee—Failure to keep separate accounts—Presumption in favour of trust—No reimbursement for expenses beyond the terms of endowment—Trust property not to be unnecessarily encumbered—Liability of trustee for compound interest—Applicability of, to public trusts.*

A hereditary trustee is liable to be removed, if his continuance in office is likely to endanger the interests of the institution (a).

The grounds which justify a Court in removing trustees are well expressed in Story's Equity Jurisprudence, §. 1289, adopted by the Privy Council in *Latterstidt v. Broers* (9 Appeal Cases 871); and the principle enunciated therein in the case of private trust is applicable a fortiori to trustees of public trusts.

Trusts Act (II of 1882)—(Continued).

"In cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust. It is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity."

The Court's duty is to look entirely to the interests of the trust, and where the circumstances show that it will not be for the benefit of the institution to allow it to remain under the management of a hereditary trustee, he ought to be removed.

Want of capacity to manage the trust properties is a sufficient ground for removal of a trustee. One of the most important duties of a trustee is to keep separate accounts and to keep the trust property separate from his own property, and if that is not done and difficulty in taking accounts thereby arise, every presumption is to be made against the defendant and in favour of the trust.

A trustee of a public charity who chooses year after year to spend monies not required by the terms of the endowments out of his own pocket, should not be allowed credit for such expenditures.

The duty of the trustee is to carry out the directions of the founder, and not to encumber the trust property by systematically incurring expenditure beyond the limits of the income of the trust property.

S. 29, cl (e) of the Trusts Act which makes a defaulting trustee liable to account for compound interest with half yearly rests applies to private trusts, and to cases of public trusts a rule of that nature can only be adopted with such modifications as the circumstances of each case require.

Where the lower Court has exercised its discretion properly the appellate Court would not interfere. *Raja of Kalahasthy v Ganapathi Iyer*, (1914) M W N 555.

ABDUR RAHIM and BURN, JJ.

References—(a) 2 M 197, 22 M 481 and 15 B. 612, R. In *re Barker's Trusts* 1 Ch D p. 43. *Andrews v M Guffog*, 11 A. O 319, R.

(8) Ss 81, 82—Purchase of property by husband in name of wife—Advancement. Presumption as to—English Law, Applicability of, to India. See **ADVANCEMENT**, 47 Ind. Cas 376.

(4) S 82. See No 3, *supra*.

(5) S 88—*Advantage gained by fiduciary—Undue influence—Transaction null and void against the original transferor and his representatives—Contract Act (IX of 1872), Ss. 19, 19-A and 64.*

The plaintiff and her sister sold their land, for inadequate price to their uncle (defendant), with whom they were living after the death of their parents. The plaintiff, after the death of

Trusts Act (II of 1882)—(Concluded).

her sister, sued to have the sale deed cancelled as having been executed through undue influence of the defendant, who brought them up, and to recover possession of the land.

Held, that the case fell within the scope of S. 88 of the Trusts Act, 1882, and that the sale-deed was null and void as regards the plaintiff's share as well as the share of her deceased sister *Govind Ramaji Ganjale v. Savitri Rama Thosar*, 40 Bom L. h. 911=47 Ind Cas. 883.

SCOTT, C J. and HAYWARD, J.

References—*Stump v Gaby*, (1859) 2 De G M and G 623, *Gresley v Mousley* (1859) 4 De G and J 78, *Holman v Loynes*, (1854) 4 De G M and G 270, *Wright v Vanderplank*, (1856) 8 De G M. and G 153, R.

(6) S 90—Applicability of section to mortgaged Lumaki land obtained by mortgagor on *darlhast*—Land so obtained if to be regarded as accession to mortgaged property. See **TRANSFER OF PROPERTY ACT**, No. 12, 8 L W. 100.

Unborn Person

Gift of *bruti* to family Rani—Creation of successive life estates in favour of unborn persons without disposing of estate itself. See **GRANT** No 1, 45 C 836.

Unconscionable Bargain

(1) *Unconscionable bargain with expectant heirs—Law governing the exercise of undue influence in such cases—Applicability to such cases of principles of English Courts of Equity—Contract Act S 16—Money lending transactions—Laches by debtor in payment—Compound interest—Accumulation of principal and interest into a very large sum—Mere fact of such accumulated sum being enormous is sufficient to make transaction unconscionable—Burden of proof of non exercise of undue influence—Illustrations to Act, value of*

Questions relating to the exercise of undue influence as between parties to a contract, the transactions resulting in which are alleged to be unconscionable bargains made with expectant heirs, must be decided on the provisions of the Indian Contract Act of 1872, as amended by the Indian Contract Amendment Act of 1899 and on those alone. The principles upon which English Courts of Equity deal with similar questions are therefore entirely inapplicable (c).

The illustrations given to the section of the Contract Act are to be taken as part of the Statute.

A person, dealing with an expectant heir and occupying a position to dominate the will of such heir, has under the Contract Act, to discharge the burden of showing that he has not used such position to obtain an unfair advantage over the expectant heir with whom he so deals (b).

The mere fact that the money claimed, in a suit upon a transaction of loan, enormously

Unconscionable Bargain—(Concluded).

exceeds the amount originally advanced will be no ground for holding the transaction unconscionable, unless it is also made to appear that there was something unconscionable either in the original dealings, or in the subsequent stages of the transaction. It is not enough—indeed, it is misleading—to look at the result alone. There is nothing inherently wrong, oppressive, harsh or unconscionable in a money-lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accruing due upon it which he has contracted to pay; since the added interest only accumulated while he forbore to enforce the payment of the same from time to time due to him.

On the other hand, it would be quite possible for a money-lender by making loans for short periods on apparently fair terms, and then insisting on capitalising the interest immediately on its becoming payable, to pile up compound interest on the initial debt at such a rate as would make the result after a few years most oppressive and unconscionable (c) *Lala Balla Mal v. Ahad Shah*, 35 M.L.J. 614 = 16 A.L.J. 905 = 124 P.R. 1918 = 23 C.W.N. 233 = 25 M.L.T. 55 = 180 P.W.R. 1918 (P.C.).

LORDS ATKINSON and PHILLIMORE and SIR JOHN EDGE.

References:—(a) 33 L.A. 118 (127) and 34 L.A. 9, F. 1b; *Queserfeld v. Janssen*, 2 Ves. Sen. 124, R (c) *Yorell v. Hibernian Bank, Limited*, (1918) A.C. 372, R.

(2) *What is—Case where discharge of debt comes impossible by long delay in payment if such bargain—Question as to nature of bargain whether one of act or of law—Stipulation if penalty or not if question of fact or law.*

A bargain is unconscionable where it is such as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other (a). This definition certainly is not satisfied by a case where long delay in payment brings about a position where discharge of the debt is impossible, the debtor being a man of intelligence who can by a simple enough calculation arrive at the position which will result if for several years he makes no payments.

The question, whether a bargain is or not unconscionable is one of fact, not of law (b).

So also is the question whether a particular stipulation in a contract amounts to a penalty (c). *Deorao v. Ambadas*, 14 N.L.R. 21 = 43 Ind. Cas. 952

DRAKE BROCKMAN, J.C.

References:—(a) 2 O.P.L.R. 23, R. (b) 28 A. 570, F.; 25 B. 332, R.; *Abrahams v. Dimmock*, (1915) K.B. 661, Dist. (c) 1 N.L.R. 9 (14), F.; 4 C.P.L.R. 146, Dist.

(3) *Factum of notice on part of subsequent transferee, if question of law or fact—Question if contract is conscionable if question of fact or law.* See SPECIFIC PERFORMANCE, No. 6, 187 P.W.R. 1916.

Under-proprietor.

(1) Under-proprietary right in land—Cash *dahiyak*—*Birdar's* right to deduct *dahiyak* from rental. See LANDLORD AND TENANT, No. 20, 21 O.C. 244.

(2) *Muafidar* when acquires status of under-proprietor—Declaration under Oudh Rent Act. See PRE-EMPTION, No. 18, 21 O.C. 124.

Under-proprietory Rights.

Declaration of—Civil and Revenue Courts, Jurisdiction of—Oudh Rent Act, S. 107-H. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 6, 46 Ind. Cas. 357.

Under-raiyat.

(1) Acquisition of occupancy right by under-raiyat—Ejection of such raiyat. See BEN. ACT VIII OF 1885 (TENANCY), No. 18, 22 C.W.N. 618.

(2) Under-raiyat: *Kabuliat*, Covenant in, for a further lease, Validity of. See LEASE, No. 11 d, 46 Ind. Cas. 924.

Under-raiyati Lease.

Permanent, Validity of, under E. 85 (2), Bengal Tenancy Act (1885). See LANDLORD AND TENANT, No. 52-g, 47 Ind. Cas. 416.

Undue Influence.

(1) Gift by Buddhist lady to her nephew—Nephew acting as agent of lady—Fiduciary relationship—Undue influence, Presumption as to, if raised by—Contract Act (IX of 1972), S. 16.

In a case of a gift of some land by a Buddhist lady to her nephew who was also acting as her agent.

Held, that although there was what may be called a fiduciary relationship between the parties, it was not such relationship as would lead the Court to infer undue influence. *Ko San U v. Ma Thaung Me*, 46 Ind. Cas. 738.

TWOMEY, C.J. and ORMOND, J.

(2) Mortgage bond—Denial of execution by mortgagor and no particulars of undue influence given—Civ. Pro. Code (1908), O. VI, r. 4—Undue influence, question if arises—Proviso for capitalising interest in arrears—Undue influence, Presumption as to, if arises from.

Where the mortgagor or the representative of the mortgagor denies the execution of the mortgage and no particulars of the alleged undue influence are stated as required by O. VI, r. 4 of the Civ. Pro. Code, the question as to undue influence cannot be raised and decided. Nor can it be presumed, from the mere fact of there being a proviso in the mortgage bond for capitalising the interest in arrear with annual rate, that undue influence has been exercised by the mortgagor. *Kashbi-rannama Ghoshdharani v. Hem Charan Kasya*, 47 Ind. Cas. 11.

FLETCHER and SMITH, JJ.

Undue Influence—(Concluded).

(3) *Cause of action to set aside transaction caused by—Limitation Act, Art. 91. Raja Rajeswara Setupati v. Rajagopala Iyer, (1917) M.W.N. 906=7, L.W. 28=43 Ind. Cas. 164. See Final Part, 1917, Col. 899.*

(4) Mere fear of punishment, if is—Contract Act (1872), S. 16. See AGREEMENT, 46 Ind. Cas. 424.

(5) Gift repudiated before registration—Undue influence: how proved—Donor's right to retract. See TRANSFER OF PROPERTY ACT, No. 100, 7 L.W. 339.

(6) Advantage gained by fiduciary—Transaction null and void against original transferor and his representative. See TRUSTS ACT, No. 5, 40 Bom. L.R. 911.

(7) Money lending transactions—Allegation of exercise by lender of undue influence—Burden of proof—When such transactions become unconscionable. See UNCONSCIONABLE BARGAIN, No. 1, 35 M.L.J. 614 (P.G.).

United Provinces Land Revenue Act.

See U.P. ACT III OF 1901.

United Provinces Municipalities

See U.P. ACT II OF 1916.

Unprofessional Conduct.

Acceptance by pleader of *Vakalatnamah* from, and acting for, both sides in same case—Conduct of Pleader if professional. See LEGAL PRACTITIONERS' ACT, No. 2, 3 Pat. L.J. 390.

Unsettled Palayam.

Unsettled hereditary palayam of Kannivadi—Military and Police tenure, cessation of—Alienability—Reg. XXV of 1802, S. 5—Reg. VI of 1831—Reg. XI of 1816—Act XXIV of 1859—Act III of 1895.

The question in this case was whether Kannivadi, then an unsettled palayam, was in 1895 (when it was mortgaged by the poligar and his son) inalienable by reason of its being held on military tenure or for police services.

Held from an examination of the history of military and police tenures in this Presidency and of this particular estate that all police or military services to be rendered by the poligars of Kannivadi had been abolished long prior to 1895; that at that time there were no such services to be rendered; that there had been continued alienations by way of mortgage which had been treated as binding by successive poligars; and that the plea of inalienability by reason of military or police tenure had never been raised before and was an ingenious after-thought. Where an estate is freed from its connection with a public office the reason arising from that connection for the preservation of the estate intact and unencumbered necessarily falls. The lands then become subject to the ordinary laws of descent and disposal (a).

Unsettled Palayam—(Concluded).

With reference to military services, Lord Olive's proclamation of 1st December 1801 was intended to suppress military service in the poligar country unconditionally and not merely after the grant of permanent sanads under Reg. XXV of 1802 then under contemplation. The fact that the Kannivadi poligar was not in fact granted such a sanad does not show that the military tenure continued. Nor did that fact affect the rights of those entitled to the palayam which though unsettled was hereditary in character and therefore liable in the hands of an holder for ancestral debts (b).

With reference to the police services the provisions of Reg. XXV of 1802 show a general intention to relieve landholders from performance of such services; and admittedly police service was abolished in the estate which received permanent sanads. The fact that no sanad was given in this case had nothing to do with the question of police service.

By Reg. XXI of 1816 the village headman was as regards police duties placed under the Tahsildar and the Zamindars were deprived of all police powers. The Police Act XXIV of 1859 created a separate police department. The definition of police in that Act which included *cattoobadies*, *Kwalgars* and all other persons exercising police functions in the Presidency was repealed, by Madras Act III of 1895 which excluded these categories from the definition of police.

The same Act also repealed Reg. VI of 1831 and re-enacted the provision against alienation only as regards Village Officers except in the Scheduled Districts. The enactment shows that in 1895 the date of the mortgage, the services formerly required of poligars had become entirely obsolete. *The Midnapore Zamindari Co., Ltd. v. Malayanid Appasawmi Nalcker*, 34 M.L.J. 563=24 M.L.T. 1=8 L.W. 382=41 M. 749=47 Ind. Cas. 733.

WALLIS, C.J. and SPENCER, J.

References:—(a) 9 B. 138; (1864) W.R. 89, F. (b) 1 I.A. 282, F.

Upper Burma Civil Courts.

See BUR. REG. I OF 1896.

Usage.

See CUSTOM.

Usurious Loans.

Court's power to give relief when money-lender not shown to have taken undue advantage of his position. See INTEREST, No. 3, 23 C.W.N. 180 (P.G.).

Utbandi Tenure.

Lease for term of years of *chur* land—Rent payable for such land as is capable of cultivation—Law governing parties—Lessee not ryot holding under custom of *utbandi*—Lessee a non-occupancy riyat. See BEN. ACT VIII OF 1885 (TENANCY), No. 90, 43 Ind. Cas. 546.

Vakalatnamah.

Acceptance by pleader of Vakalatnamah from both sides and acting for them both in same case—Pleader's conduct quite unprofessional. See **LEGAL PRACTITIONERS ACT**, No. 2, 3 Pat. L.J. 390.

Valuation.

(1) Sale-proclamation, In, Objection to, Order overruling, Appeal if lies from—Civ. Pro. Code (1908), S. 47. See **SALE-PROCLAMATION**, No. 1, 47 Ind. Cas. 512.

(2) Sale proclamation, Entry in, of value of property—Calculation of value. See **SALE-PROCLAMATION**, No. 1, 3 Pat. L.J. 590.

Valuation of Suit.

(1) *Code of Civil Procedure (Act V of 1908)*, O. XXI, r. 63—*Suit for declaration that property not saleable—Execution of decree—Valuation of suit.*

Where a suit is brought for a declaration that certain property attached in execution of a decree is not saleable, the proper valuation to put on the suit for purposes of jurisdiction is not the value of the property but the amount of the decree for which execution was taken out. **Anand Kunwar v Ram Niranjan Das**, 16 A.L.J. 374=40 A. 505=45 Ind. Cas. 494.

RICHARDS, C J. and BANERJI, J.

Reference :—38 A. 72, 498, R.

(2) *Court-fee—Suit for administration and accounts—Suit for accounts—Court Fees Act (VII of 1870)*, S. 7, cl. (iv) (f). **Sarajubala Dasl v. Jogmaya Dasl**, 26 C.L.J. 265=22 C.W.N. 115=45 C. 634. See Final Part, 1917, Col. 903

(3) *Injunction, Suit for, restraining defendants from cutting timber and undergrowth from jungle, valuation of—Court Fees Act (VII of 1870)*, S. 7 (iv) (d).

The proper valuation of a claim for a permanent injunction restraining the defendants from cutting timber and undergrowth from a jungle belonging to the plaintiffs is the amount put by the plaintiffs. **Rai Charan Panda v. Kunja Behari Das**, 46 Ind. Cas. 884.

FLETCHER and SHAMSUL HUDA, JJ.

(4) *Pecuniary jurisdiction of Court, Objection to, based on—If can be raised for first time in High Court—Suits Valuation Act (VII of 1887)*, S. 11.

An objection to the pecuniary jurisdiction of a Court based on the valuation of a suit must have been raised in the Courts below and where it is not so taken and the jurisdiction of the Court is accepted, it is not open to raise it for the first time in the High Court. **Bonkai Sahu v. Mohabib Ali**, 46 Ind. Cas. 892.

MULLICK and THORNHILL, JJ.

(5) *Suit for possession of definite plot of land forming part of survey number but not subdivided and separately assessed to land revenue—Valuation of suit how to be made*

Valuation of Suit—(Concluded).

—*Court Fees Act (VII of 1870)*, S. 7 (v) (b) and (d).

The extent of certain land bearing a certain survey number was 4 acres and 42 cents, out of which 53 cents had been sold away leaving a residue of 3 acres and 69 cents. A suit was brought for the recovery of this residual portion of the said survey number. It was found that this portion had not been sub-divided and separately assessed to land revenue, and was not a definite share of an estate. *Held*, that the subject-matter of the suit must not be valued under cl. (b) of S. 7 (v), but must be valued under cl. (d) of S. 7 (v) of the Court Fees Act according to its market value (a). **Godavari Sundaramma v Godavari Mangamma**, 31 M.L.J. 558=8 L.W. 88=47 Ind. Cas. 543.

AYLING and SESHAGIRI AIYAR, JJ.

Reference :—16 A. 493, R.

(6) *Value for purposes of jurisdiction—Appeal—Suits Valuation Act (VII of 1887)*, S. 4—*Suit for declaration that certain land is the absolute property of plaintiff—Court-fee of Rs. 10—Indian Court Fees Act (VII of 1870)*, Art. 17 of the second Schedule—*Costs of respondents.*

Held, that the proper valuation for purposes of jurisdiction of a suit for declaration that certain property is the absolute property of the plaintiff and is not liable to partition is thirty times the jama (a).

Plaintiff sued for a declaration that certain land was his absolute property and was not liable to partition. The trial Court was a Land Revenue Officer acting under S. 117 (3) (b) of the Punjab Land Revenue Act. An appeal was preferred from his order to the Court of the District Judge who dismissed it. The plaintiff filed a second appeal in the Chief Court.

Held, that, under Art. 17 of the second Schedule to Act VII of 1870, the Court fee is a fixed one of Rs. 10, but, as 30 times the revenue of the land amounts to more than Rs. 5,000, the District Judge is not competent to hear the appeal.

Held, further, that an appellant following a wrong course of appeal must pay respondent's costs. **Sohan Singh v. Devi Singh**, 115 P. W.R. 1918=81 P.R. 1918=119 P.L.R. 1918=46 Ind. Cas. 490.

LE-ROSSIGNOL and WILBERFORCE, JJ.

References :—(a) 35 P.R. 1901, F.; 111 P.R. 1918=228 P.W.R. 1918=22 Ind. Cas. 609, Dist.

(7) *Under-valuation of suit by plaintiff—First appeal to wrong tribunal—Plaintiff-appellant if can object to his own valuation in second appeal. See APPEAL (SECOND APPEAL)*, No. 17, 21 P.R. 1918.

(8) *Gross under-valuation of one item in suit—Permission to withdraw claim if can be given—Grant of permission if proper exercise of jurisdiction—Duty of Court. See WITHDRAWAL OF SUIT*, No. 8, 85 M.L.J. 27.

Yatan.

Grant purporting to have been made *jivak badal*—Suit by daughter of last male vatanedar for her share of vatan—Grant not service inam—Right of female to inherit to vatan See BOM. ACT V OF 1886 (HEREDITARY OFFICERS), No. 1, 20 Bom. L. R. 989.

Vendor and Purchaser.

- (1) *Contract, Assignment of—Covenant to re-purchase—Covenant meant to be personal—Assignment outside the family not allowed—Transfer of Property Act (IV of 1882), Ss. 6, 54—Specific Relief Act, S. 33.*

A judgment-debtor sold his land to the decree-holder on condition that after the lapse of ten years the vendor or his descendants should have the right to re-purchase it within two years for the same price for which the land was sold. After the death of the vendor and his son, the vendor's widow sold the right to the plaintiffs (strangers to the family) who sued to enforce it against the decree-holder:

Held, dismissing the suit, that the intention of the parties was that the vendor and his descendants alone should be given the privilege of re-purchasing the land after the lapse of ten years and within the limited period of twelve years at the same price at which it was originally sold: and that the assignees outside the family could not enforce the contract specifically.

Per *Beaman, J.*—Personal quality mentioned in S. 23 of the Specific Relief Act need not necessarily be restricted to particular skill or learning but may include anything peculiar to a man or his descendants which would entitle them to especial favour at the hands of other contracting parties. *Yithoba v. Madhav*, 20 Bom. L. R. 654=49 B. 344=46 Ind. Cas. 734.

BEAMAN and HEATON, JJ.

References:—*Tolhurst v. Associated Portland Cement Manufacturers*, (1900) [1903 A.O. 414]; *Kemp v. Baerselman*, [1906] 2 K. B. 604, R.

- (2) *Contract of sale—Suit for possession by vendee—Nature of—Conveyance—Suit for specific performance—Registration Act (1908), S. 77—Parties to suit.*

The plaintiff sued for recovery of possession of land on declaration of title by purchase or for specific performance of a contract of sale. The case for the plaintiff was that the disputed property belonged to the first four defendants, that he obtained a conveyance from them and that his vendors had not only failed to register the document and to place him in possession but had transferred the property to the fifth defendant: *Held* that, as regards the claim to enforce registration of the document executed in his favour by his vendor, he was no doubt bound to follow strictly the procedure prescribed by the Registration Act before he could institute a suit under S. 77 to compel registration; but that, as the execution of the conveyance, not followed by registration, could

Vendor and Purchaser—(Continued).

not be regarded as fulfilment of the contract, the plaintiff was entitled to proceed against his vendors to compel them to fulfil the contract; and that it was necessary for the plaintiff to join the fifth defendant as a party to the suit for specific performance. *Natrudin v. Bipra Das*, 27 C. L. J. 538=44 Ind. Cas. 361.

MOOKERJEE and PEACHCROFT, JJ.

References:—10 W. R. 51 (F. B.); 9 C. 150 and 851, R.

- (3) *Enforcement of contract by stranger thereto—Agreement between vendor and purchaser that the latter will pay the former's debt to a third person out of consideration money retained with him, if may be enforced by vendor's creditor.*

The first two defendants borrowed on a promissory note a sum of money from the plaintiff; they thereafter transferred their properties to the third defendant who executed an agreement in favour of his vendors expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands. The plaintiff sued his debtors as also the third defendant for his money:

Held—That the plaintiff was entitled to enforce the agreement made between the third defendant and his vendors.

The principle underlying the decision in (a), applied to the case and the distinction that the arrangement between the first two defendants and the third defendant was never brought to the notice of the plaintiff was not material. *Dwarkanath Ash v. Priyanath Malki*, 23 C. W. N. 279=27 C. L. J. 483.

MOOKERJEE and CUMING, JJ.

References:—(a) 41 C. 137; 17 C. W. N. 1143, R.

- (4) *Sale—Construction of sale-deed—Money left with purchaser for discharge of encumbrance—No attempt made by purchaser for redemption—Position of purchaser.*

Where a portion of the consideration money was left with the purchaser for payment to the mortgagee and the purchaser made no attempt to redeem the mortgage for a long time after redemption became possible and where the purchaser was made to pay the whole of the decree amount in the mortgagee's suit which was much more than the amount left with him:

Held, in a suit against the vendor for recovery of the difference between the money left with him and the amount actually paid by him, that the purchaser was only entitled to the difference between the sum left with him and the amount which was actually payable to the mortgagee on the date when redemption first became possible. *Magbar Ali Khan v. Ali Asghar*, 40 Ind. Cas. 361.

LINDSAY, J. C.

References:—21 A. 223; 10 A. L. J. 480, Dist.

Vendor and Purchaser—(Continued).

- (5) *Suit for rent in name of vendor after assignment. Maintainability of—Right of co-sharer landlord to recover his share of rent.*

After an assignment of his interest in the land by the landlord, it is open to the purchaser to institute a suit, in the name of the landlord as plaintiff, where the deed of assignment authorised the purchaser, as the irrevocable attorney of the vendor, to continue and prosecute in the name of the latter the suit then in existence or any future suit with reference to the moneys and claims transferred by that document. *Mohendra Nath Madak v. Paresh Chandra Ghosh*, 40 Ind. Cas. 506.

FLETCHER and NEWBOULD, JJ.

- (6) *Hindu Law—Co-parcener. Demand of partition by—Severance of status—But no partition by metes and bounds actually made—Sale of his share by such co-parcener—Right of purchaser to profits from date of severance of status.*

One of the members of a joint Hindu family made a demand on his co-parceners for partition some three years before this suit, but the properties were not actually divided by metes and bounds. Subsequently he sold his undivided share in an item of the joint property to the plaintiff, who brought this suit for a general partition against all the members of the family, praying that the particular piece of property sold to him might be allotted to the share of his vendor and put into his possession with profits from the date of his vendor's demand for partition. The plaintiff's alienor was excluded from the enjoyment of the land and the share of his profits by some of the defendant co-parcenary members who took the whole of the profits. *Held*, that the plaintiff's vendor must be taken to have become divided in status from the other members as from the date of his demand for partition; and that the plaintiff, standing in the shoes of his alienor in respect of the share purchased by him, was entitled to profits from the date of demand of partition. *Yanjapuri Goundan v. Pachamuthu Goundan*, 35 M.L.J. 609=45 Ind. Cas. 627=7 L.W. 225.

SPENCER and KRISHNAN, JJ.

*References:—*35 A. 80 (P.G.); 39 M. 159 (F.B.), *Rel. on*; 39 M. 265=27 M.L.J. 409; 31 M.L.J. 275; 19 B. 531, R.; 14 C. 493 and 16 C. 897, *Dist.*

- (7) *Sale by mother and guardian of certain properties including a house site—Subsequent purchase of other properties through sale-proceeds—Purchaser not put in possession of house site—Suit by minor for cancellation and possession of properties conveyed under sale-deed dismissed as barred—Right of purchaser to recover house site and to fresh properties purchased from proceeds of sale made to him—Subsequent purchase not originally in contemplation at time of sale to purchaser—Benefit under*

Vendor and Purchaser—(Continued).

S. 64, Contract Act—Transfer of Property Act, S. 35.

The plaintiff sued for possession of a certain house site specified in the plaint, alleging that the mother of the first and second defendants, acting as their guardian, had sold to him certain properties, consisting *inter alia* of the suit house site, for the purpose of purchasing other properties and that the defendants had not put him in possession of the property claimed by demolishing the building as agreed upon. The defendants contended that the sale-deed executed by their mother was invalid and not binding on them and that the plaintiff had no right to the relief claimed. It was found that some fresh lands were actually purchased, but that their purchase was not in the contemplation of the parties at the time of the sale to the plaintiff of the house site and other properties, which other properties were conveyed to the plaintiff and of which he was in possession. *Held*, that the plaintiff was entitled to a return of the value of the suit house site, if the defendants elected to retain the suit house site, and that, in default, the plaintiff was entitled to a decree as prayed for by him.

Held, also that, since the purchase of the fresh lands was not originally in contemplation, those lands did not constitute the benefit, which the defendants received from the sale by their mother as their guardian, within the meaning of S. 64, Contract Act.

Held, further, that the fact that a prior suit, by the first defendant to set aside the sale-deed executed by his mother to the plaintiff and to recover possession of the properties conveyed, other than the suit house site, was dismissed as barred did not entitle the plaintiff, on the expiry of the period specified in Art. 44 of the Limitation Act, to enforce a voidable transaction by bringing a suit for recovery of the suit house site in the possession of the minor.

Per *Kumaraswami Sastri, J.*—Ordinarily, the benefit which a party receives when he sells certain property is the price which the vendee pays. Any profits which the vendor might make with the money would be too remote in estimating what he has to return in case he is entitled to avoid the sale and elects to do so. Where, however, for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties such as the purchase of other lands with the consideration and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration. Under S. 35; Transfer of Property Act, the benefit received should be part of the same transaction and should be direct. *Chinnaswami Reddi v. Krishnaswami Reddi*, 35 M.L.J. 663.

PHILLIPS and KUMARASWAMI SASTRI, JJ.

*References:—*2 L.W. 369; 22 M. 289; 25 A. 59; 9 C.L.J. 260, R.

Vendor and Purchaser—(Continued).

- (8) *Sale—Vendee, agreement, by, to pay vendor's creditors—(Covenant to compensate on non-payment.*

On the sale of immovable property where a vendee retained a greater part of the purchase-money in his hands undertaking to pay off the different creditors of the vendors (none of the debts being charges upon the property) and covenanted to pay compensation to the vendors for any loss which might be sustained by them by his default in paying the amount which he undertook to pay.

Held, such an agreement cannot be regarded as a contract of indemnity simply, because the sale-deed provides for compensation for any loss caused by the breach of covenant. It is a mere contract to pay the purchase-money, the vendee constituting himself the agent of the vendor and a suit will generally lie against the vendee upon his failure to pay off the vendor's creditors. *Konnu Kutti v. Kumara Menon*, 24 M.L.T. 260=35 M.L.J. 692.

ABDUL RAHIM and SESHAGIRI AIYAR, JJ.

References:—5 L.W. 228; 36 M. 348, F.; 23 M. 441; R. 31 A. 583, *Expl.* and *Dist.*

- (9) *Groveholder acquiring fractional share in the village—Auction sale of fractional share—Rights in the grove, Effect on—Merger.*

A grove held by the proprietor of a fractional share in the village, from before the time he became proprietor of that fractional share, is not necessarily a legal incident of his proprietorship of the land of the village, and does not *ipso facto* pass with the sale of that fractional share to the purchaser. *Gulab Rai v. Kazim Ali*, 21 O.C. 263.

KANHAIYA LAL, A.J.C.

References:—33 C. 1212; 5 C. 198, *Dist.*

- (10) *Suit by third party against purchaser for possession of property purchased by him—Admission by vendor adverse to title of purchaser—Decree of suit against purchaser—Suit for refund of purchase-money by purchaser against vendor—Plea that former suit against vendee was wrongly decided is open to vendor—Pak sai, Meaning of.*

K died, leaving a widow and a mother, S as well as a concubine, B on K's widow remarrying her, title to K's property passed to S, the mother. One R purchased the property from S and sold it to G (with assurances of good title). In a suit by B the concubine, for recovery of the property on the ground of her lawful marriage to K, R, at the time of the trial, admitted in Court that B was the lawfully married wife of K. G, the purchaser, allowed a decree to be passed against him for the restoration of the property to B and sued R to recover the purchase-money paid by him to R. In appeal in this suit, it was found on record that B was in fact a concubine only and on this finding, R, the vendor-defendant,

Vendor and Purchaser—(Continued).

contended that, as he had done all that was necessary for him to do and as, thereafter, the plaintiff-purchaser G had foolishly allowed the suit to be decreed against him on an absolutely false claim, he was not liable to refund the price. *Held*, that, as the vendor R was a party to the former suit and not only jointly acquiesced in the adverse decision by the original Court but even made in the original Court the admission which rendered that decision inevitable he could not in the suit for refund against him turn round and say that the abandonment of the defence by G in the first suit, which took place in his presence in consequence of his own fraud, was improvident, that there was no fault on the part of the plaintiff purchaser G and that the defendant vendor R was bound to refund the purchase-money.

Per Imam, J.—*Pak sai* is a common expression in vernacular conveying meaning the title to be flawless. *Bhattu Ram v. Ganga Prasad Cope*, 2 Pat. L.J. 358.

ROE and IMAM, JJ.

Reference:—15 C.W.N. 655 (659), R.

- (11) *Sale of land by ultimate vendor—Protest by such vendor before registering officer that he had not sold shamilat also mentioned in document—Protest of amounts to denial of execution—No further steps taken by such vendor in subsequent proceedings connected with shamilat—Bona fide purchase for value by strangers from original vendee—Original vendor's right to recover shamilat on ground of fraud—Registration Act (1908), S. 35.*

In 1896 an illiterate vendor, as soon as the purport of the sale deed purporting to have been executed by him was explained to him, protested that he had sold only the *lamal*, and not also the *shamilat*, mentioned in the deed. The registering officer noted the protest but registered the document. *Held*, that the protest amounted to a denial of execution of the document of which the registering officer would have done well to refuse registration.

The vendor made no protest in subsequent mutation and *shamilat* partition proceedings but in 1916, three years after, possession was given to the defendants, who were *bona fide* purchasers from the original vendee, brought the suit for recovery of the *shamilat* from them. *Held*, that as it would be quite impossible to find oral evidence that the *shamilat* was not sold and as the vendor had permitted the *bona fide* purchasers to believe that their transferees had a good title to convey in the *shamilat*, the suit must be dismissed. *Wasila v. Muhammad*, 37 P.R. 1918=124 P.L.R. 1918=66 P.W.R. 1918=45 Ind. Cas. 161.

LE-BOSSIGNOL, J.

- (12) *Transfer by ostensible owners—Duty of transferees. See BENAMI TRANSACTION, No. 6, 46 P.R. 1918.*

Vendor and Purchaser—(Continued).

(13) Property sold subject to mortgage—Money left with vendee to pay it off—Suit for pre-emption—Pre-emptor directed under decree to pay full price—Money withdrawn by vendee—Mortgage not discharged by him—Mortgagee's suit decreed against pre-emptor—Discharge of decree by pre-emptor to save property—Vendee liable to refund money paid to him in excess. See CONTRACT ACT, No. 41, 16 A.L.J. 531.

(14) Money left with vendee for payment to mortgagee of vendor—Property mortgaged to secure sum different from property sold—Vendee paying interest to mortgagee owing to vendor's delay in registration of sale deed—Vendor's suit for balance of unpaid purchase-money—Set-off if claimable by vendee for interest paid by them. See CONTRACT ACT, No. 45, 16 A.L.J. 581.

(15) Sale of *Zurpeshgi* interest in property leasehold interest in which being in hands of third party at certain rent—Representation at time of sale by vendor that higher rate of rent claimable from lessee and agreement to indemnify purchaser for difference between rate of interest actually realised and that represented on non realisation of enhanced rent—Failure to collect enhancement from lessee and suit against vendor for recovery of accumulated difference—Contract of indemnity binding on vendor's legal representatives. See HINDU LAW (DEBT), No. 12, 3 Pat. L.J. 396.

(16) Recital in sale for compensation to the vendee in case of vendee having to pay more than agreed consideration—Recital if covenant for title or indemnity—Limitation. See INDEMNITY, No. 1, 16 A.L.J. 706.

(17) Provision in sale-deed containing agreement by vendor to establish title should it be assailed—Provision in indemnity clause containing covenant—Right of vendee conducting unsuccessful legal proceedings to damages against vendor—Points to be proved by vendee. See LIMITATION ACT (1908), No. 92, 35 M.L.J. 124.

(18) Original intention to execute conditional deed of sale abandoned—Execution and registration of absolute sale—Execution and registration after only a couple of days of agreement to recovery—Transaction as between vendor and purchaser if may be looked upon as English mortgage or conditional sale. See PRE-EMPTION, No. 26, 74 P.R. 1918.

(19) C.I.F. contract—Purchase of goods under, from a commission agent—Agent, if a C.I.F. vendor—Agency whether still subsists—Goods purchased on principal's behalf and at his risk—Outbreak of war while goods are in transit in an enemy ship—Loss, whether to be borne by the agent or by the principal—Indian Contract Act (IX of 1872), S. 222—Agency between vendor and vendee—Effect of, on C.I.F. contract. See PRINCIPAL AND AGENT, No. 9, 35 M.L.J. 184.

Vendor and Purchaser—(Concluded).

(20) Sale of land—Sale-deed, Stipulation in—Vendor not liable if purchaser dispossessed by any body other than vendor—Possession. Failure of purchaser to get—Purchase-money, Refund of, Suit for. See PURCHASE MONEY, 47 Ind. Cas. 340.

(21) Purchaser of equity of redemption getting nominal endorsement of satisfaction of mortgage from widow of mortgagor—Sale by such purchaser to third party—Third party if can plead purchase for value without notice against remainderman suing for possession. See TRANSFER OF PROPERTY ACT, No. 10, 20 Bom. L.R. 177.

(22) Vendor taking promissory note from one of the vendors for part of sale money—Charge on land if claimable by vendor for money due on note. See TRANSFER OF PROPERTY ACT, No. 37, 23 M.L.T. 65.

Vested Interest.

Interest in immoveable properties to take effect on death of living person—Whether such interest vested or contingent—Suit by two persons as reversioners—Compromise decree passed—Provision therein that some properties should be taken by them on certain person's death—Death of one reversioner before contingency—Other reversioner if solely entitled to whole. See TRANSFER OF PROPERTY ACT, No. 8, 8 L.W. 140.

Vested Remainder.

Bequest of remainder of gift to wife and then to niece and to children of niece is bequest of contingent, not vested, remainder. See WILL, No. 15, 3 Pat. L.J. 199.

Vested Right.

Right of party to prevent disturbance of finality of his decree is. See CIV. PROC. CODE (1908), No. 136, 23 M.L.T. 255.

Village Chaukidari Act.

See BEN. ACT VI OF 1870.

Village Pathway.

Obstruction of—Public nuisance, if—Use of pathway, Right to, Declaration of, Suit for, - Civ. Proc. Code (1908), S. 91, if applicable to—Limitation Act (1908), S. 26, if applicable to, used from time immemorial. See PUBLIC NUISANCE, No. 2, 46 Ind. Cas. 970.

Void Agreement.

(1) Agreement opposed to public policy—Void agreement—Consideration, Refund of—Agreement to serve till payment of the principal sum—Bond, if enforceable.

A suit is maintainable for the recovery of the sum actually paid pursuant to an agreement, which was opposed to public policy.

Quare :—Whether an agreement by which the defendants in consideration of a sum

Yold Agreement—(Concluded).

advanced by the plaintiff, agreed that one of them should always work for the plaintiff till the payment of the principal sum, and interest on that sum was not to be paid in cash but was to be liquidated by the services of one or other of them, whom the plaintiff undertook to feed but not to clothe, was a slavery bond and not enforceable as being opposed to public policy. *Anandiram v. Goza Kachori*, 27 O.L.J. 459=45 Ind. Cas. 965.

TEUNON and NEWBOULD, JJ.

References:—42 C. 742, *Dist.*; 1 O.L.J. 261; 30 O. 539; 10 O. 1054; 14 W.R. 154, R.

(2) Engagement by labourer to work for two years without pay in consideration of loan at high rate of interest—Condition for repayment of principal with enhanced interest on default to work for any day—Contract void—Time for suit begins to run on first day of default—Interest, Provision as to, if separable from other portions of contract. See CONTRACT ACT, No. 17-a, 3 Pat. L.J. 412.

Voluntary Association.

Established Church, meaning of—Roman Catholic Church, if an established Church—Voluntary association, Rules of, different from those of the parent body.—Parish Church adopting doctrines of Catholic Church if can set up separate rules of discipline—Custom, Question as to, whether one of fact or of law. See ECCLESIASTICAL LAW, No. 1, 8 L.W. 208.

Voluntary Conveyance.

Conveyance not burdened with liability for payment—Right of co-heirs *inter se* if govern rights between heirs of person and lessee of such person—Difference if exists between voluntary conveyance and that for valuable consideration. See MORTGAGE (GENERAL), No. 15, 21 O.C. 360.

Voluntary Transfer.

(1) Transfer to wife in good faith two years prior to insolvency, if valid against Official Receiver. See FRAUDULENT TRANSFER, 28 O.L.J. 536.

(2) Adjudication in insolvency relates back to presentation of petition therefor—Voluntary transfers made within two years before presentation of petition, effect of. See PROVINCIAL INSOLVENCY ACT, No. 11, 24 M.L.T. 149.

Wagering Contract.

(1) Common intention to wager essential—Speculation not equivalent to wagering—*Pakki Adat*.

Speculation does not necessarily involve a contract by way of wager; to constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for. *Pakki*.

Wagering Contract—(Concluded).

Adat dealings are well established as a legitimate mode of conducting commercial business in the Bombay market. *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji*, 28 M.L.T. 203=34 M.L.J. 305=16 A.L.J. 241=4 Pat. L.W. 229=(1918) M.W.N. 315=20 Bom. L.R. 561=7 L.W. 577=42 B. 373=22 C.W.N. 625=44 Ind. Cas. 284 (P.C.).

LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

References:—30 B. 205, R.; 38 B. 204, reversed.

(2) Money paid under, to a stake-holder, Recoverability of—Stake-holder, Authority given to, to pay over money, Revocation of. See CONTRACT, No. 5, 46 Ind. Cas. 755.

(3) Money deposited as security for performance of contract, Recoverability of. See CONTRACT ACT (IX OF 1872), No. 22, 23 M.L. 84.

Waiver.

(1) Transfer of suit by agent to his Assistant after framing of issues—No objection taken, but decision on merits awaited—Waiver. See AGENCY RULES (GANJAM), No. 1, (1918) M.W.N. 772.

(2) Forfeiture for non-payment of rent under express covenant—Ejectment suit—Inclusion in suit of claim for rent for period subsequent to default—Failure of ejectment suit on account of claim made for rent—Forfeiture waived by such claim. See LANDLORD AND TENANT, No. 24, 42 Ind. Cas. 614.

(3) By mortgagee of his right to enforce terms of mortgage-deed and defaults of mortgagor—Intention to enforce same for subsequent defaults—Previous notice to mortgagor necessary. See MORTGAGE (GENERAL), No. 17, 30 P.R. 1918.

(4) Suit against minors on mortgage—Question of proof of proper execution and attestation of mortgage-deed not raised in written statement nor issue framed thereon throughout trial—Decree against minor—Right to raise question if abandoned or waived. See PLEADINGS, No. 7, 35 M.L.J. 372.

Wajib ul-arz.

(1) Statement recorded in—*Evidentiary value*—*Pirjote*—Whether recoverable *Muhammad Falyaz Ali Khan v. Behari*, 15 A.L.J. 873=40 A. 56=45 Ind. Cas. 329 (F.B.). See Final Part, 1917, Col. 909.

(2) Unsupported by other evidence, Value of—*Custom, Proof of*.

Held that a *Wajib-ul-arz* unsupported by other evidence may be sufficient to establish a family custom. *Bodhi Ram v. Menda (Musammatt)*, 21 O.C. 334.

DANIELS, A.J.C.

References:—2 O.L.J. 388; 13 O.C. 1634 (P.C.), R.; 4 O.L.J. 509, doubted.

Wajib-ul-arz—(Concluded).

(3) Pre-emption—The value of, as evidence—Whether can be rebuttable. See CUSTOM, No. 4, 43 Ind. Cas. 864.

(4) Entry in, relates to ancestral property generally. See CUSTOMS (PUNJAB—SUCCESSION), No. 5, 123 P.R. 1918.

(5) Right of cultivating tenants to graze cattle on village shamilat—Tenants not parties to wajib-ul-arz—Tenants if thereby disentitled to right of grazing. See PASTURE, No. 1, 121 P.R. 1918.

(6) Custom of village as entered in—Construction of. See PRE-EMPTION, No. 12, 43 Ind. Cas. 2.

(7) Entry as to title in wajib-ul-arz if creates title—Presumption in its support. See TITLE, No. 3, 24 M.L.T. 271.

Warranty.

Purchase of goods by sample or after inspection—Warranty of commercial quality if implied. See CONTRACT ACT, No. 64, 35 M. L.J. 180.

Wasika.

Arrears of, due in lifetime of wasikadar—Liability to attachment for debts. See ATTACHMENT, No. 4, 21 O.C. 329.

Waste.

Permissive waste—Voluntary waste—Liability of a tenant for voluntary or permissive waste. *Doongersey Lakhmidas v. Keshavji Meghl & Co.*, 19 Bom. L.R. 878=43 Ind. Cas. 258. See Final Part, 1917, Col. 910.

Water.

Easement of supply of water from natural stream—Easement if can be acquired by 'twenty years' user—Limitation Act, S. 26.

When a person had clearly established a continuous use of water from a natural stream as of right for more than 20 years prior to suit. *Held* that he was entitled to have that supply conveyed to him undiminished by any action on the part of any riparian proprietor, as a right of easement to the supply of water from a natural stream may be acquired under S. 26, Limitation Act. *Abdul Rahman v. Muhammad Alam*, 57 P.R. 1918=104 P.L.R. 1918=180 P.W.R.=46 Ind. Cas. 441.

RATTIGAN, C.J.

References:—49 P.R. 1898, Dist.; 35 P.R. 1896, Rel. on.

Watercourse.

(1) User for nineteen years and fraction—Interruption for less than a year at end of period—Statutory period of twenty years if satisfied. See LIMITATION ACT (1909), No. 97, 48 P.R. 1918.

(2) No proceeding taken under S. 20 or S. 23 of Northern India Canal and Drainage Act—Canal Department if can interfere with decree of Civil Court or confer permanent right of irrigation from one's watercourse. See RE-MAND, No. 5, 177 P.W.R. 1918.

Water Rights.

(1) Surface water—Right of owner of higher land to discharge surface water over adjacent lower land—Inability of owner of servient tenement to discharge same owing to rise of bed of adjacent stream by silting—His remedy—Dominant owner's right if affected.

It is well settled in this country that the owner of higher land is entitled to discharge surface water over adjacent lower land.

Where, owing to the silting up of a stream into which the water thus discharged ultimately flowed, the level of the bed of the stream became higher than the adjacent lower land, to the inconvenience of the owners thereof:

Held—That the increase of burden to the servient owners not being due to anything done by the dominant owners, the latter were still entitled to exercise their rights and it was for the servient owners to take such steps as might be advisable to deal with the difficulties created by the rise in the bed of the stream. *Rastwar Mukerjee v. Jyoti Kumar Mukerjee*, 22 O.W. N. 666.

WALMSLEY and GREAVES, JJ.

References:—W.R. (F.B.) 25; 20 W.R. 287; 8 C. 469; 12 C. 263, R.; 29 M. 539, Dist.

(2) Suit to recover ryotwari lands from leasees—Right to water from Government channel—Declaration and injunction if could be granted in absence of Government to whom channel belonged. See DECLARATORY SUIT, No. 5, 34 M.L.J. 425.

(3) River water taken through another's field in undefined channel for irrigation—Enjoyment of right from time immemorial—Lost grant, presumption as to. See EASEMENTS ACT, No. 1, 20 Bom. L.R. 398.

Way.

(1) Infringement of village pathway—Obstruction—Proof of special damage not required—Cause of action. See RES JUDICATA, No. 9, 23 C.W.N. 91.

(2) See RIGHT OF WAY.

Will.

(1) Construction—Devise to testator's daughter—Absolute estate. *Chundlal Lalubhai v. Bhogilal Lakhmichand*, 19 Bom. L.R. 930=43 Ind. Cas. 468. See Final Part, 1917, Col. 917.

(2) Proof of—Succession Act (X of 1865), S. 60—Evidence Act (I of 1872), S. 68—Examination of one attesting witness in Probate Court if sufficient to prove Will.

Under S. 60 of Indian Succession Act there must be two attesting witnesses to a Will but under S. 68 of the Evidence Act the Will can be proved in the Court of Probate by one of the attesting witnesses. *Rammol (Das) Koch v. Hokol Koll Kochini*, 22 C.W.N. 315=43 Ind. Cas. 208.

FLETCHER and N. B. CHATTERJEE, JJ.

Will—(Continued).

- (3) *Delay in taking out Probate of a Will, if justified by circumstances and reasons—Probate applied for on necessity arising.*

Where a long time elapsed between the death of the testatrix and the date on which the Will was put forward for probate, and the testatrix was an illiterate Hindu lady, the prior history of the case was worthy of consideration. When there were reasons for the delay in propounding the Will, although in such a case the Court was bound to scrutinize the evidence very carefully, there was no rule of the law of evidence that such a Will was incapable of being proved. **Binodini Debya v. Hridoy Nath Ghoshal**, 22 C.W.N. 421.

* FLETCHER and NEWBOULD, JJ.

- (4) *Revocation of—Locus standi of person seeking revocation.*

A person, who is entitled to a much greater benefit under a Will alleged to have been revoked by another Will, has locus standi as having sufficient interest to oppose grant of probate and to apply for revocation of the probate of the latter Will on the ground of non-service of citation. It is not necessary to obtain probate of the earlier Will in order to be competent to apply for revocation of the probate of the later Will. **Draupadi Dasya v. Rajkumari Dasya**, 22 C.W.N. 564=45 Ind. Cas. 760.

N. R. CHATTERJEE and WALMSLEY, JJ.

- (5) *Construction of—Bequest to brother's widow and on her death to her daughter—Successive interest—Absolute estate—Succession Act (X of 1865), S. 111.*

Where, in a Will a legacy was given in the following words. "On my death my youngest brother's widow the said Bama Sundari Debya and when she is dead her daughter my niece Kusum Kamini Debi will get one-fourth share of all the self-acquired immoveable properties which I have other than my aforesaid immoveable properties."

Held, upon a construction of the Will, that the effect of the Will was to give to Bama Sundari an interest for life in the self acquired properties of the testator with a gift over her on her death of an absolute interest to her daughter Kusum Kamini.

The gift to Kusum Kamini was not a substitutional gift in the event of her mother Bama Sundari predeceasing the testator, but it was one of the successive interests; and S. 111 of the Indian Succession Act had no application to it. **Harendra Chandra Lahiri v. Basanta Kumar Maltra**, 22 C.W.N. 689=43 Ind. Cas. 991.

FLETCHER and SHAMSUL HUDA, JJ.

- (6) *Debutter created by testator—Shebaita and executors appointed—Compromise in a suit by Shebaita against executors—Transfer by shebaita of shebaiti right—Suit by executor disputing the validity of the transfer—Limitation Act (IX of 1908), Arts. 95,*

Will—(Continued).

- 91—*Property already debutter, if passes by will.*

The testator appointed four persons as shebaita of the debutter created by him and four other persons as executors, who were to be the advisors of the shebaita. In a suit brought by one of the shebaita against the executors, a compromise decree was passed in 1899, whereby the shebaita became entitled to appoint succeeding shebaita of their respective shebaita rights by means of will or by any other document. Two of the shebaita took no part in the sheba. The other two transferred their shebaita rights by two deeds, which contained recitals showing that the transfers were for the benefit of the deity to defendants Nos. 1 and 2, who were properly qualified persons. The executors brought the present suit for recovery of possession of the debutter properties and for a declaration that the deeds of transfer of the shebaita right were void and illegal, more than 14 years after the compromise:

Held, that the suit, in so far as it sought to nullify the deed of compromise, was barred by Art. 95, Limitation Act, and (semble) Art. 91 governed the suit in so far as it attacked the deeds of transfer.

Held, also, that possession having been made over by executors to the shebaita, the executors became functus officio.

Property, which is already debutter, does not pass by will to the executor. **Mohendra Nath Bagchi v. Gour Chandra Ghosh**, 22 C.W.N. 860=46 Ind. Cas. 867.

WOODROFFE and SMITHER, JJ.

- (7) *Delay in taking probate—Refusal to grant probate—Validity.*

Where an application for probate was made seven months after the testator's death, *held* that, in spite of the delay, if the will is a natural will and in accord with the tenor of the life of the deceased, it should be maintained. **Makunda Nand v. Bholanath Nanda**, 43 Ind. Cas. 195.

SHARFUDDIN and CHAPMAN, JJ.

Reference:—41 I.A. 50=18 C.W.N. 521, *Fr.*

- (8) *Interpretation of a will—Deed of endowment by a pardanashin lady, whether valid and legal.*

All that is necessary to interpret a will which is drawn by an unskillful draftsman is to give the plain meaning to the words used, neglecting grammatical errors, and remembering the limitations and deficiencies of the draftsman.

Where a testator described the legatee, who was his widow, as "owner," "owner with all powers and transfers," "ruler of the estate," and such like epithets, *held* that the testator devised a full and complete estate, and not a limited one.

Where a deed of endowment was executed by a pardanashin lady, it was not signed under duress, nor was there any undue influence, the disposition of the property was a most natural

Will—(Continued).

disposition; the lady had also outside advice and she had strength of will and business capacity. Under such circumstances, the deed of endowment was held valid and legal disposition. *Ganga Bakhsh Singh v. Gokul Prasad*, 44 Ind. Cas. 645=4 O.L.J. 744.

STUART and KANHAIYA LAL, A.J.CS.

References:—16 C. 397, R.; 7 A. 590, overruled; 9 A. 46, R.; 16 I.A. 12, Appr.; 36 A. 81, F.; 34 A. 455, Appr.

(9) *Specific legacy—Right of legatee to mesne profits—Liability of executor to pay—Probate and Administration Act (V of 1881), S. 198.*

In the case of a specific legacy such as land, the legatee is entitled to mesne profits from the date of the testator's death unless the will says something to the contrary.

Generally an executor will not be charged with interest on arrears of income unpaid by him because of his delay in accounting (a). *Gowri v. Naraina Muchintha*, 7 L.W. 513=29 M.L.T. 363=46 Ind. Cas. 664.

ABDUR RAHIM and OLDFIELD, JJ.

Reference:—(a) *Blogg v. Johnson*, L. R. 2 Ch. App. 295, Rel. on.

(10) *Executions by gosha lady—Proof—Rule as to pardanashins whether applicable to gosha ladies—Appeal—Raising plea not urged in first Court—Hindu Law—Presumption of ownership from possession, applicability of, to Hindu females—Grant of property to women for maintenance—Her power of disposition over savings out of income thereof. Sri Yikrama Deo Garu v. Sri Sri Sri Yikrama Deo Maharajulu Garu*, 33 M.L.J. 665=(1918) M.W.N. 69=43 Ind. Cas. 679. See Final Part, 1917, Col. 917.

(11) *Gift by testator to his two daughters in definite shares—Further provision that future offspring of childless daughter should take like offspring of daughter having children—No gift to children of latter daughter in express and clear terms—Gift if may be implied from language and scheme of will—Construction of will—Rules of construction in India and England same.*

Of the two daughters, S and A of a testator, S had no children but A had two sons. He devised two-thirds of his property to A and one-third to S. He also provided that if a male issue should in future be born to S, that grandson should, like the santhathi of his younger daughter A, enjoy S's third share absolutely. There was no gift to the children of A in express and clear terms. Held, on a construction of the language and scheme of the will that it was the intention of the testator that A's children should take the property given to A after her death and that there was an implied grant of their mother's two-thirds share to them.

The English rules of construction of wills making implied grants are also applicable to

Will—(Continued).

India (a). *Srinivasa Seshachariu v. Seahammā*, 34 M.L.J. 479=47 Ind. Cas. 766.

ABDUR RAHIM and OLDFIELD, JJ.

References:—(a) 5 O. 59; 30 A. 455; 22 M. 357; *Town v. Wentworth*, (1858) 11 Moo. P.C. 626; *Sweeting v. Prudeaux*, (1878) L.R. 2 Ch. D. 413; *Key v. Key*, (1853) 4 D. M. and G. 79; *In re Beafarn, Redfern v. Bryning*, (1877) 6 Ch. D. 133, R.; *Scale v. Rawlins*, (1892) A.C. 342, Dist.

(12) *Mortgage by Hindu widow of her husband's share to her husband's divided brother and his three divided sons—Agreement between widow, her husband's divided brother and his three sons to divide such mortgaged property on widow's death equally between themselves—Death of widow's husband's brother before widow—Agreement, if valid—Devise by divided brother of his one-fourth share under agreement to his wife—Estate taken by his wife.*

The plaintiff's husband by his will devised to her his one-fourth share in a *mitta*, which had fallen on partition to his brother and had been mortgaged by the brother's widow to the plaintiff's husband and to his three divided sons. Another agreement, to which the widow, the plaintiff's husband and his three sons were parties provided that, on the widow's death, the *mitta* should be divided into four shares, of which the plaintiff's husband and his three sons should each take one share. The plaintiff's husband predeceased the widow. He was the next reversioner and his sons were remoter reversioners and they were none of them competent to transfer their reversionary interests. Consequently, the agreement, being as to a mere *spes successionis*, was held to be so far void; but it was also held that as the testator was not likely to have been aware of this, his intention must be taken to be to dispose of any interest he had at the time of his death in favour of the plaintiff, *vis.*, his mortgage interest, and must be given effect to. The difference between English and Indian Law pointed out. *Subraya Goundan v. Muthayammal*, 35 M.L.J. 684.

WALLIS, C.J. and SPENCER, J.

References:—*Woodhouse v. Meredith*, (1816) 1 Mer. 450; *Bowen v. Barlow*, (1873) 8 Ch. App. 171; *Doe d. Wilkins v. Keymeys*, (1808) 9 East 366, R.

(13) *By a Talukdar—Codical, Construction of—Surrounding circumstances, Consideration of. The Deputy Commissioner of Kheri for Mahewa Estate v. Bani Bejai Raj Koor*, 20 O.C. 260=(1918) M.W.N. 304=22 O.W.N. 305=43 Ind. Cas. 987=8 L.W. 1 (P.C.). See Final Part, 1917, Col. 917.

(14) *Ordn Estate Act (I of 1869), Ss. 18-a and 22—Registration, exemption from—Devise, failure of—Time from which failure of a devise takes effect—Intestacy, partial, effect*

Will—(Continued).

of—Resulting trust in favour of heir-at-law.

Held (per *Kanhaiya Lal, A. J. C.*) that the first exception to S. 13-A, Act I of 1869 was limited to the person who would actually have succeeded at the death of the testator in case of intestacy.

Held (per *Daniels, J.*) that, it probably included not only the person who would actually have taken the estate, had the testator died intestate but any son, grandson or other lineal descendant of such person who would have taken it under the same clause of S. 22, Act I of 1869, as his ancestor or ancestors if the latter had predeceased the testator and if the testator had died intestate.

Where a devise fails in part, that failure takes effect from the date of the death of the testator, and no claim can be entertained which has the effect of diverting an estate already vested in another.

Wherever there is a partial intestacy either on account of no person being alive to claim under the will or by reason of the bequest being void or otherwise ineffectual, there is always a resulting trust in favour of the heir-at-law.

Property must vest in some one and cannot remain in abeyance or suspense without an owner. *Brijraj Kumar v. Mahadeo Bakhsh Singh*, 21 O.C. 374.

PANDIT KANHAIYA LAL and DANIELS, A.J.CS.

References:—29 C. 563 (572); 35 A. 211; 26 A. 393; 32 C. 851; 34 W.R. 168; 18 W.R. 959—9 B.L.R. 377; 12 O.C. 244; 18 O.C. 188, R.

(15) *Construction of—Corpus not expressly devised—Whether corpus passes or not—Bequest of residue to persons unborn if renders will void—Perpetuities—Creation of contingent remainder after woman's estate, effect of—Creation of estate inherited by Hindu widow in cases of intestacy if valid—Condition against alienation—Estate for life if Hindu can create—Possession entered into under uncertain will—Absolute estate if can be acquired by adverse possession—Recitals in old conveyances, evidentiary value of.*

A will recited that, if any daughter or son be born to the testator during his lifetime, such son or daughter would be the owner of all his property; but if there was none such, his niece was to take a bequest of a lakh of rupees and the rest of the moveable and immoveable property was to remain in the possession of his wife until her death, after which event it was to pass into the possession of his niece. But, if on the death of his wife and niece, there be living a son and a daughter born of the womb of the niece, then two-thirds of the cash and furniture should belong to the son and one-third to the daughter absolutely. As to his immoveable properties none should have the least right of alienation. They were to enjoy the balance left after the payment of rent and

Will—(Continued).

the expenses incurred in discharge of certain religious and charitable obligations charged upon the income of the testator's immoveable property. *Held* that the will clearly purported to convey an absolute estate ultimately to the son and daughter of the niece, that the fact that the corpus was not expressly mentioned was not sufficient to justify the view that the corpus did not pass, that the recitals from time to time in the will that there should be no right of alienation would make no difference so far as any rate as the niece's son and daughter were concerned, nor did it make any difference that the bequest in favour of the niece's son and daughter failed on the ground that they were unborn at the date of the testator's death and that the failure of the gift of the remainder to them would not make the will itself invalid (a). *Held*, also, that the disposition in favour of the niece's son and daughter indicated a gift of the remainder to them and did not vest an absolute estate of inheritance in the niece and that the expressions "heirs born of her womb," could not be held to be descriptive of an estate of ordinary inheritance as having vested in the niece (b).

Held, further, that an estate of the kind that a Hindu widow inherits in the case of an intestacy can be created by will (c).

That under the will there was no interest vested in any person other than the widow in the first place and after her the niece and that it contemplated that the estate should be completely represented first by the testator's widow, and thereafter by his niece and it was not permissible to import the English artificial idea that an estate in fee was outstanding anywhere else (d).

That the bequest of the remainder to the niece's son and daughter was that of a contingent and not a vested remainder supporting the view that the estate created was a woman's estate in the technical sense and not merely a life-estate.

That the estate created in favour of the niece was therefore an estate such as a woman ordinarily acquired under the Hindu Law, which she held in a completely representative character, but was unable to alienate except in case of legal necessity (e).

That the expression "without power to alienate" used in respect of the niece's estate was of the nature of surplusage and that the testator had in his mind the ordinary recognised restriction upon alienation which would apply independently of any provision in the will, and that he had not in his mind the eventuality of an alienation becoming necessary either for the purposes of providing maintenance for the niece or for the preservation of his estate (f).

That where a testator has intended to create a Hindu woman's estate, which is entirely representative, though restricted an absolute prohibition of alienation is void as coming within the rule of repugnancy.

Obiter.—A Hindu can by will create an estate for life in the English sense, but his intention

Will—(Continued).

to do so must be made clear by the terms of the will itself without any importation of English ideas.

General observations for construing Hindu wills and the caution necessary in applying English rules of construction pointed out.

Quere :—Where a person enters under a will of uncertain construction, an absolute title can be acquired by adverse possession in the absence of express claim to hold an absolute title.

The recitals made at or about the time of conveyance, executed twenty-five years before the institution of a suit, may be considered as weighty evidence of the existence of legal necessity for an alienation. *Ram Bahadur v. Jager Nath Prasad*, 3 Pat L.J. 199=45 Ind. Cas. 749 (F.B.).

CHAPMAN, ATKINSON and IMAM, JJ.

References :—(a) 11 C. 684, *Dist.*; 24 C. 934, *R.*; *Edwards v. Edward*, (1909) A.C. 375, *R.* (b) 1 Pat. L.J. 16, *Diss.* (c) 36 M. 484; 2 I.A. 256, *F.* (d) 22 B. 409; 35 I.A. 118; 29 C. 699; 42 C. 561; 38 C. 368; 35 A. 211; *Denuid Radclyff v. Bagshaw*, 6 T.R. 512, *R.* (e) 33 M. 91, *R.* (f) 24 C. 406, *R.*; 9 B.L.R. 377; *Perrin v. Blake*, 4 Burr. 2579, *F.*; 21 C.W.N. 235, *F.*

(16) Immediate reversioner not contesting—Next reversioner if can enter caveat and contest suit. See *CAVEAT*, 27 C.L.J. 320.

(17) Person basing title on oral will—Onus of proving precise words relied on, lies heavily on him. See *CUSTOMS (PUNJAB—SUCCESSION)*, No. 10, 85 P.W.R. 1918.

(18) Executor, Decree obtained by—Sale—Purchase by executor—Beneficial ownership in decree, determination of—Effect of family arrangement. See *EXECUTOR*, No. 4, 41 Ind. Cas. 732.

(19) Instrument of gift—Possession of property held over till after death of owner and his wife—To be treated as will. See *GIFT*, No. 1, 21 O.O. 812.

(20) Admitted to probate—Whether valid document. See *HINDU LAW (SEPARATION)*, No. 1, 48 Ind. Cas. 981.

(21) Partition under Law—Will by member dissenting from partition—Effect of. See *MALABAR LAW*, 1 (1918) M.W. N. 38.

(22) Bequest of part of non-transferable occupancy holding, Validity of. See *OCUPANCY TENURE*, No. 4, 22 C.W.N. 474.

(23) Probate of a, Delay in taking out, if justified by circumstances and reasons. See *PROBATE AND ADMINISTRATION ACT (V OF 1881)*, No. 1, 22 C.W.N. 424.

(24) Will proved in French Court and kept with notary if deposit within S. 5, Probate and Administration Act—Copy given by notary if proper copy. See *PROBATE AND ADMINISTRATION ACT*, No. 2, 22 C.W.N. 718.

Will—(Concluded).

(25) Probate Court, Final order of, as to due execution of—Effect—Competency to contest its validity otherwise—Mere omission to appeal by guardian *ad litem*, not gross negligence. See *RBS JUDICATA*, No. 40-a, 122 P.W.R. 1917.

Withdrawal of Claim.

Arbitration, Reference to, of all matters in dispute, withdrawal after, Validity of. See *AWARD*, No. 5, 46 Ind. Cas. 477.

Withdrawal of Suit.

(1) *Dismissal of suit at request of parties—Adjustment out of Court. On ground of—No formal decree under O. XXIII, r. 3, Civ. Pro. Code (1908)—Amounts to withdrawal without permission—Compromise petition addressed to Court, not an original contract—Not registrable under Registration Act (1908), S. 17 (2).*

Where, on the parties to a suit filing a petition of compromise and requesting the Court to dismiss the suit on ground of adjustment out of Court, the Court dismissed it without passing any formal decree under O. XXIII, r. 3 of the Civ. Pro. Code (1908);

Held that the suit must be taken to have been withdrawn without permission to bring a fresh suit.

An application to a Court to record the adjustment of a suit adjusted out of Court, in whatever language it may be couched, cannot properly be treated as the original contract between the parties to the case; it must be held to amount to no more than a mere recital of the contract independently entered into between them and it does not require registration, inasmuch as it does not really create or declare rights. *Mohammad Ali Khan v. Shujat Ali Khan*, 46 Ind. Cas. 918.

DRAKE-BROCKMAN, J.C.

(2) *Petition to withdraw from suit with liberty to bring fresh suit—Order permitting withdrawal but not expressly reserving right to bring fresh suit—Construction of order—Right of suit on same cause of action—Civ. Pro. Code (1882), S. 373—Civ. Pro. Code (1908), O. XXIII, r. 1.*

On a petition, under S. 373, old Civ. Pro. Code, for liberty to withdraw a suit with permission to bring a fresh suit, the order of the Court was: "The plaintiff is permitted to withdraw from the suit." *Held* that the order must be read with the petition and construed as granting permission to bring a fresh suit. *Narayana Tantri v. Nagappa*, 84 M.L.J. 515=44 Ind. Cas. 889 (F.B.).

WALLIS, G.J. SADASIWA AIZAR and KUMARASWAMY SASTRI, JJ.

Reference :—35 C. 290, *F.*

(3) *Civ. Pro. Code, O. VII, r. 10; O. XXIII r. 1, cl. 2 (b)—Other sufficient ground.*

Withdrawal of Suit—(Continued).

meaning of—Whether narrowed by principle of ejusdem generis—Gross under-valuation of one of the suit-items—Permission to withdraw claim as to that item—Granting of—Whether a judicial exercise of discretion—Suit found to be beyond Court's jurisdiction—Power of Court—Whether only to return plaint for presentation to proper Court.

Under O. XXIII, r. 1, Civ. Pro. Code, a Court would not be exercising its discretion judicially if it permits a plaintiff who has very grossly under-valued one of the suit properties to withdraw his claim as to that with liberty to bring a fresh suit.

Quare :—Whether an objection to a suit on the ground of jurisdiction and insufficient Court-fee is 'other sufficient ground' within the meaning of O. XXIII, r. 1, cl. 2 (b), Civ. Pro. Code.

Per *Sadasiva Aiyar, J. (Oldfield, J. contra)*.—The words, "other sufficient grounds" in O. XXIII, r. 1, cl. 2 (b), Civ. Pro. Code, ought to be given a wider meaning than the *ejusdem generis* interpretation of a ground of the nature of a formal defect (a).

Also per *Sadasiva Aiyar, J.*—After a Court once arrives at the conclusion that a suit as brought is beyond its jurisdiction, it has no power to pass any other order except to return the plaint for presentation to the proper Court (b). *Kannusami Pillai v. Jagathambal*, 35 M.L.J. 27=8 L.W. 145=41 M. 701=24 M.L.T. 46=(1918) M.W.N. 497=45 Ind. Cas. 265.

OLDFIELD and SADASIVA AIYAR, JJ.

References :—(a) 11 C.L.J. 45; 11 C.L.J. 512; 1 L.W. 726; 1 R. I.O.C. 27; 1 Q.B.D. 12; 2 El. and El. 1, 77; 6 E. and B. 363; L.R. 19 Eq. 166; 13 M.I.A. 160; 6 L.W. 75, R; (1911) M.W.N. 106; 25 C.L.J. 454, *Expt.*; O. VII, r. 10, Civ. Pro. Code, R. 33 M. 362, *Dist.*

(4) Civ. Pro. Code, O. XXIII, r. 1—*Application for withdrawal with liberty to bring fresh suit, grant of—Defect curable by amendment of pleadings.*

An application to withdraw from a suit with liberty to bring a fresh suit under O. XXIII, r. 1, should not be granted, if the defect, on the basis of which the leave to withdraw is asked for, can be cured by amendment of the pleadings. *Rameshwar Bakhsh Singh v. Mirza Rasool Beg*, 31 O.C. 66=45 Ind. Cas. 603.

LINDSAY, J.C.

(5) *Reasons therefor not recorded—Order bad—Small Cause Courts Act, S. 25—'Decided'—Government of India Act (1915), S. 107—Interference by High Court. Luchil Rai v. Raghunath Dube*, 2 Pat. L.J. 682=43 Ind. Cas. 455. See Final Part, 1917, Col. 920.

(6) *Leave to withdraw from suit given in appeal by appellate Court—Revision of leave against order granting such leave—Right of opposite party to object to leave granted after admitting formal defect in suit—Civ. Pro. Code (1908), S. 115, O. XXIII, r. 1.*

Withdrawal of Suit—(Continued).

The High Court has power to revise the order of a lower appellate Court giving leave to the plaintiff to withdraw from his suit with permission to bring a fresh suit upon the same cause of action subject to payment of costs to the defendant (a).

Where in an appeal by the plaintiff from the decree dismissing his suit, the defendant-respondent put in a cross-appeal on the ground that the whole action should be dismissed for misjoinder of causes, upon which the plaintiff applied to withdraw his suit with permission to bring a fresh suit upon the same cause of action on the ground that there were some formal defects, held that from the moment that the defendant alleged in his cross-appeal that the suit must fail in appeal owing to a formal defect in the pleadings, the lower appellate Court had jurisdiction to pass any order it pleased under O. XXIII, r. 1 and that the defendant could not object to it. *Blashehar Ahir v. Brijra Misair*, 2 Pat. L.J. 630=44 Ind. Cas. 406.

ROE and JWALA PRASAD, JJ.

References :—(a) 41 C. 632, *Diss.*; 11 C.L.J. 45, R.

(7) Civ. Pro. Code (1908), O. XXIII, r. 1—*Grounds for withdrawal of suit, what are sufficient—Duty of Court permitting withdrawal to make serious enquiry as to whether suit must fail for defect of parties—Vague opinion as to defect of parties affecting decision not enough—Attention of Courts drawn to this decision.*

A suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to bring a fresh suit. The sufficient grounds contemplated in the second clause of O. XXIII, r. 1, should be grounds closely analogous to the grounds given in the first clause. A vague opinion on the part of the Court that the defect of parties might materially affect the decision is not a sufficient reason for giving the permission. The Court must exercise the jurisdiction vested in it by law to make a serious enquiry and satisfy itself as to whether the suit must fail for defect of parties or not. *Mahendra Ram v. Singi Lal*, 3 Pat. L.J. 651.

ROE and JWALA PRASAD, JJ.

(8) *Suit for divorce adjourned for judgment—Death of defendant in the interval—Withdrawal of suit if can be permitted—Civ. Pro. Code, O. XXII, r. 6; O. XXXIII, r. 1—Scope of O. XXII, r. 6—Delivery of judgment if can be refused simply because of death. Ma Kin Nyun v. Ma Tin*, U.B.R. (1917), 4th Qr., 46=44 Ind. Cas. 620. See Final Part, 1917, Col. 920.

(9) *Parties not at issue on question of reasonable or convenient partition of dwelling-house—Application for withdrawal of suit—Rejection of application as made at late stage of suit—*

Withdrawal of Suit—(Concluded).

Discretion of Court. See PARTITION ACT (IV OF 1893), No. 1, 16 A.L.J. 584.

(10) Essentials in application to withdrawal of suit—What are. See CIV. PRO. CODE (1908), No. 398, 48 Ind. Cas. 346.

(11) Leave for, with liberty to bring fresh suit—Civ. Pro. Code (1908), O. XXIII, r. 1. See CIV. PRO. CODE (1908), No. 389, 45 Ind. Cas. 918.

(12) Leave to withdraw with liberty to bring fresh suit, when to be granted—Sufficient grounds. See CIV. PRO. CODE (1908), No. 390, 7 L.W. 181.

(13) No decision on merits in previous suit—Leave to withdraw suit with liberty to bring fresh suit on payment of costs—*Res judicata*. See CIV. PRO. CODE (1908), No. 211, 7 L.W. 557.

(14) Suit in ejectment without notice—Withdrawal of suit without the leave of the Court for fresh suit—Second suit after notice—Subject-matter of both suits not the same—Second suit maintainable. See CIV. PRO. CODE (1908), No. 391, 20 Bom. L.R. 35.

(15) With permission to institute fresh suit—Formal defect, Necessity of existence of, for validity of order—High Court, Power of, to interfere in revision, when no finding as to existence of legal defect—O. XXIII, r. 1, Civ. Pro. Code (1908), Object of—Civ. Pro. Code, S. 115. See CIV. PRO. CODE (1908), 3 Pat. L.J. 460.

(16) On minor's behalf, when permissible—Benefit of minor to be considered before withdrawal—Suit withdrawn without consideration by Court of question of benefit to minor by the withdrawal—Subsequent suit by minor, for same relief, if barred. See MINOR, No. 8, 164 I.W.R. 1918.

(17) Dismissal of suit by trial Court—Prayer by plaintiff in appeal for leave to withdraw from appeal admitting inability to adduce evidence necessary to support case—Grant of leave accordingly—Subsequent suit between same parties same question being substantially in issue—Subsequent suit barred. See RES JUDICATA, No. 34-a, 3 Pat. L.J. 404.

(18) Application by plaintiff to withdraw suit with leave to bring fresh suit—Application made after close of evidence and during or after arguments—Leave granted if can be disturbed in revision. See REVISION, No. 3, 16 A.L.J. 495.

(19) Permission for, with liberty to bring fresh suit—Revision if lies from order so permitting—Grounds on which permission may be granted. See REVISION, No. 28, 117 P.W.R. 1918.

(20) *Ex parte* decree obtained by fraud set aside—Arrangement between parties that suit should be withdrawn if revived with revival of suit. See REVIVAL OF SUIT, No. 1, 28 O.L.J. 158.

Witness.

(1) *Death of, after examination and cross-examination, but before termination of suit—Evidence Act, S. 32, Applicability of—Previous statement, of, Admissibility of, under S. 32, Evidence Act (1872).*

Where a witness has been fully examined and cross examined, S. 32 of the Evidence Act has no application, and if the witness happens to die before the termination of the suit, it is not open to either party to then apply under S. 32 for the admission of a previous statement made by him. *Sahdeo Narain Dey v. Kusum Kumari*, 46 Ind. Cas. 929.

CHAPMAN and ATKINSON, J.J. :

(2) *Adverse inference from non-production of—Mesne profits.*

Held, that no inference should be drawn against a party for not producing a material witness, where the question of the absence of such witness was not raised at the trial.

Held, further, that the possession of the transferee from a Hindu father under a deed, which was set aside on condition of the sons' paying a certain sum of money to the vendee, could not be said to have been unlawful, while the deed stood, and no mesne profits could be awarded against him. *Banwar Lal v. Mahesh*, 21 O.C. 228 (P.C.).

LORD ATKINSON, LORD PHILLIMORE,
SIR JOHN EDGE and MR. AMEER ALI.

(3) Credibility of, how to be judged. See MAHOMEDAN LAW (GIFT), No. 1, 28 O.L.J. 306.

(4) *Pardanashin lady, Document, executed by—Attestation of—If witnesses should be present within Pardah.* See MORTGAGE (GENERAL), No. 7, 45 Ind. Cas. 691.

Woman.

Right of, to hold religious office. See MAHOMEDAN LAW (WAKF), No. 1, 41 M. 1083.

Words and Phrases.

(1) 'Case,' Meaning of, in S. 115, Civ. Pro. Code (1908). See CIV. PRO. CODE (1908), 3 Pat. L.J. 460.

(2) "Sikka Rupees," History and origin of. See CONSTRUCTION OF WORDS, 47 Ind. Cas. 109.

(3) *Audi alteram partem*, Rule of, Applicability of. See GUARDIAN AND MINOR, No. 3, 45 Ind. Cas. 882.

(4) "Varas" Use of, in a Hindu will—Explanation of term, whether it means 'heir' or successor. See HINDU LAW (WILL), No. 2, 47 Ind. Cas. 611.

(b) "San ba San," Meaning of, in an under-*raiyat* lease. See LANDLORD AND TENANT, No. 52-g, 47 Ind. Cas. 416.

(6) "Entitled"—Limitation Act, 1908, S. 1, Art. 91, in—Meaning of. See LIMITATION, 47 Ind. Cas. 505.

Words and Phrases—(Concluded).

(7) "Maral." Meaning of—Deposit in A's name Maral B. Effect of—Deposit repayable on demand after certain time. See LIMITATION ACT (1908), No. 137, 3 L.W. 221.

(8) Meaning of a word, a question of fact. See MEANING, 46 Ind. Cas. 794.

(9) "Redeem." Meaning of. See MORTGAGE (REDEMPTION), No. 19-a, 3 Pat. L.J. 490.

(10) *Pak saf*—Expression of vernacular conveying—Meaning, flawless title. See VENDOR AND PURCHASER, No. 10, 3 Pat. L.J. 358.

Written Statement.

(1) Order of High Court Judge on original side refusing leave to defendant to file written statement—Order if appealable. See APPEAL (GENERAL), No. 2, 45 C. 818.

(2) Pleas in — Cause of action if can be furnished by. See CAUSE OF ACTION, No. 1-a, 46 Ind. Cas. 650.

(3) Plaintiff, allegation of title in—No denial as to title in—Effect—Civ. Pro. Code (1908), O. VIII, r. 5. See PLEADINGS, No. 4, 45 Ind. Cas. 878.

Written Statement—(Concluded).

(4) Omission to deny allegation of fact in plaint and conduct of suit, Distinction between—Suit against minor on mortgage—Question of proof of proper execution of mortgage, not raised in, or at trial—Waiver of right to raise question. See PLEADINGS, No. 7, 35 M.L.J. 872. ..

Zarpeshgi Ijara.

Construction of. See MORTGAGOR AND MORTGAGEE, No. 1 a, 44 Ind. Cas. 153.

Zirat Land.

Is not *raiya* land, though Zemindar may lose rights in it by treating it as if it was *raiya*. See BEN. ACT VIII OF 1855 (TENANCY), No. 97-a, 44 Ind. Cas. 94 (F.B.).

Zarpeshgi Lease.

Construction of — Relationship of mortgagor and mortgagee or landlord and tenant, is created by—Determination of. See MORTGAGOR AND MORTGAGEE, No. 1-a, 44 Ind. Cas. 153.

SUPPLEMENT.

Digest of Mysore Chief Court Reports. (Civil and Criminal Cases).

Act X of 1873.

See OATHS ACT.

Act III of 1900 (Mysore).

See MYSORE COURT FEES REGULATION.

Act III of 1911 (Mysore).

See MYSORE C.P. CODE.

Act IV of 1911 (Mysore).

See LIMITATION REGULATION.

Adjournment.

(1) *Civ. Pro. Code (Reg. III of 1911), O. XVII, rr. 2 and 3—Adjournment subject to conditions—Failure to fulfil condition—Order of dismissal—Remedy.*

Where the plaintiff, who was granted an adjournment on condition that his suit would be dismissed if he did not come with his witnesses at the next hearing, failed to fulfil the condition and the suit was consequently dismissed, but the plaintiff's pleader, after knowing that the suit was to be dismissed, reported no instructions:

Held that, in the circumstances of the case, the order of dismissal was one under O. XVII, r. 3 and that the remedy of the plaintiff was by way of appeal and not by a petition for restoration. *Rajappa v. Rangappa*, 23 Mys. C.C. R. 275.

MILLER, C.J. and PARAMASIVA AIYAR, J.

(2) *Civ. Pro. Code (Reg. IV of 1911), O. XVII, rr. 2 and 3—Adjournment—Time granted at party's request for particular purpose—Failure to fulfil purpose—Whether pleader's appearance to ask for time is 'appearance' within meaning of O. XVII.*

Where the pleader for the defendant, who, at her request, had been granted time for filing her written statement, moved, on the adjourned date of hearing for a further adjournment, on the ground that the written statement was still not ready and that the defendant had not arrived at the Court-house, and, on the Court refusing to grant the adjournment, the pleader reported that he had no further instructions, and the suit was consequently disposed of:

Adjournment—(Concluded).

Held, that the disposal of the suit was under O. XVII, r. 3 and not under O. XVII, r. 2 of the Civ. Pro. Code, inasmuch as appearance to ask for time is 'appearance' within the meaning of O. XVII and r. 2 of that Order cannot apply where there is an appearance. *Narasappa v. Venkatappa*, 23 Mys. C.C. R. 297.

MILLER, C.J. and PARAMASIVA AIYAR, J.

Reference:—23 Mys. C.C.R. 1, *Dist.*

(3) Plaintiff's absence at adjourned hearing—Pleader reporting no instructions, if amounts to plaintiff's failure to appear—Dismissal for default if proper. See APPEARANCE, No. 1, 23 Mys. C.C.R. 1.

Adverse Possession.

Limitation Regulation (IV of 1911), Art. 144—Mahomedan Law—Adverse possession as between co-heirs—Gift of musha—Chief Court Regulation, S. 11—Equity and good conscience.

On the death of one J, a Mahomedan, his two sons took possession of his estate, treated it as though their rights of inheritance and succession were determined by the Hindu Law and held the property in halves having effected an informal partition, ignoring altogether the existence of their sister, the plaintiff, who was also under the impression that she had no right to the estate. The eldest brother, by a deed of settlement, gave part of his one-half share to his own wife, and part to his nephew's wife reserving for his own maintenance a little, which, before his death, he gave to the first defendant along with that which he had settled on his own wife. When the plaintiff sued for her share in her deceased father's estate and in that of her deceased brother, the defendants contended that, as regards the first claim, the suit was barred as being no more than twelve years from the date when she became entitled to claim her share, and, as regards the second, that the deceased owned no property at his death which the plaintiff could inherit. The plaintiff contended that the suit was not barred and that the gift by her deceased brother to his wife and nephew's wife was invalid, because the property given to one was not divided off by

Adverse Possession.—(Concluded).

metes and bounds from that given to the other: *Held* that the possession of the brothers was adverse to plaintiff, as they held the property to her knowledge as property in which she had no share and she also thought they were entitled to do so and that the plaintiff's claim, as her father's heir, was barred by limitation:

Held, further, that the gift was not invalid owing to the doctrine of *musha*, inasmuch as the confusion, if at all there was any, was on the side of the donee only.

Per *Paramasiva Aiyar, J.*—It is not incumbent on the Chief Court as a Court of equity and good conscience under S. 11 of the Chief Court Regulation to enforce an artificial restriction of antiquated law on the right of an owner to dispose of his property by gift. *Hadiya Kanumbl v. Iscof Khan*, 23 Mys. C.O.R. 45

MILLER, C.J. and PARAMASIVA AIYAR, J.

References:—16 I.A. 195; 34 I.A. 167; 38 C. 518; 35 M. 120; 23 Ind. Cas. 547; 15 C.W.N. 328; 17 Ind. Cas. 857; 106 P.R. 1912; 21 Mys. C.O.R. 5, R.

Appeal.

- (1) *Civ. Pro. Code, O. XLIII, r. 1, cl. (d)*—*Ex parte decree*—*Application to set it aside dismissed for default*—*Subsequent application to restore original one*—*Dismissal*—*Appeal*.

Where an application by the defendant, for an order to have an *ex parte* decree set aside, was dismissed for default, and a second application presented by him for the restoration of the former one was also dismissed:

Held that the order dismissing the second application is not appealable under O. XLIII, r. 1, cl. (d) of the Civ. Pro. Code. *Kuppurayamy Mudallar v. Venkatappa*, 23 Mys. C.O.R. 163.

PARAMASIVA AIYAR and HUSEIN, JJ.

- (2) *Civ. Pro. Code (Reg. III of 1911), S. 149—Limitation (Reg. IV of 1911), S. 5—Leave to appeal in forma pauperis refused—Payment of Court-fee after period of limitation—Date of institution of appeal, meaning of—Whether inability to raise money for payment of Court-fee earlier is a sufficient excuse for delay.*

Where an application for permission to appeal *in forma pauperis* was rejected, and, after the expiry of the period of limitation, the appellant furnished the necessary Court-fee and claimed (1) that his appeal was in time, inasmuch as it must be held to have been presented on the date of the application for permission to appeal as a pauper and (2) that, if it be held that the appeal was out of time, there was sufficient cause for the delay in preferring the appeal, inasmuch as the appellant was unable to raise the money for payment of Court-fee on the appeal memorandum earlier.

Held that, in the circumstances of the case, the appeal was out of time.

Appeal.—(Concluded).

The date of the institution of the appeal is, in the absence of any permission or grant of time by the Court to make good the deficient Court-fee, the date on which the necessary Court-fee is paid on the appeal memorandum and not the date of presentation of the application for leave to appeal *in forma pauperis*.

Held, further, that the inability of the appellant to raise money for the requisite Court-fee earlier is not a sufficient cause for the delay within the meaning of S. 5 of the Limitation Regulation. *Wallappa v. Sreeramulu Naidu*, 23 Mys. C.O.R. 216.

MILLER, C.J. and CHANDRASEKHARA AIYAR, J.

(3) *Adjournment subject to condition of dismissal on default to appear on adjourned date*—"No instruction" reported by pleader—*Failure to appear*—*Dismissal of suit*—*Petition for restoration of suit not proper procedure*—*Appeal is proper remedy*. See *ADJOURNMENT*, No. 1, 23 Mys. C.O.R. 275.

Appearance.

- (1) *Civ. Pro. Code, O. XVII, rr. 2 and 3; O. IX, r. 12; O. III, rr. 1 and 4; O. V, r. 1; O. X, r. 1 (1)—Adjourned hearing—Plaintiff's absence—Pleader reporting "no instructions"—Whether amounts to plaintiff's failure to appear—Dismissal of suit for default of prosecution—Applicability of O. XVII, r. 2.*

Where, at an adjourned hearing of the suit, the plaintiff was absent and his pleader reported to the Court that he had no instructions from his client to proceed with the case, and the Munsif dismissed the case for default of prosecution, held by a majority of the Full Bench (*Paramasiva Aiyar, J., dissenting*) that, in the circumstances stated, the plaintiff failed to appear within the meaning of O. XVII, r. 2...1. *Held*, further, that, as there was nothing to show that the Munsif intended to decide the suit forthwith on the materials before him and not to dismiss it on the ground of the plaintiff's non-appearance, the order of dismissal passed by him should be treated as a proceeding under O. XVII, r. 2, and not as one under O. XVII, r. 3.

Held, by *Paramasiva Aiyar, J.*, that, when a pleader empowered, entitled and bound by his vakalat to appear, apply and act for his client, appears and reports 'no instructions,' the report has not the effect of a 'failure to appear' by the party he represents in the sense in which the words 'the parties or any of them fail to appear' are used in O. XVII, r. 2 of the Civil Procedure Regulation, as the words 'failure to appear' mean neither more nor less than failure to attend in person or by pleader at the Court-house so as to catch the eye of the Court when the case is called on for hearing. The pleader's inability or refusal to answer material questions relating to the suit is irrelevant to the question of appearance, cannot make him

Appearance—(Concluded).

cease to represent his client, convert his appearance into non-appearance and render the party whom he represents liable to the penalty for non-appearance. *Held*, further, that the procedure applicable to the circumstances of the case under reference is that laid down in r. 9 of O. XVII and that the decisions of British Indian High Courts to the contrary are based on an imperfect examination of the provisions of the Civ. Pro. Code. *Chikkanna v. Mariappa*, 23 Mys. C.O.R. 1 (F.B.).

MILLER, C.J. CHANDRASEKHARA AIYAR and PARAMASIVA AIYAR, JJ.

References:—33 M. 241; 34 C. 235; 22 A. 66; 23 B. 414; 20 B. 736; 20 A. 195; 19 A. 355; 23 C. 738, discussed.

(2) Adjournment subject to condition of dismissal on default to appear on adjourned date—"No instructions" reported by pleader—Failure to appear—Dismissal of suit—Petition for restoration of suit not proper procedure—Appeal is proper remedy. See ADJOURNMENT, No. 1, 23 Mys. C.O.R. 276.

(3) Appearance to ask for time if appearance within O. XVII. See ADJOURNMENT, No. 2, 23 Mys. C.O.R. 297.

Arbitration.

(1) Award—Suit to enforce terms of an award—Limitation Regln. (IV of 1911), Arts. 113, 120—Applicability—Award partly void and partly valid—Enforceability of valid portion.

A suit to enforce the terms of an award is not a suit to enforce the specific performance of a contract; and the article of the Limitation Regulation applicable to such a suit is not Art. 113, but the general Art. 120, which allows a period of six years from the time when the right to sue accrues.

Where a portion of the award is void, it does not follow that the rest of the award is unenforceable, provided it is good in itself and can be separated from the other portion. *Ranglah Setty v. Chikka Ranglah Setty*, 23 Mys. C.O.R. 71.

CHANDRASEKHARA AIYAR and PARAMASIVA AIYAR, JJ.

Reference:—23 M. 533, F.

(2) Award—Omission to determine some of the points referred for decision—Waiver by consent of parties in regard to matters left undetermined—Award not void in toto.

Where a suit was based on an award, which left undetermined some matters not directly connected with the subject-matter of the suit, though included in the list of matters originally submitted to the arbitrators for decision, and it was found that there had been a waiver by consent of parties in regard to the matters left undetermined: *Held*, that the award, as a whole, was not bad and that the suit should be

Arbitration—(Concluded).

decreed in favour of the plaintiff. *Yembarumanar v. Selvapillulengar*, 23 Mys. C.O.R. 79.

CHANDRASEKHARA AIYAR and PARAMASIVA AIYAR, JJ.

References:—14 C.L.J. 188 and 309; 21 C. 590, R.

Attachment before Judgment.

Omission of Court to order withdrawal of attachment when dismissing suit—Suit decreed by appellate Court—Attachment if remains in force—Civ. Pro. Code (Act V of 1908), O. XXXVIII, rr. 9 and 11.

Where the trial Court made an order for attachment before judgment and after trial dismissed the suit but omitted to make an order in terms of O. XXXVIII, r. 9, withdrawing the attachment and the suit was eventually decreed by the appellate Court.

Held—That the attachment did not subsist and fell with the dismissal of the suit in spite of the Court's failure to make the formal order withdrawing the attachment when dismissing the suit. *Azizur Rahman v. Amla Sharif*, 22 C.W.N. 927.

RICHARDSON and BEACHCROFT, JJ.

References:—10 A. 506; 13 C.L.J. 243, R.

Award.

Award partly valid and partly void—Enforceability of valid portion—Suit to enforce award if one to enforce specific performance of contract. See ARBITRATION, No. 1, 23 Mys. C.O.R. 71.

Cancellation of Document.

Suits both under S. 39 and S. 42 of Specific Relief Act if come under category of—Declaratory decree and adjudication, Distinction between—Suit for cancellation of deed of release on ground of fraud, Nature of. See COURT FEES REGULATION (III OF 1900), No. 2, 23 Mys. C.O.R. 197.

Certificate of Payment.

Razinama decree—Payment certified by the decree-holder—Claim for further payment in execution of the razinama decree—Application by the judgment debtor not to execute the decree—Civ. Pro. Code, O. XXI, r. 2, Applicability of.

The following statement of facts is taken from the judgment of the District Judge:—
"By the razinama Exhibit A presented in O. S. No. 116 of 1908/09, the parties agreed that if the defendant (appellant) paid Rs. 600 in two instalments of Rs. 300 each the claim in that case as well as the sum due under the decree in favour of the plaintiff (respondent) in O. S. No. 436 of 1910/11 should both be discharged. The first instalment of Rs. 300 had to be paid on or before the 30th October, 1911, and the second instalment of Rs. 300 had to be paid

Certificate of Payment—(Concluded).

with interest at one per cent. per mensem on or before the 20th October, 1912, and a penal clause was inserted that, if these terms were contravened, the amount that had been remitted in O. S. No. 116 of 1908-09 should be paid up in full.

The respondent filed execution petition No. 443 of 1912-13 on 20th November 1912 claiming a sum of Rs. 951-15-10. In this petition (Exhibit B), he states that Rs. 300 were received on 26th March, 1912, but that he was entitled to the whole sum sued for with costs, etc., in all amounting to Rs. 1,951-15-10 and, as the payment was not made in time, he was entitled to enforce the terms of the razinama, and that, therefore, deducting Rs. 300 paid beyond time, he was entitled to recover Rs. 951-15-10. The appellant engaged counsel to defend this case, but owing apparently to the fact that one other person was put down as a judgment-debtor was not served with notice, the case underwent some adjournments, but on 6th June, 1913, when that party was served, the appellant's pleader did not appear, and the appellant was also absent till 27th November, 1904. She then, however, put in this application, on which the order under appeal was passed, saying that she had paid up all the 600 rupees in time according to the razinama, and that the decree-holder was fraudulently trying to execute the decree and that he represented to her that he himself would get the necessary things done to have the matter settled and prevailed upon her not to go to her pleader and that he did so with a view to defraud her and, having prevailed on her not to go to her pleader and state her defence, he was still executing the decree.

The decree-holder admitted having received another sum of Rs. 300, but says he appropriated Rs. 200 out of this for the decree in O. S. No. 446 of 1910-11 and the remaining Rs. 100 to the decree in question (O. S. No. 116 of 1908-09). The respondent says that the second sum of Rs. 300 was paid in two sums at first Rs. 200 and half an hour later on Rs. 100, but on the same date which is 30th May, 1914.

The appellant complains in her petition that the decree-holder has gone on making appropriations unauthorisedly.

The lower Court dismissed the petition on the ground that it was barred by time and that S. 18 of the Limitation Act is of no avail to the appellant, as the respondent did not keep her away from the knowledge of her right to make the application."

Held that, inasmuch as the payments made had been certified to the Court by the decree-holder, no application under O. XXI, r. 2, was necessary, and the question, whether any further payment can be claimed in execution of the razinama decree, can be raised by the judgment-debtor in resisting the decree-holder's application for execution. *Sidda Basava Setty v. Ningamma*, 23 Mys. C.O.R. 111.

MILLER, C.J. and CHANDRASEKHARA AIYAR, J.

Civ. Pro. Code (III of 1911) Mysore.

(1) Adjournment on condition of dismissal of suit for default to appear on adjourned date—Pleader reporting "no instructions"—Failure to appear—Dismissal of suit—Remedy of plaintiff lies in appeal, not in prayer for restoration of suit. See *ADJOURNMENT*, No. 1, 23 Mys. C.O.R. 275.

(2) S. 49—Application praying for completion of proceedings initiated by previous execution application, but not in itself an execution application—Such application if a fresh application within meaning of S. 48 See *EXECUTION OF DECREE*, No. 1, 23 Mys. C.O.R. 55.

(3) Ss. 51, 73, O. XXI, r. 11 (3)—Execution of decree—Application for rateable distribution furnishing all particulars required by r. 11—Separate execution application if necessary to entitle to share in distribution. See *RATEABLE DISTRIBUTION*, No. 1, 23 Mys. C.O.R. 170.

(4) S. 73. See No 3, *supra*.

(5) S. 141, O. XXI, r. 97—Application complaining of resistance to delivery of possession in execution under O. XXI, r. 91—Dismissal for default of such application—Subsequent application for restoration if lies See *DISMISSAL FOR DEFAULT*, No. 1, 23 Mys. C.O.R. 164.

(6) Ss. 144, 151—*Ex parte* decree, Execution of, and delivery of property thereunder—Subsequent setting aside of by *ex parte* by Court that passed it—Application for restitution if can be granted by such Court. See *RESTITUTION*, No. 1, 23 Mys. C.O.R. 180.

(7) S. 149—Refusal of leave to appeal as pauper—Payment of Court-fee after period of limitation—Date of institution of appeal, meaning of—Inability to raise money for payment of Court-fee earlier if sufficient excuse for delay. See *APPEAL*, No. 2, 23 Mys. C.O.R. 216.

(8) S. 151. See No. 6, *supra*.

(9) O. III, rr. 1 and 4. See No. 12, *infra*.

(10) O. IX, r. 12. See No. 12, *infra*.

(11) O. XVII, rr. 2 and 3—Time granted at party's request for particular purpose—Failure to fulfil and fresh adjournment prayed for—Appearance to ask for time if appearance within O. XVII—Refusal of adjournment—Disposal of suit on pleader reporting no instructions—Disposal one under r. 3—R. 2 inapplicable to case. See *ADJOURNMENT*, No. 1, 23 Mys. C.O.R. 297.

(12) O. XVII, rr. 2 and 3, O. IX, r. 12, O. III, rr. 1 and 4—Plaintiff's absence at adjourned hearing—Pleader reporting no instructions, if amounts to plaintiff's failure to appear—Dismissal for default if proper. See *APPEARANCE*, No. 1, 23 Mys. C.O.R. 1.

Civ. Pro. Code (III of 1911) Mysore—(Ctd.).

(13) O. XXI, r. 2—*Razinama* decree—Payments made certified by decree-holder—Right to further payment in execution of *razinama* decree or decrees which that decree consolidated—Judgment-debtor if may question such right without any application under r. 2. See CERTIFICATE OF PAYMENT, 23 Mys. C.O.R. 111.

(14) O. XXI, r. 11 (2). See No 3, *supra*.

(15) O. XLIII, r. 1 (d)—*Ex parte* decree—Dismissal for default of application to set it aside—Application to restore such application also dismissed—Appeal if lies from latter order of dismissal. See APPEAL, No. 1, 23 Mys. C.O.R. 163.

Compromise Decree.

Razinama decree—Payment certified by decree-holder—Claim for further payment in execution of *razinama* decree—Application by judgment debtor not to execute decree—Civ. Pro. Code, O. XXI, r. 2 if applies to case. See CERTIFICATE OF PAYMENT, 23 Mys. C.C.R. 111.

Consideration.

Barred debt, consideration for fresh prom-note—Omission to specifically refer to barred debt in later agreement—Enforceability of pro-note. See CONTRACT ACT, No. 1, 23 Mys. C.C.R. 131.

Contract Act

(1) S. 25, cl. (3)—*Barred debt*—Consideration for a fresh promissory note—Omission to refer specifically to barred debt in later agreement—Enforceability.

Where the plaintiff sued on a promissory note, the consideration for which was the amount due on a previous note executed by the defendant, but which was barred by limitation on the date of the execution of the later note and the later agreement did not specifically refer to the barred debt: *Held* that the suit pro-note was a contract enforceable under S. 25, cl. (3) of the Indian Contract Act, and a specific reference to the barred debt in the later agreement was not necessary for the applicability of that section *Bheemalya v. Gurusiddappa*, 23 Mys. C.O.R. 131.

CHANDRASEKHARA AIYAR and PARAMASIVA AIYAR, JJ.

References:—33 M. 159; 10 Mys. C.C.R. 121, R.

(2) Ss. 38, 45 and 165—Co-lessors—Payment of rent by tenants to one of several co lessors if good against the others. See LESSOR AND LESSEE, No. 1, 23 Mys. C.O.R. 148.

(3) Ss. 38, 67—Offer of performance if succession certificate is produced is not unconditional offer.

In 1896, the father and the paternal grandfather of the defendants, who had mortgaged certain land with possession for ten years to

Contract Act—(Concluded).

one K, took a lease back from him for the same term, the mortgagee having the right to resume possession on failure of regular payment of the rent and to interest on arrears. In 1903, the mortgagor executed a bond in favour of K for three years' arrears of rent under the lease. K then died, leaving a daughter, O, his heir and devisee under his will whereby he also appointed one A, to be guardian of O during her minority. O having died a minor without issue, the plaintiff, her husband, brought two suits, one on the bond of 1903, and the other for rent from 1904 to the date of suit with interest. The defendants contended that in 1906 they offered to A to redeem the mortgage and to discharge the amount due on the bond, provided that he would obtain a succession certificate and a guardianship certificate for their protection and that consequently their liability to pay the rent and the interest ceased from that date: *Held* that the offer to pay, if a succession certificate was produced, could not be held to be an unconditional offer and did not operate to absolve the debtors from their liability to pay the rent and the interest on the bond. *Yenkata Rao v. Venkatesa Pandita*, 23 Mys. C.O.R. 139.

MILLER, C.J. and PARAMASIVA AIYAR, J.

References:—4 M.L.T. 435, F.; 27 B. 23, R.

(4) S. 45. See No. 2, *supra*.

(5) S. 67. See No. 3, *supra*.

(6) S. 165 See No. 2, *supra*.

Court-fees.

Court-fee—Whether ad valorem fee is payable on relief for interest after suit—Memor. of objections.

A suit for the recovery of jewels deposited by the plaintiff with the defendant, or, in the alternative, for the value thereof, was decreed as prayed in the plaint, and the defendant appealed against the decree. The plaintiff-respondent filed a memorandum of objections, urging that the Court ought to have directed the defendant to pay interest on the amount awarded by way of alternative relief and paid a Court-fee of two rupees on the ground that his objection was only as to the form of the decree: *Held* that the memorandum was sufficiently stamped. *Surayya v. Sundarasanil*, 23 Mys. C.O.R. 211.

MILLER, C.J. and HUSEIN, J.

References:—43 C. 650; 17 B. 41, F.

Court Fees Regulation (III of 1900).

(1) S. 4, cl. 9—*Mortgage*—Separate and distinct part of the mortgaged property already redeemed with the consent of the mortgagee—Suit for redemption of the remainder—Court-fee payable on the balance.

Where a separate and distinct part of the mortgaged property had been, with the consent of the mortgagee, already redeemed and the plaintiff sued to redeem the remainder and paid

Court Fees Regulation (III of 1900)—(Old.).

a Court-fee calculated on the balance due, after deducting from the original principal mortgage-money the amount already paid by him for the redemption of the part already redeemed: *Held* that the Court-fee so calculated satisfied the provisions of S. 4, cl. 9 of the Court Fees Regulation, and was sufficient. *Slidde Gowda v. Dodda Channe Gowda*, 23 Mys. C.O.R. 85.

MILLER, C.J. and CHANDRASEKHARA AIYAR, J.

References.—6 B. 324; 8 A. 438, F.

(2) S. 4, sub-S. (iv), cl. (c), Sch. II, No. 11, cl. (6)—*Specific Relief Act* (I of 1877), Ss. 39 and 42—*Suit for cancellation of a deed of release—Basis of valuation for the purpose of Court-fee.*

Held, by a majority of the Full Bench (*Paramasiva Aiyar, J. dissenting*) that the Court-fee payable on the plaint, in a case in which the plaintiff asks for the cancellation of a deed of release, which he alleges was obtained from him by fraud, is on the amount at which the relief sought is valued in the plaint under S. 4, sub-S. (iv), cl. (c) of the Court Fees Regulation, and that the valuation placed by the plaintiff on the relief sought must be accepted and cannot be revised by the Court.

Per *Miller, C.J.*—Though the 'declaratory decree' of S. 42 is not the same thing as the adjudication under S. 39 of the Specific Relief Act, it does not follow that the latter adjudication is not also a declaratory decree.

Per *Chandrasekhara Aiyar, J.*—Every suit under S. 39 of the Specific Relief Act is a suit to have it "adjudged" that a particular instrument is void or voidable and for an order (consequent upon such adjudication) that the instrument be delivered up and cancelled; it is, therefore, a suit for a "declaration" and for appropriate "consequential relief" and must be valued accordingly.

Held by *Paramasiva Iyer, J.*, that a suit for the cancellation of an instrument under S. 39 of Chap. V of the Specific Relief Act stands in a category by itself and is altogether distinct from a suit for a declaratory decree and consequential relief under S. 42, Chap. VI, and should, as such, be valued as per cl. (6), Art. 11, Sch. II of the Court Fees Regulation, the relief sought being incapable *per se* of valuation. *Putta Ramanna v. Shambhog Seshanna*, 23 Mys. C.O.R. 197 (F. B.).

MILLER, C.J., CHANDRASEKHARA AIYAR, J. and PARAMASIVA AIYAR, J.J.

References.—27 M. 480; 38 M. 922; 18 Mys. C.O.R. 53, F.

(3) S. 4, sub-S. V (B)—"Garden." Meaning of—Test for determining whether suit property is garden. See *HINDU LAW (ALIENATION)*, No. 1, 23 Mys. C.O.R. 250.

Cross Objections.

Decree for recovery of jewels deposited by plaintiff or in the alternative for their value—Appeal by defendant—Objections by plaintiff

Cross Objections—(Concluded).

stating that interest on alternative relief ought to have been given—Court-fee on such objections—Objection if only relates to form of decrees. See *COURT-FEES*, No. 1, 23 Mys. C.O.R. 211.

Damages.

Claim for reasonable interest by way of damages on money recoverable in Small Causes Court—Jurisdiction of such Court to entertain claim. See *SMALL CAUSES COURT (JURISDICTION OF)*, No. 1, 23 Mys. C.O.R. 314.

Declaratory Decree.

Suits both under S. 39 and S. 42 of Specific Relief Act if come under category of—Declaratory decree and adjudication, Distinction between—Suit for cancellation of deed of release on ground of fraud, Nature of. See *COURT FEES REGULATION (III OF 1900)*, No. 2, 23 Mys. C.O.R. 197.

Devadaya Unconfranchised Inam.

Jurisdiction of Civil Courts to direct who is to be put in possession of. See *JURISDICTION (OF CIVIL COURTS)*, No. 1, 23 Mys. C.O.R. 39.

Dismissal for Default.

(1) *Civ. Pro. Code*, O. XXI, r. 97, S. 141—Dismissal of application for default—Subsequent application for restoration—Maintainability.

Where an application of the petitioner, under O. XXI, r. 97 of the Civ. Pro. Code complaining of resistance on the part of the opponent in the course of the delivery of certain property decreed in his favour, was dismissed for default, and a subsequent application for the restoration of the former one to file was also rejected as not being maintainable: *Held* that, inasmuch as the application presented under O. XXI, r. 97, was disposed of under O. XXI, r. 99 of the Civ. Pro. Code, the proceedings instituted were in the nature of the original proceedings and that consequently the subsequent application of the petitioner was maintainable, S. 141, Civ. Pro. Code, being applicable to the case. *Munlyappa v. Kasim Khan*, 23 Mys. C.O.R. 164.

HUSEIN, J.

References.—38 M. 199, F.; 5 Mys. C.O.R. 119; 21 Mys. C.O.R. 64; 19 C.L.J. 6; 13 O.L. 532; 19 C.W.N. 758; 41 C. 1; 17 A. 106, R.

(2) *Ex parte* decree, Application to set aside, Dismissal for default of—Subsequent application to restore original one also dismissed—Appeal if lies against latter order. See *APPEAL*, No. 1, 23 Mys. C.O.R. 163.

Evidence Act.

S. 31—Suit to recover from inamdar's *kadim* the assessment at settlement rate—Plea of liability to pay only smaller rent under unregistered agreement affecting abatement of rent—Agreement if admissible in evidence—

Evidence Act—(Concluded).

Oral agreement to same effect alleged to be prior in date to unregistered agreement if admissible in evidence. See **MYSORE LAND REVENUE CODE**, No. 1, 23 Mys. C.O.R. 290.

Execution of Decree.

(1) *Limitation—Fresh application—Civ. Pro. Code S 48—Appeal—Jurisdiction to revise proceedings dismissed by an order not appealed from as a consequence of the reversal on appeal of another order.*

An application, which is not in substance one to initiate execution of a decree, but which is merely ancillary to, and praying for, the completion of proceedings initiated by a previous execution application is not a 'fresh application' within the meaning of S. 48 (1) of the Civ. Pro. Code, and is not barred by time, although made more than twelve years after the date of the decree, if the completion of the proceedings has not been delayed owing to any fault of the decree-holder.

Where two applications for execution were dismissed by the District Judge, in consequence of an objection raised against the execution by a transferee from the judgment-debtor in a miscellaneous application, and, on appeal from the order in the miscellaneous application the objection was overruled, and thereupon the District Judge restored both the applications for execution to his file, although no appeal was preferred expressly from the orders dismissing them it was held that he had jurisdiction to do so. **Shankar Rao v. Padmaraj Pandit**, 23 Mys. C.O.R. 55.

MILLER, C.J. and PARAMASIVA IYER, J.

References—26 M.L.J. 83, 24 M.L.J. 139, 18 A. 482, 33 A. 517; 12 M.L.J. 24, 31 M. 71; 7 Ind. Cas. 707; 27 A. 311; 2 Pat. L.J. 115; 18 Mys. C.O.R. 124, 22 Mys. C.O.R. 1, R.

(2) *Submission to the jurisdiction of a Foreign Court—Bombay High Court Rules—Ex parte order under r. 815 against a non-resident foreigner—Whether submission to jurisdiction for purposes of trial of suit can be regarded as submission in a subsequent proceeding under r. 815—Execution in Mysore*

Where the High Court of Bombay made an *ex parte* order, under r. 815 of its Rules, directing two persons, S and G, to pay their solicitor a certain sum of money due to him for costs incurred on their behalf in a suit in the High Court, in which they were defendants, and the High Court treating their order as equivalent to a decree for money transferred it for execution in Mysore:

Held that inasmuch as the proceeding under r. 815 of the Bombay High Court Rules, was not a proceeding in the suit, the submission of S and G to the jurisdiction of the Court for the purpose of the trial of the suit could not be regarded as a submission in the subsequent proceeding under r. 815 and that, therefore, the order passed

Execution of Decree—(Concluded).

by the Bombay High Court against a non-resident foreigner, who did not submit to its jurisdiction, could not be treated by the Mysore Courts as a decree capable of execution. **Subbaetty v. Nannu Harmaaji and Co.**, 28 Mys. C.O.R. 247.

MILLER, C.J. and CHANDRASEKHARA IYER, J.

(3) *Foreign Court—Execution of decree—Whether Court of District Judge, Civil and Military Station, Bangalore, is foreign Court for purposes of execution.*

The Courts of the Civil and Military Station of Bangalore are as much foreign Courts, in the matter of the execution of their decrees in Mysore, as any other Court in British India established by the authority of the Governor-General in Council, and the fact that they exercise jurisdiction on Mysore ground does not make any difference.

The petitioner obtained an *ex parte* decree in the Court of the District Judge of the Civil and Military Station, Bangalore, against the opponent, a resident of Kunigal, Tumkur District, and applied for its execution in the First Munsiff's Court, Tumkur. The application was dismissed on the ground that the decree sought to be executed was made by a foreign Court against a non-resident foreigner, who had not submitted to its jurisdiction and as such was incapable of execution in the Mysore territory.

Held that the order of dismissal was right. **Abdul Razack Sab v. Seeniah**, 23 Mys. C.O.R. 249.

MILLER, C.J. and PARAMASIVA IYER, J.

(4) *Application for rateable distribution containing all particulars required for application for execution—Separate execution application if also necessary for claiming such distribution* See **RATEABLE DISTRIBUTION**, 23 Mys. C.O.R. 170.

(5) *'Sale on the spot,' demanded by judgment debtor—Property to be sold in village in which it is attached—Sale liable to be set aside for omission* See **SETTING ASIDE SALE**, 23 Mys. C.O.R. 322.

Foreign Court.

(1) *Ex parte order by Bombay High Court under r. 815 of its rules against non-resident foreigner—Submission to jurisdiction of such High Court for purposes of trial of suit if submission in subsequent proceeding ending in ex parte order—Such order if may be executed in Mysore.* See **EXECUTION OF DECREE**, No. 2, 23 Mys. C.O.R. 247.

(2) *Ex parte decree by Court of District Judge of Civil and Military Station of Bangalore against resident of Tumkur District—Application for execution instituted in Tumkur Munsiff's Court—Decree incapable of execution in Mysore Courts as made by foreign Court against non-resident foreigner.* See **EXECUTION OF DECREE**, No. 3, 23 Mys. C.O.R. 299.

Guardian ad litem.

Civ. Pro. Code, Reg. III of 1911—Guardian ad litem—Failure to ascertain willingness of proposed guardian to serve—Omission to record order of appointment—Illegality.

Where, on the death of the defendant during the pendency of a suit, his minor sons were brought on the record, and their mother, whom the plaintiff proposed as their *guardian ad litem*, was served with a notice to state if she had any objection but made no reply, and the Court, without recording any order appointing her as guardian, issued to her a notice of the suit and proceeded to hear the case *ex parte* on her failure to appear on the date of hearing and passed a decree:

Held that the omission to record the order of appointment, as well as the failure to ascertain from the proposed guardian her willingness to serve as such, were illegalities which rendered all proceedings subsequent to the death of the defendant null and void as against his minor sons. *Channavirappa v. Kempanna*, 23 Mys. O.C.R. 213.

MILLER, C.J. and PARAMASIVA AIYAR, J.

Reference:—13 Mys. C.C.R. 68, *Dist.g.*

Guardian and Minor.

(1) *Promissory note—Note taken in name of minor by mother as guardian—Suit by minor—Maintainability—Holder of the note.*

A minor is entitled to maintain a suit upon a promissory note, which mentions him as the person whose money has been borrowed, and which is executed in favour of his mother, not in her own name, but as his guardian. *Thimmappa v. Avanappa*, 23 Mys. O.C.R. 161.

CHANDRASEKHARA AIYAR and PARAMASIVA AIYAR, JJ.

References:—28 M. 205; 33 M. 115, *Dist.*

(2) *Mortgage by mother as guardian of minor owner—Death of minor before attaining majority—Mother as next heir under Hindu Law admitting mortgage—Suit by separated half brother of minor to set aside mortgage—Maintainability. See HINDU LAW (REVERSIONERS)*, 23 Mys. C.C.R. 89.

Hindu Law.

- 1.—ALIENATION.
- 2.—JOINT FAMILY PROPERTY.
- 3.—PARTITION.
- 4.—REVERSIONERS.
- 5.—WIDOW.

—1.—Alienation.

Hindu law — Joint family — Mortgage decree against father — Sons not made parties to the suit — Sale and purchase in execution by mortgagee decree-holder — Suit for possession — Right of sons to redeem after sale — Court Fees Reg. (III of 1900), §. 4, sub-S. V (B)—'Garden,' meaning of, explained.

Hindu Law—(Continued).**—1.—Alienation—(Concluded).**

Plaintiff, a mortgagee, who had purchased the mortgaged property in Court-sale consequent on his suit on his mortgage, sued for the recover of possession of the property from the mortgagor's sons, the fourth and the fifth defendants, neither of whom had been made a party to the suit on the mortgage. The fourth defendant was an infant at the time of the institution of the suit, and the fifth was born after the decree but before the sale but neither of them had been born at the time of the mortgage.

The fourth and the fifth defendants contended that their right to redeem was not extinguished by the decree passed against their father, inasmuch as they acquired by birth a vested interest in the equity of redemption which their father held after the mortgage.

Held, by the Full Bench, that neither of the defendants four and five was entitled to an opportunity to redeem the plaintiff's mortgage in the present suit, inasmuch as the latter acquired his interest only after the decree in the mortgage suit and was consequently bound by it, and the former, in the absence of any allegation of fraud, collusion or negligence on the part of his father, was substantially represented by him in the mortgage suit.

Held, by the Division Bench, in the same case on a question of Court-fee, that the question whether the property sued is or is not a 'garden,' within the meaning of the Court Fees Regulation, does not depend on the class of assessment fixed upon it in the books of the Revenue Department, but on whether it is a 'garden' within the ordinary meaning of that word. *Keshavamurthi v. Krishnappa*, 23 Mys. C.C.R. 250 (F.B.).

MILLER, C.J., PARAMASIVA IYER and HUSEIN, JJ.

References:—(a) 17 Mys. C.C.R. 7; 24 B. 135; 21 M.L.J. 508; 28 C. 517; 27 C. 724; 16 C.W.N. 1019; 9 M. 243 (F.B.); 4 M. 1 (F.B.); 21 M. 222; 22 M. 207; 22 M. 372; 5 C. 148 (171) (P.C.); 9 Mys. C.C.R. 43; 15 Mys. C.C.R. 233; 21 C.W.N. 698 (P.C.); 33 A. 7 (13); 32 M.L.J. 132 (P.C.); 15 C. 70 (P.C.); 33 A. 272 (P.C.); 36 A. 383 (P.C.); 41 C. 727; 37 Ind. Cas. 823 R. (b) 1 Mys. C.C.R. 28; 3 Mys. C.C.R. 102; 17 Mys. C.C.R. 82, *Ref. to.*

—2.—Joint Family Property.

Joint family governed by Mitakshara—Whether acquisition by members of a joint family through joint labour but without the aid of any ancestral nucleus is joint family property—Intention—Subsequent partition—Right of the sons to acquire born subsequent to partition to take a vested interest in their father's shares.

B. The brothers, who formed members of a joint family, acquired certain property through their joint labour but without the aid of any ancestral nucleus. The property was subsequently partitioned among them, and B

Hindu Law—(Continued).**—2.—Joint Family Property—(Concluded)**

sold his share without necessity to defend interests 1 and 2. Plaintiff, the undivided son of B, who was born after the partition, contested the sale and claimed that the property jointly acquired by his father and his uncle was joint family property and that consequently he acquired a vested interest at his birth in the portion that fell to his father's share. The defendant contended that (1) the property was not joint family property and (2) that, as the plaintiff had not been born at the time of the partition, he did not acquire any interest in the property by birth. *Held* that, in the absence of anything to suggest that the brother agreed to hold the property as co-owners, otherwise than as a joint family, it was joint family property, in which the sons of the acquirers obtained an interest by birth and (2) the circumstance that the plaintiff had not been born at the time of the partition did not make any difference, as partition had not the effect of divesting the undivided share in the hands of B of its character of joint family property as between him and his sons. **Basappa v. Halappa**, 23 Mys. U C R 73.

MILLER, C J and CHANDRASEKHARA IYER.

References - 25 M 110 31 B 11, I., 3 B, 438, Dist. 7 Ind. C. 150 27 N 300 (313), R.

—3.—Partition

Itakshara joint family - Acquisition by members of joint family though joint labour but without aid of ancestral nucleus in joint family property - Subsequent partition - Right of sons of acquirers born after partition to take vested interest in father's share. See **HINDU LAW (JOINT FAMILY PROPERTY)**, 23 Mys C C R 73.

—4.—Reversioners

Alienation by mother as guardian of minor owner—Death of minor before attaining majority—Suit by presumptive reversioners to set aside alienation—Maintainability—Specific Relief Act, S 12

Where the mother of a minor owner of immoveable property executed, as guardian on his behalf, a mortgage of a portion of such property, and on the death of the minor without having attained majority, succeeded him as his heir under the Hindu Law and admitted the mortgage. *Held*, by the majority of the Full Bench (the Chief Judge dissenting) that a suit was not maintainable on the part of the minor's separated half-brother, claiming as presumptive reversioner entitled to succeed on the death of his step-mother, to set aside the mortgage as having been made without necessity.

Held, by the Chief Judge, that the suit to avoid the guardian's act did not lie with the minor but vested on his death in his representative, and that the plaintiff had sufficient interest to support a suit to avoid the guardian's

Hindu Law—(Concluded)**—4.—Reversioners—(Concluded).**

act, where the heir in possession did not choose to act or was precluded from acting by the fact that the voidable alienation was made by the heir herself as guardian.

Per Chandrasekhara Aiyar, J—A reversioner has no right to question an alienation made during the lifetime of the full owner, the title of the alienee is not derived from the holder of the limited interest or life tenant, and there can, in such a case, be no reversionary interests that could be affected by the alienation. Even if the right of avoiding an alienation made on behalf of a minor by his guardian be not a personal right which dies with the minor, it can only be exercised, where the full owner has died during minority or without having ratified the act of the guardian—by the legal representative of the minor, that is, the person entitled to succeed to the property on his death, and not by a person who has merely a contingent interest therein as reversioner.

Per Paramasiva Aiyar, J—Having regard to the spirit of the Hindu Law, it may be held that the right of election, which the law gives a minor in virtue of his minority, must be treated as a personal right with reference to the merely voidable transactions of a parent-guardian whom the *Smriti* enjoins on him to regard as his God, and such a right may not survive to his heir, if the minor dies before attaining majority or exercising his election. Even assuming that the right so survives, it should be confined only to the heir-at-law entitled to take the estate immediately on the death of the minor. **Narasimha v. Borayya**, 23 Mys C C R 59 (F B).

MILLER, C J., (CHANDRASEKHARA AIYAR and PARAMASIVA AIYAR, JJ.

References - 30 B 161, 30 M. 195; 13 Ind. C. 610, 1 C W N 546; 30 A. 497-35 A. 316, 18 C 269 (163), R.

—5.—Widow.

Mother as guardian of minor owner—Death of minor before attaining majority—Mother as next heir under Hindu Law admitting mortgage—Suit by separated half-brother of minor to set aside mortgage—Maintainability. See **HINDU LAW (REVERSIONERS)**, 23 Mys C C R 89.

Insolvency Regulation (VI of 1911).

S 16, cl (3)—Joint decree—Insolvency of some of the decree-holders—Payment in satisfaction of the decree to the insolvent decree holders with knowledge of the insolvency—Effect.

A decree, which R had obtained against G and K and executed, was reversed on appeal by the Chief Court, with the result that R had to restore to G and K some of the proceeds of the execution. In full satisfaction of his obligations to G under the decree, R paid a sum of money, after his death, to three persons, his legal representatives, of whom two had been

Insolvency Regulation (VI of 1911)—(Old.).

adjudged insolvent, nearly year before the decree of the Chief Court was passed. When the three representatives applied to the Court to certify satisfaction of the decree so far as they were concerned, S, the representative of K, objected, contending *inter alia* that, owing to the insolvency of two of them, the payment could not be accepted as a satisfaction of the decree: *Held* that, so far as the insolvents were concerned, the objection was valid, inasmuch as, immediately after passing of the decree of the Chief Court, the benefit of it vested in the Court under S. 16 (3) of the Insolvency Regulation, and consequently the money paid to the insolvents could not be treated as money going in discharge of a decree, the right to execute which had passed from them before the payment was made.

Held, further, that, so far as the third representative was concerned, the judgment-debtor was entitled to a certificate of satisfaction to the extent of his interest in the decree, as, at the date of the payment, the right to execute the decree was vested in himself. **Ramappa v. Rama Rao**, 23 Mys. C.O.R. 121.

MILLER, C J. and PARAMASIVA AIYAR, J.

Interest.

(1) Tender of mortgage money—Offer to pay money on production of Succession Certificate with offer to redeem mortgage—Offer not unconditional—Liability to pay interest not suspended by such offer. See **CONTRACT ACT**, No. 3, 23 Mys. C.O.R. 139.

(2) Decree for recovery of jewels deposited by plaintiff or in the alternative for their value—Appeal by defendant—Objections by plaintiff stating that interest on alternative relief ought to have been given—Court-fee on such objections—Objection if only relates to form of decree. See **COURT-FEES**, 23 Mys. C.O.R. 211.

(3) Claim for reasonable interest by way of damages on money recoverable in Small Causes Court—Jurisdiction of such Court to entertain claim. See **SMALL CAUSES COURT (JURISDICTION OF)**, 23 Mys. C.O.R. 314.

Joint Decree.

Insolvency of some of several decree-holders—Payment in satisfaction of decree to such insolvents with knowledge of insolvency—Payment how far discharge of debt due by judgment-debtor. See **INSOLVENCY REGULATION (VI OF 1911)**, 23 Mys. C.O.R. 121.

Jurisdiction—(Of Civil Courts).

Devadaya unenfranchised inam—Jurisdiction of Civil Courts to declare a title to the inam other than that of the inamdar—Civ. Pro. Code, S. 11, Expt. II—Res judicata.

A village, which originally belonged to the plaintiff's ancestors, was endowed by them to a *mutt* for the performance of certain services.

Jurisdiction—(Of Civil Courts)—(Concluded)

At the *inam* settlement, the *inam* was confirmed to the *mutt*, the settlement being made with the 1st defendant, who died after suit, whereby he was to enjoy the *inam* so long as he performed the services for which it was granted. The plaintiff claimed a sixty-sixth portion of the entire village on the ground that it was divided into eleven *vrittis*, of which the *mutt* had alienated to the plaintiff's ancestors three *vrittis* and that he was entitled to a sixth part of the three *vrittis*.

In support of his claim, the plaintiff alleged (1) that the Courts had decided in previous cases that the plaintiff's predecessors had rights to possession of portions of the *inam* against the 1st defendant and that the latter had submitted to them; (2) that the former decisions, as between the parties, should be given effect to as neither the Government nor the *mutt* had intervened till then; (3) that, in the present suit, the Court was not competent to enter into the question of jurisdiction inasmuch as the 1st defendant, who might and ought to have raised that question in the former suit, had failed to do so.

Held, (1) that the Civil Courts had no jurisdiction to divide a *devadaya* unenfranchised *inam* into shares among disputants claiming title thereto; (2) that the fact that the first defendant had submitted to the previous decisions could not confer on the Court a jurisdiction, which no Court in the State could exercise; (3) that the Civil Courts were not entitled to usurp jurisdiction, merely because of the possibility that the Government or the *mutt* might not care to interfere to prevent the enforcement of their decree, and (4) that it is only where the defence, which ought to have been raised but was not raised, would have affected the finding on an issue actually decided that it can be held that the decision debars by reason of Expt. II to S. 11 of the Code of Civil Procedure, the raising of the omitted defence in a subsequent suit, and that, the question of jurisdiction not having been decided in the former suit, it was open to the Court to decide it in the present suit. **Gururayachar v. Vijayendra Rao**, 23 Mys. C.O.R. 39.

MILLER, C J. and PARAMASIVA IYER, J.

References:—12 Mys. C.O.R. 267; 22 Mys. C.O.R. 60, R.

Acquisition Regulation (VII of 1894).

Acquisition by Municipality of agricultural land for building purposes—Mode of valuation.

The Bangalore City Municipality acquired a piece of land belonging to a Lingayat *mutt*, of which the claimants were the *Sanagers*. The Municipality awarded compensation at Rs. 300 per acre on the footing that the land acquired was agricultural land. The claimants contended that, although it was agricultural land, it was best suited for the erection of buildings thereon and that, inasmuch as it was acquired

Land Acquisition Regulation (VII of 1894) —(Concluded).

by the Municipality for that very purpose, compensation should be awarded on that footing:

Held, that the Court, in such cases, has to find out the market value of the land at the date of the Notification of its acquisition and that, in the absence of anything to show that it had before acquisition acquired a special value as building land, it cannot be valued on the basis of the prices at which portions of it were subsequently sold, as building lots. *Subba Rao v. Desada Redda Basappa*, 23 Mys. C.O.R. 193.

MILLER, C.J. and PARAMASIVA AIYAR, J.

Landlord and Tenant.

Inamdar of village where survey settlement introduced after grant—Suit to recover assessment at settlement rate from kadim tenant—Superior holder if bound to get it confirmed against each tenant by suit in Revenue Court before suing in Civil Court—Plea of written lease at lower rate of rent but unregistered—Agreement invalid for want of registration—Oral agreement prior to such lease if may be proved. See *MYSORE LAND REVENUE CODE*, No. 1, 23 Mys. C.O.R. 290.

Lessor and Lessee.

Lease—Co lessors—Whether payment of rent by tenants to one of two co lessors is a good payment as against the other—*Indian Contract Act*, Ss. 38, 45 and 165.

Where the plaintiff, who, along with the third defendant, had let the land to the first and second defendants, sued the tenants for the rent, making his co-lessor a defendant as he refused to join as plaintiff, and the tenants pleaded payment to the third defendant, who admitted that he had received the whole rent: *Held* that, in the absence of proof of an agreement between the co-lessors that the rent paid shall be held by them jointly each being owner of the whole, or of a mutual grant of authority between them to receive the rent, the tenants, by payment to the third defendant, were not discharged from their liability to pay the rent to the plaintiff and that the plaintiff was entitled to one-half of the rent, the shares being presumed to be equal, in the absence of anything to show that they were unequal.

Held, further, that the provision of S. 165 of the *Indian Contract Act*, cannot be extended by analogy to the case of joint lessors. *Mahade Gowda v. Lingappa*, 23 Mys. C.O.R. 148.

MILLER, C.J. and CHANDRASEKHARA IYER, J.

References :—11 B.H.C.R. 106; 36 M. 544; 20 M. 461, *Not F.*; *Steads v. Steads*, 21 Q.B.D. 537; 19 Ind. Cas. 865, *Wallace v. Kelall*, 7 M. and W. 264—56 R.R. 707, *corrected*; 20 M.L.J. 709; 25 A. 155; 27 B. 890 (392); 19 O. 785, R.

Limitation Regulation (IX of 1911).

(1) S. 5—Rejection of application for leave to appeal as pauper—Payment of necessary Court-fee after limitation period—Inability to raise money for payment of Court-fee earlier if sufficient excuse for delay—Date of institution of appeal, meaning of. See *APPEAL*, No. 2, 23 Mys. C.O.R. 216.

(2) Ss. 20, 21—Suit on pro-note—Part-payment by duly authorised agent, what is not—Lawful guardian. See *ACKNOWLEDGMENT OF LIABILITY*, 23 Mys. C.O.R. 267 (*vide* page 10, *supra*).

(3) S. 21. See No. 2, *supra*.

(4) *Applicability to wills*—*Registration*—*Knowledge of contents immaterial*.

Art. 92 of the Limitation Regulation is applicable to the case of any instrument, testamentary or non-testamentary, which is registered and which the plaintiff seeks to have declared a forgery. The three years, which it allows for filing a suit is from the time "when the registration becomes known to the plaintiff," that is to say, the *factum* of registration, and not necessarily the contents of the instrument. *Chowdiah v. Ramanna*, 23 Mys. C.O.R. 293.

CHANDRASEKHARA IYER and PARAMASIVA IYER, JJ.

References :—23 C. 1 (10) (P.G.), R.; 20 Mys. C.O.R. 211, *Appl*.

(5) Arts. 113, 120—Suit to enforce terms of award partly void and partly valid—Enforceability of valid portion—Suit to enforce award if one to enforce specific performance of contract—Article applicable to suit. See *ARBITRATION*, No. 1, 23 Mys. C.O.R. 71.

(6) Art. 120. See No. 5, *supra*.

(7) Art. 144—Adverse possession as between co-heirs—Long abstention from interference with enjoyment of property by others under the belief that the property was theirs, if evidence that their possession is adverse. See *ADVERSE POSSESSION*, 23 Mys. C.O.R. 45.

Mahomedan Law—Gift.

Gift of musha—Gift of divisible but undivided immoveable property whose profits donor had shared as a co-owner—Gift if valid. See *ADVERSE POSSESSION*, 23 Mys. C.O.R. 45.

Mortgage.

- 1.—REDEMPTION.
- 2.—SUBROGATION.

—1.—Redemption.

(1) *Mortgage—Redemption—Term fixed for redemption—Whether mortgage could be redeemed before expiry of term fixed—Construction of mortgage deed.*

Where the material conditions of a usufructuary mortgage-deed ran as follows:—"This

Mortgage—(Continued).**—1.—Redemption—(Concluded).**

day I have taken Rs. 500 from you and mortgaged the properties. I have this day put you in possession of the properties and so you have to take the produce of the lands on account of interest. In case you pay the taxes due to Government, I will pay the same to you when I pay the mortgage amount in redemption of the mortgage. For this I have given a term of 20 years from this date. I will redeem in Jeishtha month when there is no crop." And the mortgagors sued to redeem before the expiry of the term of 20 years :

Held that, on a construction of the mortgage-deed, it could be inferred that the parties intended that the mortgagee should be in undisturbed possession of the mortgaged properties for twenty years and that consequently the mortgagor's suit was premature.

Per **Chandrasekhara Iyer, J.**—In one sense, the fixing of a term for redemption is always for the benefit of the mortgagor. He can never be foreclosed before the term expires. Whether, over and above this, he has also the right to redeem the mortgage within the term fixed is essentially a matter of construction, or, where the deed itself is silent on the point or its language ambiguous, of inference from the nature of the mortgage, the operation of its terms and conditions, and any other relevant circumstances from which the probable intention of the parties may reasonably be inferred. **Naranappa v. Yele Venkatasamappa**, 23 Mys. C.C.R. 275.

MILLER, C.J. and CHANDRASEKHARA IYER, J.

Reference :—16 Mys. C.C.R. 113, *Dist.*

(2) Tender of mortgage-money—Offer to pay money on production of Succession Certificate with offer to redeem mortgage—Offer not unconditional—Liability to pay interest not suspended by such offer. See **CONTRACT ACT**, No. 3, 23 Mys. C.C.R. 139.

(3) Separate and distinct part of mortgaged property already redeemed with consent of mortgagee—Suit for redemption of remainder—Court-fees payable. See **COURT FEES REGULATION (IV OF 1900)**, No. 1, 23 Mys. C.C.R. 85.

(4) Mortgage decree against father—Sons not made parties to suit—Sale and purchase in execution by mortgagee-decree-holder—Right of sons to redeem after sale—Suit for possession—Court fees. See **HINDU LAW (ALIENATION)**, 23 Mys. C.C.R. 250.

(5) Mortgage with possession—Stipulation in deed that mortgagor should pay assessment—Right of mortgagee paying it to add it to mortgage-money. See **MORTGAGEE IN POSSESSION**, 23 Mys. C.C.R. 287.

Mortgage—(Concluded).**—2.—Subrogation.****Mortgage—Priority of mortgages—Subrogation**

The plaintiff, a second mortgagee under an unregistered mortgage, paid off the amount due on a first registered mortgage as required by his mortgage-deed itself. When the first defendant, who had taken a third mortgage (registered) without notice of the second mortgage, brought the mortgaged premises to sale under his mortgage, the plaintiff claimed priority.

Held that, in the circumstances of the case, the plaintiff had priority to the extent of the amount paid by him in satisfaction of the first mortgage, inasmuch as he did not intend to extinguish the security afforded by the first registered mortgage, which was a better security than his second unregistered one. **Gudda Thimmlah v. Sanjeevlah**, 23 Mys. C.C.R. 189.

MILLER, C.J. and PARAMASIVA ALYAR, J.

References :—9 C. 961 ; 8 M. 246 ; 21 Mys. C.C.R. 19, R.

Mortgagee in Possession.

Mortgage with possession—Stipulation in deed that mortgagor should pay assessment—Whether mortgagee paying it can add amount of payments to mortgage-money.

Where a deed of mortgage with possession provided that the assessment of the mortgaged property was to be paid by the mortgagor, without containing an express undertaking by the mortgagor that, in the event of the mortgagee making the payment, he (the mortgagor) would repay the money so paid, and, in a suit for redemption the mortgagee contended that he paid the assessment for a number of years and claimed to add it on to the mortgage-money :

Held, that the mortgagee was entitled to do so and the absence of an express undertaking was immaterial. **Appaji v. Puttannalya**, 23 Mys. C.C.R. 287.

MILLER, C.J. and PARAMASIVA IYER, J.

References :—7 Mys. C.C.R. 20 ; 8 Mys. C.C.R. 135, R.

Mysore Land Revenue Code (Reg. IV of 1888)

(1) Ss. 85, 88, 89, 113, 236—**Inam Village—Survey settlement introduced after grant—Suit to recover assessment at survey rates without first bringing suit before Deputy Commissioner—Maintainability of suit—Evidence Act, S. 91—Unregistered agreement effecting abatement of rent.**

Where the plaintiff, an inamdar of a village into which survey settlement had been introduced, sued to recover his *kadim* tenant assessment at the settlement rate, and the defendant contended, *inter alia*, (1) that the suit was not maintainable inasmuch as the plaintiff had not previously brought a suit in the Revenue Court under S. 88 of the Land Revenue Code and (2) that, even if the

Mysore Land Revenue Code (Reg. IV of 1888)
—(Concluded).

suit was maintainable, the defendant had, long before the introduction of the survey settlement, obtained, by an unregistered agreement, a lease in perpetuity at a rent of some Rs. 16 when the actual assessment was Rs. 31 and that he was, therefore, liable to pay rent at only Rs. 16 per annum.

Held, following 22 Mys. C.C.R. 259, that, when once the survey settlement is introduced, it is not necessary for the superior holder to get it confirmed by a suit against each tenant in the Deputy Commissioner's Court and that, therefore, the present suit is maintainable.

Held, also, by the Chief Judge, that, assuming that the unregistered agreement relied upon by the defendant, was not superseded by the settlement, it could not be proved, inasmuch as, according to S. 89 of the Land Revenue Code, such an agreement is good only, if registered, and that the oral evidence was inadmissible to prove the lease.

Per Paramasiva Iyer, J.—Even where (1) the *mamool* rent of a *kadim* tenant is altered by a registered instrument as provided by S. 89 of the Land Revenue Code, or, (2) the tenant has secured a piece of *madhyaka* land on perpetual lease under S. 85 of the Land Revenue Code, if the Government, in the exercise of the power conferred on it by the last paragraph of S. 236 of the Land Revenue Code, sanctions a survey settlement at the instance of the Inamdar ignoring the subsisting contracts between the inamdar and his tenants, the rates prescribed under such a settlement and announced in the manner laid down in S. 113, whether they exceed or fall below the rents provided in the contracts, supersede the latter and are binding on inamdar and tenants alike by virtue of S. 237 of the Land Revenue Code. *Rama chandra Rao v. Venkata Rao*, 23 Mys. C.C.R. 290.

MILLER, C.J. and PARAMASIVA IYER, J.

- (2) S. 88. See No. 1, *supra*.
- (3) S. 89. See No. 1, *supra*.
- (4) S. 113. See No. 1, *supra*.
- (5) S. 236. See No. 1, *supra*.

Oaths Act (X of 1873).

- (1) Ss. 9 and 10—Offer to be bound by an oath—Subsequent withdrawal—Failure to deposit Commissioner's fee.

In a suit on a money bond, the defendant admitted the bond, but alleged a right to avoid it for fraud and misrepresentation. In the course of the trial, he challenged the plaintiff to swear to the truth of his claim in a temple and consented to a decree being passed against him, if the plaintiff took the prescribed oath. The plaintiff accepted the challenge and also agreed that, if he failed to take the oath, his suit might be dismissed. A Commissioner was appointed to administer the oath, but the defendant resiled from his challenge, and failed to deposit the Commissioner's fee. The suit was decreed as prayed in the plaint by the Munsif on the ground that the defendant could

Oaths Act (X of 1873)—(Concluded).

not be allowed to revoke the agreement entered into by him. The District Judge reversed the Munsif's decree, holding that, as the plaintiff could not be compelled to take the oath, the defendant could not be compelled to accept it.

Held, on appeal, that the plaintiff was entitled to a decree, inasmuch as the defendant, who should be considered to have agreed to give no evidence in the case other than that of the plaintiff on the agreed oath, prevented the giving of that evidence by a refusal, without good grounds, to abide by his challenge and by failure to deposit the Commissioner's fee to enable the plaintiff to take the oath. *Kottige Hanumappa v. Hanumathappa*, 23 Mys. C.C.R. 116.

MILLER, C.J. and CHANDRASEKHARA AIYAR, J.

References:—12 Mys. C.C.R. 189, P.; 23 Mys. C.C.R. 72, 17 M.L.J. 99; 31 M. 1, R

(2) S. 10. See No. 1, *supra*.

Parties to Suit.

Suit on promissory note—Collateral members of joint family of maker of promissory note, if can be impleaded in such suit. See ACKNOWLEDGMENT OF LIABILITY, 23 Mys. C.C.R. 267 (*vide* page 10, *supra*).

Practice and Procedure.

Adjournment subject to condition of dismissal on default to appear on adjourned date —“No instructions” reported by pleader—Failure to appear—Dismissal of suit—Petition for restoration of suit not proper procedure—Appeal is proper remedy. See ADJOURNMENT, No. 1, 23 Mys. C.C.R. 275.

Procession.

(1) Conduct of series of processions through public streets—Enquiry by police—Magistrate's order regulating precedence of processions according to *mamool*—Failure to get precedence—Suit for declaration of right to precedence and for damages—Maintainability. See PUBLIC STREET, No. 1, 23 Mys. C.C.R. 113.

(2) Right of user of public streets—Non-user for long time if will deprive citizens' right to use public streets for lawful purposes—When such right may be lost—Liability of persons interfering with another's right to conduct procession. See PUBLIC STREET, No. 2, 23 Mys. C.C.R. 133.

Promissory Note.

(1) Barred debt, consideration for fresh promissory note—Omission to specifically refer to barred debt in later agreement—Enforceability of pro-note. See CONTRACT ACT, No. 1, 23 Mys. C.C.R. 131.

(2) Minor mentioned in pro-note as owner of money lent—Note in name of his mother as guardian—Right of minor to sue upon such note. See GUARDIAN AND MINOR, No. 1, 23 Mys. C.C.R. 161.

Public Street.

- (1) *Procession—Conduct of a series of processions through public streets—Enquiry by the police—Magistrate's order regulating the order of going according to mamool—Suit against a person examined by the police—Maintainability.*

The plaintiff's right to carry in procession the idols of Kama and Rati through certain public streets being recognised by a Civil Court decree, he applied for and obtained a license from the City Magistrate in March, 1915. The plaintiff, however, apprehended some trouble between defendant and himself as to the order of precedence of their respective processions and petitioned to the Magistrate for protection of his rights. The City Magistrate, after receiving a police report, decided that the police should fix the order of the processions according to *mamool*. It appeared that the defendant was one of those, who made a statement to the police during their enquiry regarding the customary order of processions. The plaintiff, having failed to obtain precedence over the defendant in the order fixed by the police, sued for declaration and damages, on the ground that the defendant had infringed his right and had occasioned the withdrawal of the license granted to him.

Held, that the report of the police and the consequent order of the Magistrate had not the effect of withdrawing the license originally granted to the plaintiff and that he was not prevented from conducting his procession by any act amounting to an infringement of his rights.

Held, further, that, in the circumstances of the case, the defendant was not responsible for the result of the enquiry, the more so as it was started after the application of the plaintiff himself. *Shankarappa v. Ammichinnappa*, 23 Mys. C.O.R. 113.

MILLER, C.J. and CHANDRASEKHARA AIYAR, J.

(2) *Public streets—Right of user—Procession.*

Mere non-user for any length of time cannot take away the inherent natural right of a citizen to use the public streets for a lawful purpose in a lawful manner; nor can such a right be extinguished even by occasional opposition or other conduct on the part of other citizens that has not itself ripened, by virtue of long and recognized acceptance, into a valid custom.

Persons, who set the local authorities in motion with a view to prevent another person from exercising his lawful right to conduct a procession and who actively oppose the grant of the license applied for by him, cannot, by pleading that they merely figured as witnesses at the enquiry or furnished no more than their opinion, escape liability in damages for any resulting interference with the exercise of the right.

Certain observations, contained in 6 M. 203 (190 and 221), in regard to the considerations that should guide the magistracy in dealing with the exercise of lawful rights in the

Public Street—(Concluded).

face of threatened disturbance, quoted with approval. *Chickaveera, Setty v. Huchappa*, 19 Mys. C.O.R. 183.

CHANDRASEKHARA AIYAR and PARAMA-SIVA AIYAR, JJ.

References:—6 M. 203; 16 Mys. C.O.R. 35. R.

Rateable Distribution.

Civ. Pro. Code, Ss. 51 and 53, O. XXI, r. 11 (2)—Execution of decrees—Application for rateable distribution furnishing all particulars required by O. XXI, r. 11—Separate execution application not necessary.

An application, which is in form an execution application and which furnishes all the particulars prescribed in O. XXI, r. 11 of the Civ. Pro. Code, is none the less an application for execution in substance as well, because the assistance which it asks for from the Court is 'the benefit of a rateable distribution of assets; and a separate execution application is not necessary to entitle the applicant to share in such rateable distribution under S. 73 of the Civ. Pro. Code. *Lakmajji v. Mir Dastgir Sab*, 23 Mys. C.C.R. 170.

CHANDRASEKHARA AIYAR and PARAMA-SIVA AIYAR JJ.

References:—3 Mys. C.C.R. 82, 30 M. 25. R.

Reg. IV of 1888 (Mysore).

See MYSORE LAND REVENUE CODE.

Reg. VII of 1894 (Mysore).

See LAND ACQUISITION REGULATION.

Reg. VI of 1911 (Mysore).

See INSOLVENCY REGULATION.

Rent Suit.

Inamdar of village where survey settlement introduced after grant—Suit to recover assessment at settlement rate from *kadim* tenant—Superior holder if bound to get it confirmed against each tenant by suit in Revenue Court before suing in Civil Court—Plea of written lease at lower rate of rent but unregistered—Agreement invalid for want of registration—Oral agreement prior to such lease if may be proved. See MYSORE LAND REVENUE CODE, No. 1, 23 Mys. C.C.R. 290.

Re's Jurisdiction.

Jurisdiction of Civil Courts to decide title to unencumbered *devadaya inam* materially and substantially in issue in former suit so as to make it imperative on defendant to raise that question therein—Question of such jurisdiction, however, not heard and finally decided—Question of such jurisdiction if becomes *res judicata*. See JURISDICTION (OF CIVIL COURTS), 23 Mys. C.O.R. 89.

Restitution.

Civ. Pro. Code; Ss. 144, 151—Ex parte decree, Execution thereof and delivery of property—Subsequent setting aside of decree—Application for restitution—Applicability of S. 144.

Where an *ex parte* decree was set aside by the Court that passed it and before the suit was finally disposed of thereafter, the defendants applied for restitution of property, that had been taken possession of by the plaintiff in execution of such decree:

Held, by the Full Bench, that, when once the *ex parte* decree was set aside, the parties were entitled to be restored as far as possible to the position which they occupied before it was passed and that consequently, the defendants were entitled to restitution under S. 144 of the *Civ. Pro. Code*, that section being applicable not merely to a case where a decree is set aside by a superior Court, but also to one where it is set aside by the Court which passed it. *Puttanna v. Puttachari*, 23 Mys. C.C.R. 180 (F.B.).

MILLER, C.J., CHANDRASEKHARA Aiyar and PARAMASIVA IYER, JJ.

References:—20 Mys. C.C.R. 1; 31 Ind. Cas. 305; 28 C. 113; 30 A. 476; 10 M. I.A. 412; 33 C. 247, R.

Restoration.

Adjournment subject to condition of dismissal on default to appear on adjourned date—No instructions reported by pleader—Failure to appear—Dismissal of suit—Petition for restoration of suit not proper procedure—Appeal is proper remedy. See *ADJOURNMENT*, No. 1, 23 Mys. C.C.R. 275.

Right of Suit.

(1) Minor mentioned in pro-note as owner of money lent—Note in name of his mother as his guardian—Right of minor to sue upon such note. See *GUARDIAN AND MINOR*, No. 1, 23 Mys. C.C.R. 161.

(2) Conduct of series of processions through public streets—Enquiry by police—Magistrate's order regulating precedence of processions according to *mamool*—Failure to get precedence—Suit for declaration of right to precedence and for damages—Maintainability. See *PUBLIC STREET*, No. 1, 23 Mys. C.C.R. 113.

Satisfaction of Decree.

Insolvency of some of several decree-holders—Payment in satisfaction of decree to such insolvents with knowledge of insolvency—Payment how far discharge of debt due by judgment-debtor. See *INSOLVENCY REGULATION (VI OF 1911)*, No. 1, 23 Mys. C.C.R. 121.

Setting aside Sale.

Civil Rule of Practice No. 9, dated 13th September, 1878—Sale 'on the spot.'

Civil Rule of Practice No. 9 of the 13th September, 1878, requires that, if a sale 'on the spot' is asked for by the judgment-debtor, the property shall be ordered to be sold in the village in which it is attached. If this is not done, the sale may be set aside. *Chowdiah v. Narasamma*, 23 Mys. C.C.R. 322.

MILLER, C.J. and CHANDRASEKHARA Aiyar, J.

Small Causes Court, Jurisdiction of.

Small Causes suit—Whether claim for interest by way of damages is within Small Cause jurisdiction.

A claim for reasonable interest by way of damages on money claimable in a Small Causes suit is within the Small Causes jurisdiction of a Court. *Rudrappa v. Durgappa*, 23 Mys. C.C.R. 314.

PARAMASIVA IYER, J.

Specific Relief Act.

(1) Ss. 39, 42—Suits under sections, Nature of and distinction between—Declaratory decree and consequential relief, Suit for, if common category of. See *COURT FEES REGULATION (III OF 1900)*, No. 2, 23 Mys. C.C.R. 197.

(2) S. 42—Alienation by mother as guardian of minor owner—Death of minor before attaining majority—Suit by presumptive reversioner to set aside alienation—Maintainability. See *HINDU LAW (REVERSIONERS)*, No. 1, 23 Mys. C.C.R. 89.

(3) S. 42. See No. 1, *supra*.

Will.

Suit for declaration that will is forged—Limitation of three years for suit when begins to run, from time when registration of document or its contents become known to plaintiff. See *LIMITATION REGULATION*, No. 4, 23 Mys. C.C.R. 293.

